

EFFECTIVE JANUARY 24, 2022

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## PBGC

### **Despite Systemic Problems at PBGC, Advocate Optimistic About Agency Change**

**A**lthough defined benefit plan sponsors confront persistent and systemic problems in dealing with the PBGC, there are signs of positive change coming from the agency, according to the annual report from the PBGC's liaison to the benefits community.

In the report, released Dec. 31, Constance A. Donovan, the Pension Benefit Guaranty Corporation's Participant and Plan Sponsor Advocate, said the agency "must noticeably improve its relations with plan sponsors" to avoid further encouraging sponsors to abandon their plans.

Among the areas of concern cited in the report were the agency's unnecessarily adversarial tone, its aggressive second-guessing of private business operations and its expansive use of its early warning program and reportable events requirements.

Despite these concerns, Donovan expressed optimism in the report that the agency's leadership and staff, under the new direction of W. Thomas Reeder, have been open to changes in their practices to help mitigate these problems.

The "report is much more optimistic" than the one Donovan issued last year, attorney Harold J. Ashner, a partner with Keightley & Ashner LLP, told Bloomberg BNA Jan. 4 (02 PBD, 1/5/15). Donovan's optimism is based on both progress already made and her early experiences indicating that the new director is "very focused on addressing the issues the advocate has been raising," Ashner added.

**Call for Better Relations.** In the report, Donovan said the PBGC needs to improve its relations with plan sponsors. She said the PBGC should:

- view plan sponsors as premium-paying customers seeking assistance from the agency rather than as adversaries;

- keep sponsors fully informed as to why the agency believes they have committed any legal or regulatory violation and the reasons for any business operation changes the agency wants them to make;

- maintain a dialogue with plan sponsors, particularly when a significant portion of the plan sponsor community expresses significant concerns about a PBGC position;

- consider the potential harm to both the PBGC and the sponsor before using the tools available to the agency, such as plan termination or litigation, as a threat or "negotiation tactic"; and

- develop recommendations to the agency's board of directors so that the administration can determine whether to pursue legislative changes, rather than the PBGC substituting its own judgment for that of Congress through PBGC enforcement actions.

**Other Areas of Concern.** In the report, Donovan also recommended that the PBGC take a fresh look at plan premiums and premium penalties given that a combination of factors, including the agency's inflexible imposition of premium penalties even for honest mistakes, are driving plan sponsors to de-risk and move away from defined benefit plans.

The report said the other factors contributing to such de-risking include the volatility around pension funding primarily driven by fluctuations in discount rates, returns on plan assets that can significantly affect both profit and loss statements and cash requirements from year to year, and skyrocketing premium costs.

The advocate also said in the report that plan sponsors believe the PBGC has been using its early warning program to circumvent restrictions enacted by Congress in 2014 under Employee Retirement Income Security Act Section 4062(e), pertaining to downsizing liability on employers for certain substantial cessations of operations at a facility (242 PBD, 12/18/14).

The agency's issuance of new final rules on reportable events has also been an area alienating plan sponsors, the advocate said. The new rules represent a significant and controversial change in the agency's focus away from the health of a sponsor's pension plans to the plan sponsor's financial health, the report said (176 PBD, 9/11/15).

Donovan said the PBGC must "actively seek and obtain input from the regulated community as to any problems that may arise in connection with the implementation of the new rules," and should "take prompt action to provide any necessary relief."

**Effort to Address Penalties.** Donovan's optimism that the agency was amenable to making changes to improve its relations with plan sponsors was due at least partially to the creation of a PBGC internal working group to address premium penalties to account for what the advocate described as "honest mistakes" by plan sponsors.

"This working group holds great promise in addressing concerns sponsors have with the automatic-like ap-

plication of premium penalties especially in light of skyrocketing premium costs,” Donovan said.

Donovan also said in the report that the agency’s Reeder has had “a positive influence that will lead to improvements with the PBGC and the sponsor community particularly when sponsors come to PBGC for assistance with their plans.”

The advocate position serves as a liaison between the agency and the plan sponsor and participant community, and is responsible for resolving disputes between

the PBGC and its customers, recommending legislative changes and filing an annual report to Congress.

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*The 2015 Annual Report of the Participant and Plan Sponsor Advocate is at <http://src.bna.com/bN9>*