**PBGC Responses to Questions for the Record**

**Hearing Before the Subcommittee on Health, Employment, Labor, and Pensions**
**Committee on Education and the Workforce**
**U.S. House of Representative**
**March 20, 2024**

**Chairman Bob Good (R-VA)**

1. When Congress passed the *American Rescue Plan Act* (ARPA) and bailed out multiemployer pension plans, ARPA put an express limit on the interest rate used to calculate a plan's bailout. The Pension Benefit Guaranty Corporation (PBGC) recognized this limit in its interim final rule when it said: "PBGC does not have the authority to provide a different rate or bifurcate the statutorily mandated interest rate."[1] That rule has your signature on it. But a year later, you reversed course and provided a different interest rate that swelled the bailout by 4.64 billion in taxpayer dollars.[2]

   a. How can you justify such a dramatic shift in position?

   **Response**:

   PBGC modified the interest rate structure to harmonize the various sections of ERISA added by a subtitle of the American Rescue Plan Act of 2021 (ARP). Specifically, PBGC adopted the dual interest rate structure to give more weight to section 4262(j), that the amount of assistance "shall be such amount required for the plan to pay all benefits" through 2051. The interest rate in the interim final rule (IFR) would not have accomplished this. The dual interest rate structure also aligns with ARP's requirement, in section 4262(*l*), that plans segregate, and treat separately, SFA funds and non-SFA funds. PBGC's authority in issuing these rules comes from ERISA, including the provisions amended by ARP, and is express and comprehensive. *See* 29 U.S.C. § 1302(b)(3), ERISA § 4002(b)(3) (granting authority "to adopt, amend, and repeal . . . regulations as may be necessary to carry out the purposes of [Title IV]"); 29 U.S.C. § 1432(c), ERISA § 4262(c) (directing PBGC to "issue regulations or guidance setting forth requirements for special financial assistance applications").

   PBGC arrived at this change after further legal analysis and consideration of new information received during the comment period for IFR. Note that an IFR, while effective immediately, "typically allows for public comment after the rule is published so that the agency still has an opportunity to consider public input and revise the rule accordingly." *See* Office of Information and Regulatory Affairs of the Office of Management and Budget FAQs on the Regulatory Dashboard at https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp; *see*

[1] https://www.govinfo.gov/content/pkg/FR-2021-07-12/pdf/2021-14696.pdf#page=6.

[2] https://oig.pbgc.gov/pdfs/SR-2022-12.pdf.

*also* Response 1.c, *infra* (discussing changes between the IFR and the PBGC's Final Rule (Final Rule)[3]). Here, PBGC received over 100 comment letters in response to its IFR, many of which raised concerns that the method for determining SFA amounts under the IFR would not provide plans with sufficient funds in "such amount required . . . to pay all benefits due" through 2051, as required in section 4262(j)(1) of ERISA.

Commenters noted an inconsistency between sections 4262(e) and 4262(*l*) of ERISA, stating that if the interest rate specified in section 4262(e) of ERISA (which, for many plans, would be close to 5.3 percent based on pension funding segment rates in December 2021), were used to project the value of both SFA and non-SFA assets, but SFA investments were limited to investment-grade bonds under section 4262(*l*) (which would likely result in an actual rate of return close to 2 percent as of December 2021, assuming that PBGC permitted no investments other than investment-grade bonds and that current yields on such bonds continued through 2051), the SFA amount would be insufficient to meet the requirement of section 4262(j)(1) that it be the "amount required for the plan to pay all benefits due" through 2051.

Some commenters illustrated this point by noting that their modeling showed their plans running out of money before the end of 2051. Such comments were received from several plans, including the Graphic Communications Conference of the International Brotherhood of Teamsters National Pension Fund (projected insolvency in 2040), Local 138 Pension Trust Fund (projected insolvency in 2041), Arizona Bricklayers Pension Fund (projected insolvency 2048-2049), and the IBEW No. 237 Pension Fund (projected insolvency in 2048). PBGC and its Board considered the information from the commenters and performed its own extensive actuarial modeling. The information from commenters and PBGC's modeling performed after issuance of the IFR demonstrated that using the interest rate in section 4262(e) of ERISA for both SFA funds and non-SFA funds would, using reasonable assumptions of future investment returns, result in a material number of the SFA-recipient plans becoming insolvent before the end of 2051—which would be inconsistent with section 4262(j)'s requirement that SFA amounts be sufficient to enable plans to reasonably project to pay all benefits due through 2051.

On the basis of this information, PBGC concluded that the requirement in section 4262(j)(1) of ERISA that SFA be provided in the "amount required for the plan to pay all benefits due" through 2051 meant the amount required in addition to the plan's non-SFA assets. As required by ARP, plans will pay benefits from two separate pools of assets which, under section 4262(*l*), must be segregated and invested separately. In order to calculate the amount of SFA "necessary for the plan to pay all benefits due" through the end of 2051, plans must perform separate calculations to project the value of each pool of assets, each of which requires the use of an interest rate assumption to reflect expected returns on that pool of assets. As such, an amount of SFA that accounts for existing plan assets under section 4262(j), and the segregation and separate investment of those assets from SFA assets under section 4262(*l*), requires two asset projections: one for a plan's SFA assets, and one for a plan's non-SFA assets.

