



Office of Inspector General
Pension Benefit Guaranty Corporation

July 20, 2016

MEMORANDUM TO THE BOARD OF DIRECTORS

FROM: Robert A. Westbrooks *Robert A. Westbrooks*
Inspector General

SUBJECT: Special Report: Review of Office of Participant and Plan Sponsor Advocate –
Safeguards to Prevent and Detect Conflicts of Interest

Our office received a confidential hotline contact regarding the implementation of the role of the Office of the Participant and Plan Sponsor Advocate. The contact expressed concerns over the potential for conflicts of interest or other ethical conduct violations given the unique nature of the position in the federal government in advocating on behalf of plan sponsors. Under Section 4 of the Inspector General Act, it is the duty and responsibility of the Inspector General to review laws and make recommendations, if necessary, to prevent and detect fraud and abuse in programs and operations. We obtained and reviewed information from the Advocate, the Board, and the Corporation; and we reviewed federal ethics laws and regulations, and PBGC ethics policies and procedures. We have completed our review. This memorandum is to report to the Board our findings, analysis, and conclusions. This OIG Hotline contact matter is now closed.

Executive Summary

In general, common safeguards are in place to detect conflicts of interest or other ethical conduct violations by the Advocate. Notwithstanding these safeguards, we suggest the Board consider a resolution establishing a policy explicitly binding the Advocate to PBGC ethics policies and procedures and encouraging the Advocate to proactively identify potential conflicts of interest and otherwise consult with PBGC ethics officials (or the U.S. Office of Government Ethics if appropriate). Such a resolution would help prevent conflicts of interest or other ethical conduct violations, demonstrate a strong ethical “tone at the top” by the Board, provide for greater transparency and public accountability, and guide future Boards and Advocates. In addition, such a resolution would recognize the unique and important role of the Advocate, and would be consistent with the good governance – conflict of interest requirements in 29 U.S. Code Section 1302(j), which applies to the Board and the Director. We also note the ambiguity in the statute regarding the unique role of “advocating” on behalf of plan sponsors. Future legislative proposals should consider eliminating this ambiguity or providing clarification.

Background

The position of the Advocate was created on July 6, 2012, when the Moving Ahead for Progress in the 21st Century Act (MAP-21) was signed into law. MAP-21 amended section 4004 of ERISA to include the role of the Advocate, its duties and reporting requirements. Under Section 4004, the 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 possible 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.

Through Board Resolution 2013-11 (February 11, 2014), the current Advocate was selected for the position, and the position was placed under the general supervision of the PBGC Director. Board Resolution 2015-10 (August 11, 2015) resolved that the position is an employee of the PBGC, but reports to the Board of Directors. The Department of Labor Board Representative, on behalf of the Chair, approved a position description (OF-8) for the Advocate on October 23, 2015, which states that the Advocate “is an employee of the PBGC required to comply with the PBGC’s policies and procedures.” PBGC’s General Counsel/Secretary to the Board of Directors and Board staff have indicated that this clause summarizes significant discussions between Board staff, PBGC, and the Advocate clarifying that the Advocate would be covered by PBGC’s ethics program.

On September 2, 2015, the acting PBGC Director received a letter regarding the Advocate from Senate HELP Committee chairman Senator Lamar Alexander, ranking member Senator Patty Murray, Senate Finance Committee ranking member Senator Ron Wyden, and House Education and Workforce Committee ranking member Rep. Robert C. Scott. This letter was to “clarify the unique role” of the Advocate. The letter indicates that the position was modeled largely after the Taxpayer Advocate at the Internal Revenue Service, and that PBGC employees may not interfere with the Advocate’s ability to assist participants and plan sponsors with resolving disputes with PBGC. The letter further states that Congress intended for the Advocate to have full access to relevant information (provided no restrictions by law or regulations), and to attend and participate with participants and plan sponsors in meetings with PBGC.

The independent Advocate plays an important role on behalf of participants and plan sponsors. The Office of the Advocate maintains a public webpage, which is accessible through a direct link from the pbgc.gov homepage, and its annual reports provide public accountability of its advocacy efforts.