In developing the Final Rule, PBGC further noted section 4262(e) of ERISA is general

[3] PBGC's Final Rule published in the Federal Record on July 8, 2022.

in its language regarding the determination of the amount of SFA and does not speak directly to the precise question of the use of an interest rate to project returns *on SFA assets*. PBGC, in consultation with its Board agencies, concluded that the best way to address the limitations imposed by the statute and PBGC on permissible investments was to use a separate interest rate to project the expected returns on SFA assets in determining the amount of SFA required for a plan to pay all benefits due through 2051. The interest rate identified in section 4262(e) of ERISA must be used and, under the Final Rule, it is used—for non-SFA funds. A separate interest rate is applied to the separate account holding SFA funds, allowing plans to receive sufficient funds to project to pay benefits through 2051.

Thus, PBGC adopted an approach with two interest rates to harmonize the requirements that (a) plans use an identified interest rate, (b) plans receive sufficient assistance to enable them to project to pay all benefits due through 2051, and (c) plans segregate, and keep separate, SFA funds and non-SFA funds.

PBGC's modeling showed that loosening restrictions on permissible investments would not, by itself, allow PBGC to harmonize the various statutory directives. Instead, to achieve the statutory mandate in section 4262(e) of ERISA, PBGC required the identified interest rate be applied only to the non-SFA assets. This approach gives appropriate weight to section 4262(j)(1). After considering section 4262(e) together with sections 4262(j)(1) and 4262(*l*), and in order to harmonize these provisions of the statute effectively, PBGC provided two interest rate assumptions in the Final Rule. PBGC reads the statute as a whole and construes each section in a manner that renders them compatible.

For a more detailed discussion of the rationale for modifying the interest rate as well as the comments PBGC received on this issue, we refer you to the preamble to the Final SFA Rule, 87 Fed. Reg. 40968 (Jul. 8, 2022) at page 40973 and pages 40977 to 40980.

b. What authority did you have to change the interest rate without a change in the law?

**Response**:

Please see the answer to question 1a.

c. From whom did you seek advice on this issue?

**Response**:

PBGC made changes to the SFA regulation in consultation with, and with the approval of, PBGC's Board of Directors, which is made up of the Secretaries of the Department of Labor, the Department of the Treasury, and the Department of Commerce. *See* 87 Fed. Reg. 40968, n.2. Under section 4002(a) of ERISA, PBGC is administered in accordance with policies established by the Board of Directors. In addition, PBGC submitted the Final Rule to OMB for interagency review under EO 12866. *See* 87 Fed. Reg. at 40999.

d. Has the Department of Justice asked PBGC anything about the bifurcated interest rate?

**Response:**

Please see the answer to question 1c. Since the final rule was promulgated, we are not aware of any questions by DOJ to PBGC regarding the bifurcated interest rate.

e. The August 9, 2023, Government Accountability Office opinion sidestepped the question of whether PBGC had the authority to set an interest rate lower than specified by ARPA.[4] Does ARPA give you the authority to bifurcate the interest rate?

**Response:**

Please see the answer to question 1.a.

**Chairwoman Virginia Foxx (R-NC)**

1. The 2023 PBGC Advocate Annual Report calls for the creation of a Chief Executive Officer position to provide daily oversight and management of PBGC senior leaders.

   a. Does PBGC agree with this recommendation?

   **Response:**

   No. The Director serves the function of Chief Executive Officer and is accountable to the Board of Directors.

   b. Why do you think the PBGC Advocate made this recommendation?

   **Response:**

   The only reasons we are aware of are those described in the report you reference.

2. PBGC's regulations governing the Special Financial Assistance (SFA) program allow PBGC to recover overpayments. Those regulations state: "If PBGC determines that a payment for special financial assistance to a plan exceeded the amount to which the plan was entitled, any excess payment constitutes a debt to the Federal Government."

   a. Why did PBGC not demand repayment of the additional SFA based on dead people improperly included on the census rolls of multiemployer pension plans?

   **Response:**

   PBGC itself did not have legal authority to recover SFA amounts based on inaccurate census data. However, working with DOJ – which does have that legal authority – we recovered $126.5 million from Central States, which represents the SFA amount that was paid based on

[4] https://www.gao.gov/products/b-334541.

inaccurate plan census data. We are working with another 66 plans to assess whether they received any SFA based on inaccurate plan data, and we will work with DOJ as needed to recover any such amounts we find. When OIG first raised the issue, we promptly took steps to fix the issue prospectively to prevent the same issue from arising as PBGC processes additional SFA applications.

b. Why do you believe the Department of Labor (DOL) stepped in on March 14, 2024, and directed multiemployer plans to repay these amounts?

**Response:**

Before March 14, 2024, the Department of Justice, in cooperation with PBGC, had been in discussions with Central States seeking repayment of SFA amounts that had been paid based on inaccurate plan census data. PBGC had also already begun contacting other plans that had not been subjected to an independent census data audit by PBGC to determine if their census data contained deceased participants. On February 28, 2024, Central States sent a letter to Acting Secretary Su of the Department of Labor and Secretary Yellen of the Department of the Treasury asking if plan fiduciaries would violate their duties under Sections 403 and 404 of ERISA if the plan returned $127 million of its SFA funding to the federal government. A copy of the letter can be found at this link: https://si-interactive.s3.amazonaws.com/prod/plansponsor-com/wp-content/uploads/2024/02/29170329/Central-States-Nyhan-Letter-to-Julie-Su-and-Janet-Yellen-02282024-final.pdf. DOL has the jurisdiction to enforce Section 404 of ERISA. DOL issued the March 14, 2024, statement to clarify that plans could repay any SFA amounts that had paid based on inaccurate plan census data without violating their Section 403 and 404 duties. As DOL stated,

> Although plans have expressed their willingness to refund these excess payments, some have expressed concern about possible arguments that refunding those excess payments could violate the requirement of ERISA Section 403(c)(1), which provides that plan assets must be held for "the exclusive purposes of providing benefits to participants….and defraying reasonable expenses of administering the plan," or the duties of prudence and loyalty as set forth in ERISA Sections 404(a)(1)(A) and (B).
>
> The Department confirms, however, that these provisions do not prevent plans from refunding any excess payments received through the SFA Program or excuse any failures to return SFA funds to which the plans are not entitled. The excess payments would not have been made to the plans absent the inaccurate census data, and the excess payments gave rise to an equal and offsetting liability owed by the plans to the United States government. These excess payments can and must be repaid, and in the Department's view, such repayments would not violate the ERISA provisions noted above or related provisions of the Internal Revenue Code, including section 401(a)(2). The Department has confirmed its understanding with the Department of the Treasury and the Internal Revenue Service.

3. On a weekly basis, PBGC matches its list of payees under the single employer pension plan program to the Social Security Administration's Death Master file.

   a. Why does PBGC match these lists, and why does it do so every week?

      **Response:**

      For the Single-employer Program, PBGC becomes the trustee of terminated, underfunded single-employer pension plans. The participants in the trusteed plans receive their benefits from PBGC. PBGC receives a weekly update from SSA of its full file of death information. PBGC matches the lists against its customer database monthly, prior to the monthly payment distribution, to ensure that we are stopping payments for deceased payees.

   b. Would similar matching be just as useful for the participant roles of multiemployer pension plans?

      **Response:**

      In the multiemployer pension program, PBGC does not make direct payments to participants or their beneficiaries. PBGC provides periodic financial assistance payments to insolvent plans. The plans are responsible for paying benefits to individuals. However, in the context of financial assistance for insolvent plans, PBGC uses the SSA full file to ensure that insolvent plans do not pay benefits to deceased participants. For plans not receiving PBGC assistance, PBGC does not have legal authority to audit participant rolls of multiemployer pension plans. Multiemployer plans that are not receiving assistance from PBGC are responsible for updating and correcting their own participant census.

4. In its response to the PBGC Inspector General, PBGC supported its decision not to pursue repayment of the $127 million in SFA to the Central States Pension Fund (Central States) for dead people by stating that "census data is just one of the multiple factors that contributed to the inherent imprecision of assumptions." However, participant rolls and census data for multiemployer pension plans are facts, not assumptions. PBGC created the novel idea that factual census data in a multiemployer pension plan is an assumption defying industry practice, settled authority, and common sense.

   a. What authority did PBGC have for the novel interpretation that payments to multiemployer plans for dead people was merely an assumption?

      **Response:**

      As described in PBGC's testimony, the SFA calculation requires measurement of current plan assets and long-term actuarial projections of future employer contributions to the plan, all plan benefits expected to be paid through 2051, withdrawal liability income, investment income, and plan expenses – an inherently complex and uncertain proposition. These projections rely

heavily on economic and actuarial assumptions on which PBGC has provided guidance and conducts thorough reviews. The projection of all plan benefits expected to be paid through 2051 is necessarily uncertain and requires use of plan benefit provisions, participant census data and a range of assumptions about changes in the participant population and benefits payments over time, including assumptions for new entrants, turnover, retirement rates, disability, and mortality.

b. Was this novel interpretation created to cover up the SFA overpayment to Central States?

**Response:**

PBGC's Office of Inspector General flagged the issue of deceased participants in Central States' census data. Since that time, PBGC took steps to prevent the issue from occurring again, and then evaluated if there was authority allowing it to recover SFA amounts paid based on inaccurate plan census data. DOJ identified legal authority available to it, and DOJ, in cooperation with PBGC, reached an agreement on April 8, 2024, whereby Central States would repay $126.5 million to the federal government. Central States made that payment the same day.

5. PBGC is responsible for administering withdrawal liability rules, including for multiemployer pension plans that received taxpayer bailout money.

a. What is withdrawal liability, and what is the reason it exists?