Findings and Analysis

Due to the nature of the Advocate position, we reviewed the Advocate’s statutory duties and the applicability of federal ethics laws and PBGC policies and procedures to determine if there is a need for clarification – legislative or otherwise.

Representation and Nature of the Advocate Position

In reviewing the Advocate’s official duties, we note (as others have) that there is some ambiguity in section 4004 between:

- 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;
- advocate for the full attainment of the rights of participants in plans trusted by the corporation; and
- assist pension plan sponsors and participants in resolving disputes with the corporation.

The Advocate told the OIG she believes that because section 4004 is titled, “Participant and Plan Sponsor Advocate,” she can “advocate” on behalf of plan sponsors, as well as

participants. According to the U.S. Supreme Court, however, “It has long been established that the title of an Act ‘cannot enlarge or confer powers.’”¹ The Court has held that a title or heading is only “a short-hand reference to the general subject matter involved” and “not meant to take the place of the detailed provisions of the text[.]”²

Unfortunately, the enabling legislation or legislative history does not provide practical definitions distinguishing between “liaison,” “advocate,” and “assist.” With regard to participants of plans that have been trusted by PBGC, often retirees or surviving spouses on a fixed income, a distinction may not be necessary. Section 4004 defines the scope of advocacy as “full attainment of rights,” and on its website the Office of the Advocate defines advocacy for participants as working “directly with participants in defined benefit plans to ensure that they receive benefits they are entitled to under defined benefit plans insured by PBGC.” With regard to plan sponsors, often represented by counsel, the need for defining the boundaries of advocacy is more apparent. In complex and difficult negotiations, PBGC attorneys seek to fulfill their duties to preserve plans and protect pensioners, while plan sponsors have competing financial interests. These positions may understandably result in some level of friction.

Congress may have intended for the Advocate to advocate for represented plan sponsors or “second-chair” any and all negotiations between PBGC and plan sponsors, but we note that courts would provide no weight to the September 2015 congressional letter. In a case involving a similar congressional letter issued after enactment of legislation, the court stated, “those letters stated the views of the individual members . . . they provide no light on the intent of the Congress that had enacted the legislation two years earlier.”³ According to the U.S. Supreme Court, “. . . isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment. Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent ‘legislation’ such as this Court might weigh in construing the meaning of an earlier enactment.”⁴

The law is not clear and without legislative, regulatory, or policy guidance, the boundaries of the advocacy role (specifically as it relates to plan sponsors) are dependent on the judgment of the Advocate subject to Board oversight. In contrast, comparable roles at other agencies are

¹ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 n.14 (1981) (quoting *United States v. Oregon & California R. Co.*, 164 U.S. 526, 541 (1986) and *Cornell v. Coyne*, 192 U.S. 418, 430 (1904), and citing *United States v. Fisher*, 2 Cranch 358, 386 (1805) and *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188 (1889)).

² *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947).

³ *Riggsbee v. Bell*, 787 F.2d 1564, 1569 (Fed. Cir. 1986).

⁴ *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n. 11 (1979).

more clearly defined in statute, regulation, policy, and formal Board Policy Statement; and all explicitly adhere to the principle of neutrality.

For example, the role of the IRS Taxpayer Advocate is listed in statute, regulation, policy (*see, Internal Revenue Manual, Part 13*) and publicly available IRS publications (*see, Taxpayer Advocate Service: We Are Here to Help You, Pub. 1546*). The Taxpayer Advocate ensures that taxpayers are treated fairly in accordance with the Taxpayer Bill of Rights, just as the PBGC Advocate advocates “for the full attainment of the rights of participants in plans trusted by the corporation.” The concept of impartiality is reflected in the Internal Revenue Manual which states: “TAS is composed of advocate ombudsmen. The key characteristics of advocate ombudsmen are independence, impartiality and confidentiality. Advocacy is not just about recommending legislative and procedural changes, but it is also about applying advocacy attributes to each taxpayer's case. An advocate conducts an independent and impartial analysis of all information relevant to the taxpayer's problem.” *Internal Revenue Manual, Section 13, Section 13.1.1.2.*