**Response:**

Withdrawal liability is statutory liability that an employer owes to a multiemployer defined benefit pension plan if the employer withdraws from the plan in a complete or partial withdrawal. *See* 29 U.S.C. § 1381(a); ERISA § 4201(a). An employer completely withdraws when it permanently ceases to have an obligation to contribute to the plan or permanently ceases all covered operations under a plan. *See* 29 U.S.C. § 1383(a); ERISA § 4203(a). In either case, the employer ceases to contribute to the plan. An employer partially withdraws when there is either a 70% decline in its contribution base units or a partial cessation of its contribution obligation. *See* 29 U.S.C. § 1385(a); ERISA § 4205(a).

An employer's withdrawal liability is its allocable amount of the plan's unfunded vested benefits ("UVBs"), subject to certain adjustments. *See* 29 U.S.C. § 1381(b)(1); ERISA § 4201(b)(1). A plan's UVBs are determined by subtracting the value of the assets of the plan from the value of nonforfeitable benefits under the plan. *See* 29 U.S.C. § 1393(c); ERISA § 4213(c). UVBs must be allocated to the withdrawing employer using one of the methods permitted under ERISA. *See* 29 U.S.C. §§ 1381(b)(1), 1391(a); ERISA §§ 4201(b)(1), 4211(a). Under each of the allocation methods, withdrawal liability is measured as of the last day of the plan year preceding the plan year in which the employer withdrew. *See Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995).

Congress established withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Prior to MPPAA, if a multiemployer plan became

insolvent and terminated, only employers that were obligated to contribute to the plan during the five-year period preceding termination were liable for their proportional share of the plan's underfunding. ERISA § 4064, as enacted in 1974 and abrogated by MPPAA in 1980.

> Unfortunately, this scheme encouraged an employer to withdraw from a financially shaky plan and risk paying its share if the plan later became insolvent, rather than to remain and (if others withdrew) risk having to bear alone the entire cost of keeping the shaky plan afloat. Consequently, a plan's financial troubles could trigger a stampede for the exit doors, thereby ensuring the plan's demise.

*Id.* at 416-17 (1995).

The legislative history of MPPAA explains that Congress created withdrawal liability to correct this perverse incentive structure:

> The Ways and Means Committee believes that the current rules governing an employer's withdrawal liability upon withdrawal from a multiemployer plan fail to adequately protect plan participants, the employers who remain in the plan, and the PBGC premium payers. The present-law rules have the effect of increasing the liabilities of employers who remain with a plan until it terminates and rewarding those employers who leave the plan early. When an employer withdraws from a multiemployer plan, the remaining employers must assume the burden for funding benefit liabilities left by the withdrawing employer. In addition, a withdrawal may reduce the plan's contribution base and necessitate an increase in the rate of contributions to the plan. The Committee finds it necessary to adopt statutory withdrawal rules to protect a multiemployer plan from the adverse financial impact of employer withdrawal. The Committee believes that a rule which requires an employer who withdraws from a multiemployer plan to continue funding a share of the plan's unfunded benefit obligations removes the present incentive for employer withdrawals and provides protection to remaining employers where withdrawals nevertheless occur.

H.R. Rep. No. 96-869, pt. II, at 15 (1980), reprinted in 1980 U.S.C.C.A.N. 2993, 3004.

b. Do you agree that the purpose of withdrawal liability is to ensure that a multiemployer pension plan's unfunded vested benefits are paid for by an exiting employer—not to penalize an employer for leaving the plan?

**Response:**

Please see the response to Chairwoman Foxx's question 5a for an explanation of the purposes of withdrawal liability. Withdrawal liability is not a penalty. The text and legislative

history of MPPAA reflect Congress's concern with the financial incentives of employers to withdraw or continue contributing, the impact of the incentive structure on employer withdrawals, and the impacts of employer withdrawals on plan viability, on plan participants, on the remaining employers required to contribute to the plan, and on the larger set of employers in all multiemployer plans that fund the pension insurance program.

6. Central States is 98.5 percent funded after PBGC paid it $35.8 billion in taxpayer bailout funds. But now, Central States is trying to collect imaginary underfunding from any employer that exits the fund. Under PBGC's SFA final regulations, any contributing employer must pay a share of past underfunding to exit the plan, even when there is no underfunding and even though the employer may have no fault in any underfunding. For example, Central States—which is now fully funded courtesy of the U.S. taxpayer—is attempting to collect $5 billion in mythical underfunding from a bankrupt company that is exiting the fund after the date the fund received SFA.

    a. Why should a bankrupt company pay a $5 billion windfall in withdrawal liability to Central States in addition to the contributions it has paid or will pay when due?

    **Response:**

    Yellow Corporation, which is liquidating under Chapter 11 of the Bankruptcy Code, has raised these or similar issues in its bankruptcy proceeding, *In re Yellow Corp.*, Case No. 23-11069 (Bankr. D. Del.). Accordingly, it would be inappropriate to comment further on the issues pending before the court.

    b. Are PBGC's rules trying to handcuff employers to make them stay in these multiemployer pension plans?

    **Response:**

    The purposes of the rules PBGC adopted that impose conditions on SFA recipient plans are described in PBGC's rulemaking documents published in the Federal Register. See 87 FR 40968, 40996 regarding the rule requiring phase-in over time of SFA assets for purposes of calculating withdrawal liability.

7. In 1980, Congress passed a clear framework imposing withdrawal liability on any employer that exits an underfunded multiemployer pension plan. Withdrawal liability pays for unfunded benefits, but it is not (and never was) an exit penalty. If a multiemployer pension plan is not underfunded, then there is no withdrawal liability when exiting. ARP gave PBGC authority to impose reasonable conditions on withdrawal liability, but Congress did not give PBGC authority to create imaginary underfunding for employers that are exiting a multiemployer plan.

    a. What is your justification for imposing withdrawal liability based on underfunding that no longer exists? How do you justify this double dipping?

**Response**:

Please see the response to questions 6a and b above.

b. If multiemployer pension plans double dip, are you going to ask multiemployer plans to refund the bailout money they received to taxpayers?

**Response**:

Plans that receive SFA are required to determine withdrawal liability in accordance with conditions authorized by statute and promulgated under the Final Rule. The SFA amount for a plan is calculated to be the amount required for the plan to pay benefits due through the end of the last plan year ending in 2051, based on assumptions directed by statute and PBGC regulations. The solvency of a multiemployer plan receiving SFA will ultimately depend on the plan's actual experience going forward (e.g., actual investment experience, employer contributions, fluctuations in participant population and mortality experience, employer withdrawals, etc.) after receiving SFA.

Requesting that SFA-recipient plans refund SFA would be inconsistent with ARP, under which Congress specified that a plan receiving SFA "shall not be subject to repayment obligations with respect to such special financial assistance." 29 U.S.C. § 1432(a)(2); ERISA § 4262(a)(2).

8. The single-employer program at PBGC is running a very large surplus. PBGC's annual report states that the single-employer program ended the year with a balance of $44.6 billion. PBGC's projections report estimates that the surplus balance will be between $45.6 billion and $80.7 billion by the end of Fiscal Year 2032. Is it time to end PBGC premiums for single employer pension plans that are fully funded? Why or why not?

**Response**:

PBGC is always willing to work with Congress and provide data and technical assistance on premiums and other aspects of PBGC's insurance programs. Congress has the sole authority to set PBGC's premium rates, and PBGC is willing to work with Congress to assess options that would protect the financial solvency of the Single-employer Program and encourage continued employer participation in the defined benefit system.

9. With respect to the surplus in the single employer program, the 2023 PBGC Advocate Report states: "One ominous note that threatens the viability of the defined benefit system is PBGC premiums. The agency has an extraordinary $44.6 billion surplus that is far in excess of anything that the agency needs. PBGC premiums cover a level of risk associated with a defined benefit system that simply no longer exists." Do you agree with this statement? Why or why not?

**Response:**

PBGC's most recent annual Projections Report (FY 2022 Report) shows that the Single-employer Program is strong and projected to remain strong going forward. The variable rate premium (VRP) is designed such that underfunded plans contribute more to the PBGC insurance pool to mitigate this risk. Over time, we expect that the VRP revenue will decline as plan funding levels improve. The projections described in PBGC's annual Projections Report are made under a wide range of future economic scenarios and the Report includes information on the level of risk in the Single-employer Program and how that risk has changed over time. The FY 2022 Projections Report includes analysis of plan underfunding in the past and projections going forward, and the modeling results includes a stress scenario to test the program's resiliency of the Single-employer Program.

10. The 2023 PBGC Advocate Report called the agency's failure to show leadership regarding PBGC premiums "more troubling" than the unneeded surplus in the single employer pension program. The report states that PBGC premiums in the single employer program are an extraordinary financial burden that are driving pension plan sponsors from the defined benefit structure. What policy solutions has PBGC considered to address the burden of unnecessary premiums paid by fully funded, single employer, defined contribution plans?

**Response:**

As noted in response to question 8 above, Congress has the authority in setting PBGC's premium rates, and PBGC is willing and prepared to support policy makers in that effort. There is a lot to consider. PBGC's first objective is to protect Americans' hard-earned benefits by ensuring the long-term solvency of PBGC's programs and encouraging the continuation of pension plans. PBGC's variable rate premiums incentivize better plan funding, which supports long-term security of retirement benefits. There is always a risk of future market uncertainty and PBGC has a history of episodic spikes in claims.

PBGC is monitoring the current trends in plan benefit freezes and risk transfers, the ongoing, long-term shift away from Defined Benefit (DB) plans to Defined Contribution (DC) plans in the private sector, and the role PBGC's premiums may have. The strong current financial position and the positive outlook present an opportunity for policymakers to consider changes that protect the strong financial position of the Single-employer Program and encourage continued employer participation and PBGC stands ready to work with Congress to maintain a strong pension insurance program.

11. On February 9, 2024, PBGC said that it could not recover its SFA overpayments attributable to dead people on multiemployer pension plan census rolls. Yet, on March 14, 2024, DOL posted a statement that says plans must repay amounts because of dead people on the multiemployer plan census rolls. This is a big change from PBGC's position from just a few weeks before. Why does PBGC's response differ from DOL's statement calling for the recovery of these overpayments?