The Office of the Investor Advocate at the U. S. Securities and Exchange Commission explicitly distinguishes between assisting and advocating, and adheres to the principle of impartiality. The Office of the Investor Advocate was established pursuant to Section 915 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The Investor Advocate has similar responsibilities to the Participant and Plan Sponsor Advocate. For example, the Investor Advocate is to “assist retail investors in resolving significant problems such investors may have with the Commission or with self-regulatory organizations” and “act as a liaison between the Commission and any retail investor in resolving problems that retail investors may have with the Commission or with self-regulatory organizations.” These core functions are performed by an Ombudsman, who is appointed by and serves under the Investor Advocate. On its web page (www.sec.gov/ombudsman), the Office of the Investor Advocate and Ombudsman identifies which activities it is “available to” do and which activities the office “does not do.” One of the activities it does not do is: “serve in any role that compromises the impartiality of the Ombudsman.” Under its frequently asked questions (FAQs) is the follow item: “*Will the Ombudsman act as my advocate? No. The Ombudsman does not represent or act as an advocate for any person or entity, and does not take sides on any issues. Instead, the Ombudsman remains impartial and advocates for a fair process.*”

The Federal Reserve Ombudsman was created as the result of Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994. Similar to the Advocate, the Ombudsman is “to act as liaison between the agency and any affected person with respect to any problem such party may have in dealing with the agency resulting from regulatory

activities of the agency.” Similar to the Investor Advocate, the website for the Federal Reserve Ombudsman specifically lists the activities it does and does not do. One of the activities it does not do is “take sides.” (www.federalreserve.gov/aboutthefed/ombudsman.htm.) The Board of Governors for the Federal Reserve System enacted a Policy Statement concerning the Ombudsman function which can be found online at www.federalreserve.gov/aboutthefed/ombpolicy.htm.

The law prohibits a government employee from acting as an attorney or agent against the government, “*other than in the proper discharge of his official duties.*” 18 U.S. Code Section 205. Without more specific guidance on the advocacy role with regard to advocating on behalf of plan sponsors, the Advocate *may be* at risk of acting outside the proper discharge of her official duties.

In addition to the possible Section 205 risk regarding advocating on behalf of plan sponsors, we also note that the Advocate position appears unique in assisting both participants and plan sponsors – private parties with potentially competing financial interests. Neither the Taxpayer Advocate nor the Investor Advocate assists private parties with potentially competing interests. In response to the OIG, the PBGC Advocate stated that to date she has not experienced situations that would give rise to a “conflict of interest” between participants and plan sponsors. According to the Advocate, “Participants come to the Advocate and OPPSA to resolve benefit entitlement issues they have with plans trusted by PBGC, and sponsors seek assistance from the Advocate to help resolve often long-standing disputes with the corporation making it nearly impossible for the sponsor to continue with their business plans.” Past experience is informative, but does not negate the possibility of a future conflict.

Future legislative proposals should consider eliminating the ambiguity regarding advocating on behalf of plan sponsors.

Applicability of Federal Ethics Rules

The Advocate is subject to common federal ethics rules which serve to deter and detect ethics violations. For example, like all federal employees, the Advocate is subject to the post-employment restrictions contained in Title 18 U.S. Code Section 207. According to the PBGC Ethics Office, the Advocate is also deemed senior personnel. As such, the Advocate is subject to a post-employment one-year “cooling off” period, during which time she would be prohibited from making any communication or appearance before PBGC with the intent to influence. Like all federal employees, the Advocate is also subject to the limitations on accepting gifts from prohibited sources. As a senior federal official, the Advocate is required to file an annual public

financial disclosure statement (OGE Form 278e) and periodic public financial transaction reports (OGC Form 278-T). Unlike the confidential financial disclosure statements filed by some mid-level federal employees, these forms are available to the public. In general, although no rules or controls are fail-safe, common safeguards exist to detect conflicts of interest or other ethical conduct violations by the Advocate.