**Response**:

As discussed above, PBGC's February 9, 2024 letter stated that PBGC itself did not have legal authority to recover SFA payments made as a result of inaccurate plan census data. PBGC stated in that letter that it "supports repayment of any material SFA amount that was paid based on inaccurate census data" and "continues to explore any potential mechanism for recovery with executive branch partners." DOJ had such a mechanism available to it, which it utilized in cooperation with PBGC to reach an agreement on April 8, 2024, whereby Central States repaid $126.5 million to the federal government. DOL's March 14, 2024, statement references the fact that PBGC had already begun discussions with plans about potential repayments of SFA amounts that had been calculated based on the presence of deceased participants in their census data. DOL issued the statement to assure plans that repayment of these amounts would not violate their fiduciary duties to plan participants.

12. In a February 26, 2024, statement, PBGC described the Department of Justice (DOJ) as an "executive branch partner."

    a. Were PBGC's SFA overpayments the subject of a DOJ investigation?

    **Response**:

    With the caveat that DOJ does not comment on ongoing investigations, other than the civil settlement agreement with Central States, not that we are aware of.

    b. Are SFA overpayments currently the subject of a DOJ investigation?

    **Response**:

    With the caveat that DOJ does not comment on ongoing investigations, we are not aware of one.

    c. Were PBGC's actions in connection with SFA overpayments the subject of a DOJ investigation?

    **Response**:

    With the caveat that DOJ does not comment on ongoing investigations, not that we are aware of.

    d. Are PBGC's actions in connection with SFA overpayments currently the subject of a DOJ investigation?

    **Response**:

    With the caveat that DOJ does not comment on ongoing investigations, we are not aware of one.

e. How has DOJ been involved with PBGC's SFA overpayments?

**Response:**

DOJ identified a legal claim to recover SFA amounts paid based on inaccurate plan census data. DOJ negotiated a settlement agreement with Central States dated April 8, 2024, pursuant to which Central States repaid the federal government $126.6 million on April 8.

**Rep. Tim Walberg (R-MI)**

1. The PBGC is responsible for protecting the retirement security of over 31 million Americans in both single-employer and multiemployer private-sector pension plans. During the hearing, we focused almost exclusively on the multiemployer program, but it is important to also turn our attention to the Single-Employer Pension Program. As the PBGC's 2023 Annual Report[5] states, the Single-Employer Program protects 20.6 million workers and retirees, generally sponsored by a single employer.

   The defined benefit system provides essential retirement savings to the millions of workers, retirees, and beneficiaries who rely on it, and the PBGC should "encourage the continuation and maintenance of private-sector defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at a minimum," as your mission statement[6] states and as ERISA established in 1974.

   The Single-Employer Pension Program is now overfunded with a surplus of $44.6 billion. As the Advocate states in the2023 Annual Report of the Participant and Plan Sponsor Advocate, "This kind of surplus combined with high premiums has led to an exodus of employers from the defined benefit system."[7]

   And while it is Congress, not the PBGC, that has the authority to set premium levels, Director Hartogensis, I would like your perspective as the agency's leader on how we in Congress should address the "viability of the defined benefit system"[8] in the Single- Employer Program, which your agency is charged with continuing and maintaining. What is the level of funding for the Single-Employer Pension Program that is appropriate for the program's viability but at the same time will stem the plan sponsor exodus from the defined benefit system?

**Response:**

You are correct that it is Congress, not the PBGC, that has the authority to set premium levels, and PBGC is willing and prepared to support policy makers in that effort. There is a lot to consider. PBGC's first objective is to protect Americans' hard-earned benefits by ensuring the long-term solvency of PBGC's programs and encouraging the continuation of pension plans.

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[5] PBGC 2023 Annual Performance & Financial Report, page 3.

[6] https://www.pbgc.gov/about/who-we-are.

[7] 2023 Annual Report of the Participant and Plan Sponsor Advocate, page 4.

[8] *Id.*

PBGC's variable rate premiums incentivize better plan funding, which supports long-term security of retirement benefits. There is always a risk of future market uncertainty and PBGC has a history of episodic spikes in claims.

PBGC is monitoring the current trends in plan benefit freezes and risk transfers, the ongoing, long-term shift away from DB plans to DC plans in the private sector, and the role PBGC's premiums may have. The strong current financial position and the positive outlook present an opportunity for policymakers to consider changes that protect the strong financial position of the Single-employer Program and encourage continued employer participation and PBGC stands ready to work with Congress to maintain a strong pension insurance program.

**Rep. Rick Allen (R-GA)**

1. The 2023 PBGC Advocate Report states that the agency needs systemic improvement, such as regarding how PBGC handles benefit determinations. Please provide a comprehensive explanation of whether you agree or disagree with this assessment.

   **Response:**

   We do not agree with that assessment because the Advocate's statement is based on a narrow view of PBGC's benefit determination process. The Advocate has contacted PBGC's Office of Benefit Administration (OBA) on behalf of participants between 20 and 70 times a year over the last six years. That represents a small fraction of the total number of annual calls (500,000), calculations (100,000), letters (80,000), applications (30,000), and other customer service transactions performed by OBA.

2. Since its establishment in 2014, the PBGC Advocate has filed 10 annual reports with Congress. The 2023 Annual Report, for the first time, calls for congressional intervention in PBGC administration. The report states in bold: "It is now time for consistent intervention and assistance from Congressional Committees of Jurisdiction to help the agency in making recommended changes to improve." What changes is the Advocate calling for that you, as Director, cannot or will not implement without congressional intervention?

   **Response:**

   Congressional intervention is necessary to address the recommendation in the Advocate's report regarding premium rates. As noted in our response to question number 8 from Chairwoman Foxx, Congress, not PBGC, has the authority to set PBGC's premium rates. PBGC is willing and prepared to support policy makers in that effort.

3. The 2023 PBGC Advocate Report states that at a minimum there should be a new position of Chief Executive Officer to provide day-to-day supervision of the PBGC leadership team and to hold PBGC senior staff accountable.

   a. Who currently has responsibility for these supervisory duties?

**Response:**

The Director.

b. Can you explain why the report would recommend creating a position to manage the agency when it already has a director?

**Response:**

We would have to refer you to the Advocate's report.

4. The 2023 PBGC Advocate Report states that establishing a Chief Executive Officer position is necessary to provide daily oversight of, and management of, senior leaders. The report further states that the Chief Executive Officer would be responsible for overseeing the recommendations that have been made in the other advocate reports from the last 10 years that have not been implemented. Please provide a list of each of the Advocate's recommendations from the last 10 years and what PBGC has done, or will do, in response to each recommendation.

**Response:**

PBGC is attentive and responsive to the issues and recommendations presented each year in the Advocate's report. It is important to note that the Advocate's observations are based on a limited number of interactions with plan participants and plan sponsors that tend to occur in the midst of difficult times, such as a plan termination or employer bankruptcy. For instance, the Advocate has contacted PBGC's Office of Benefit Administration (OBA) on behalf of participants between 20 and 70 times a year over the last six years. That represents a small fraction of the total number of annual calls (500,000), calculations (100,000), letters (80,000), applications (30,000), and other customer service transactions performed by OBA.

Most of the Advocate's cases are customer-specific issues. These are generally customers who are unhappy with the service or outcome they have received from PBGC and would like their issue reconsidered by the Agency and contact the Advocate. PBGC dedicates expert federal employees to work in partnership with the Advocate's office to address and resolve these referrals. This team meets weekly with the Advocate's office, expedites the resolution of the issue, and tracks all issues to completion with full transparency. The Advocate has expressed many times over the years an appreciation for this level of collaboration and attention from PBGC.

PBGC has made numerous improvements to customer service based on feedback from the Advocate. For example,

- The Advocate recommended in her reports from 2014-2017 that PBGC improve its internal processes for resolving claims of pensioners that were potentially omitted from

the original plan trusteeship inventory. In 2018, PBGC consolidated its process for making benefit determinations in situations where the participant was not included in the inventory of those owed a benefit at termination.

- The Advocate recommended in the 2019 Annual Report that PBGC improve the overpayment recovery process. In 2019 and 2020, PBGC reviewed its overpayment recovery process and made several improvements to internal coordination, clarified external communications, and expanded its hardship determination efforts.
- The Advocate recommended in her 2020 Annual Report that PBGC.gov should provide more detailed information for potentially omitted participants. PBGC has enhanced the PBGC.gov sections on finding a lost pension. The most recent effective in early 2024 provides detailed instructions.
- The Advocate also recommended in her 2020 Annual Report that PBGC should make it easier for customers to obtain documents through the PBGC Disclosure Office. PBGC developed a streamlined process for certain disclosure requests where more support is provided to the customer and if there is no privacy information, the disclosure can be provided more quickly.

In fact, the Advocate has positively commented on PBGC's actions in several reports. For instance,

- In her 2016 Annual Report, she commended PBGC on its efforts with DOL to locate missing participants. "I want to commend OBA and the Office of the General Counsel for their leadership in working with EBSA and the Chicago Regional office to get this great initiative off the ground. It is an example of coordination between two federal agencies to help participants make sure they get their benefit entitlements."
- In both her 2018 and 2020 Annual Reports, she commended the Agency on a process improvement involving claims for omitted participants. "PBGC continues to take a more holistic approach when addressing these cases … by analyzing all available information and documenting reasoning and rationale supporting its decisions... The Advocate is pleased to report that the review of all potentially omitted participants (POPs) cases has been consolidated in OBA, effective October 2018… This consolidation will provide consistency in the review of these types of cases from a department that routinely makes benefit determinations. It will also alleviate the burden on POPs, as they will need to contact only one department for assistance. Moreover, this change responds to a recommendation in the 2014 Advocate Annual Report."
- In her 2020 Annual Report, the Advocate commended PBGC for coordination with pension counseling projects. "PBGC acted on both recommendations and has communicated with the Pension Counseling Projects regarding its requirements for letters of representation. It has also made necessary process improvements to ensure that it communicates with the attorney if a participant is represented by counsel."

5. The 2023 PBGC Advocate Report states that PBGC's administrative review is marred by an ineffective benefit-determination process and an appeal process that has significant governance issues. The report also states that the PBGC Director has been made aware of these issues repeatedly and that the Director continues to evaluate the matter by seeking input from the PBGC Office of the

General Counsel, which is the very office that often oversees, provides advice, and may determine how PBGC responds to claims. What steps have you as Director taken or do you plan to take to address the administrative review process?