Applicability of PBGC Ethics Program – Preventing Conflicts of Interest

The Advocate is required to follow PBGC's ethics program. The Advocate's position description states that the Advocate "is an employee of the PBGC required to comply with PBGC's policies and procedures." PBGC's ethics program consists of an Ethics Handbook (which answers basic ethics questions), mandatory annual training, monitoring of compliance with financial disclosure requirements, and designated agency ethics counselors who are available to provide advice on specific matters. Although PBGC's ethics program provides a basic foundation to detect conflicts of interest or other ethical conduct violations by the Advocate, more can be done to prevent conflicts of interest with the unique role of the Advocate.

Periodic financial disclosure requirements and mandatory annual ethics training may not be enough to prevent actual or apparent conflicts of interest or other ethical conduct violations. (*See, generally, PBGC OIG Audit Report, Former Director's Involvement in Contracting for Investment Services Blurs Roles and Raises Fairness Issues*, (AUD-2009-5/PA-08-63-1), oig.pbgc.gov/summaries/PA-08-63-1.html) Prevention and internal control is enhanced through proactive engagement with designated agency ethics officials. Proactive engagement is even more critical with sensitive positions that may present novel ethical issues requiring expert legal opinions.

The Advocate is a sensitive and unique position, and there is a higher risk of potential perceived or actual conflicts given her duties. The Advocate represents the interests of private parties – participants and plan sponsors – in resolving disputes with PBGC. The Advocate is a PBGC employee, but is independent from PBGC management. The Advocate reports to the Board, but is not subject to day-to-day supervision. The Advocate may communicate independently with Congress. PBGC may not interfere with the Advocate in the performance of her duties. There exists some level of confidentiality over communications between the Advocate and participants and plan sponsors (except for the OIG's right of access under the IG Act). The issues presented in the course of the Advocate's unique duties may not be addressed in annual ethics training. For these reasons, it is critical that the Advocate proactively engage with PBGC ethics counselors to identify and mitigate potential ethics issues.

Proactive engagement is in the best interests of the Advocate. The Office of Government Ethics rules provide that disciplinary action “will not be taken against an employee who has engaged in conduct in good-faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has fully disclosed all relevant circumstances.” 5 C.F.R. Section 2635.107(b).

In MAP-21, Congress recognized the need for proactive engagement on ethics issues by those charged with PBGC governance when it required the Board of Directors to “establish a policy that will inform the identification of potential conflicts of interests of the members of the board of directors and mitigate perceived conflicts of interest of such members and the Director of the corporation.” In addition to helping to prevent potential conflicts, such a policy also demonstrates a strong tone at the top regarding the Board’s commitment towards openness, integrity and ethical behavior.

It must be noted that PBGC ethics officials have advised the OIG that the Advocate has sought out ethics advice in the past and is otherwise in compliance with PBGC ethics training and reporting requirements. We commend this practice, and simply suggest that the Board formalize this practice into policy and institutionalize this policy through Board resolution.

Conclusion

We note the ambiguity in the statute regarding the unique role of “advocating” on behalf of plan sponsors, and suggest that any future legislative proposals consider eliminating this ambiguity.

We found that common safeguards are in place to detect conflicts of interest or other ethical conduct violations by the Advocate. Notwithstanding these common safeguards, we suggest that the Board consider a resolution establishing a policy expressly binding the Advocate to PBGC ethics policies and procedures and encouraging the Advocate to proactively identify potential conflicts of interest and consult with the PBGC ethics officials.

Like many internal control tone at the top policy statements, such a resolution would require minimal effort from the Board. It would not be unduly burdensome to the Advocate. Such a resolution would be both an “easy-win” and a “win-win” that would benefit stakeholders as follows:

- For the Board, a resolution would publicly demonstrate its commitment to internal control and ethical tone at the top, and would provide evidence of

policy direction in the absence of day-to-day supervision over a high-risk and unique position in the federal government;

- For the Advocate, a resolution would provide a reminder of the OGE good-faith reliance rule;
- For the OIG, a resolution would aid in the prevention of fraud and other ethical conduct violations, and would provide for greater transparency and public accountability by establishing criteria upon which we could evaluate compliance;
- For the PBGC Ethics Office, a resolution would help prevent ethics violations by PBGC employees by encouraging consultation with ethics counselors; and
- For future Boards and Advocates, a resolution would provide continuity through a formal record that is not dependent on individual recollections.