**Response:**

PBGC has an Appeals Board that will review the agency's benefit determinations if a participant or beneficiary believes the agency made an error. In FY 2023, of the 24,452 benefit determinations issued by PBGC, 147 determinations, or 0.6%, were appealed. The Appeals Board issued three decisions in 2023 that were criticized by the Advocate in her report. Regarding one appeal, in particular, the Advocate had lobbied the Appeals Board for a particular result while the appeal was under review, but the facts and law compelled a different result than that sought by the Advocate. Specifically, the appellant was the domestic partner of a deceased vested Participant in a registered domestic partnership under California law; the appellant was not married to the participant under California law. The Appeals Board upheld PBGC's determination, affirming that the appellant is not eligible for a PBGC-guaranteed qualified preretirement survivor annuity ("QPSA") because she was not married to the participant, and PBGC guarantees QPSA benefits under ERISA for the surviving spouses of married participants only.

Another matter about which the Advocate expressed disagreement turned on whether a plan participant had received a benefit suspension notice from the former plan administrator several years before PBGC trusteed the plan. The Advocate maintained that he had not; however, both the Appeals Board, and then the appellant himself, independently discovered that he had indeed received a benefit suspension notice. The third decision raised by the Advocate was mooted by a subsequent benefit determination issued by the agency.

All that said, we are looking at ways of simplifying administrative review procedures for appealing parties.

6. The *Pension Protection Act of 2006* bolstered the funding rules for single employer pension plans by requiring the plans to be fully funded over time.

   a. Does PBGC agree that single employer pension plans, on the whole, have a much lower risk of insolvency as compared to multiemployer pension plans that have not received bailout funds? Why or why not?

**Response:**

The structure, funding mechanisms, solvency risks, and rules governing multiemployer pension plans differ significantly from those of single-employer plans. So do the basic terms of PBGC insurance, i.e., the guarantee level, the insurable event, the premiums charged, and the authorities and roles of PBGC. Overall, single-employer plans are better funded than multiemployer plans, but enactment of the SFA program--which provides funding for the most financially troubled multiemployer plans--addresses the immediate financial crisis that

threatened the retirement security of millions of America's workers, retirees, and their families. The SFA program also addressed the solvency of PBGC's Multiemployer Pension Insurance Program, which, before enactment of ARP, was projected to become insolvent in 2026.

b. Does PBGC agree that single employer plans are better funded due to the funding rules that are in place for them? Why or why not?

**Response:**

Lower funding levels in multiemployer plans in part reflect the less stringent funding rules that have always applied to multiemployer plans. For many years, multiemployer plans were widely considered to be inherently more financially stable than single-employer plans because they rely on contributions from many employers, unlike single-employer plans that generally rely on one employer. If an employer failed, other employers were there to make contributions to fund the promised benefits. Perhaps because risks were pooled in this way, the law allowed plans to take more time to pay down underfunding created by benefit improvements or adverse experience, such as investment returns that were lower than anticipated or industry declines. Many other factors – financial, economic, and demographic – also have contributed to underfunding in multiemployer plans and the financial distress of some multiemployer plans. When Congress enacted reforms for multiemployer plans in 2006 and 2014, the shortfalls were large, and the options available to help plans recover were limited—especially in the aftermath of the economic crisis. PBGC testimony before the Senate Finance Committee in 2019 and testimony before the Joint Select Committee on Solvency of Multiemployer Plans in 2018 provide a more comprehensive discussion of the structural flaws in the funding rules applicable to multiemployer plans and possible reforms to strengthen security of benefits promised by multiemployer plans.

c. Should Congress reform the rules for multiemployer pension plans to prevent future bailouts, and, if so, why has PBGC not made this recommendation?

**Response:**

ARP significantly extends PBGC's multiemployer program solvency, but it was not designed to address structural issues and is not a permanent solution. The ideas developed by the 2018 Joint Select Committee on Solvency of Multiemployer Plans could be a starting point. We will be happy to provide Congress with technical assistance on this. PBGC testimony before the Senate Finance Committee in 2019 provides a more comprehensive discussion of the structural flaws and possible reforms to strength the security of benefits promised by multiemployer plans.

7. An April 2023 Congressional Research Service report on the funding status of multiemployer defined benefit pension plans states that multiemployer plans which are not eligible for Special Financial Assistance are underfunded by $565 billion, using roughly the same assumptions that are used for imposing withdrawal liability. However, those same multiemployer plans are allowed to use different assumptions for calculating their contribution levels. Using those assumptions, multiemployer plans are underfunded by $73 billion.

a. Does PBGC agree that funding reform is desperately needed for multiemployer plans? Why or why not?

**Response:**

See answer to question 6c above.

b. What reforms are needed?

**Response:**

See answer to question 6c above.

**Rep. Aaron Bean (R-FL)**

1. Director Hartogensis, I read with interest the PBGC Participant and Plan Sponsor Advocate's 2023 Annual Report as it concerns the Single-Employer Pension Program. I want to focus on a part of that report where the Advocate discusses the threat PBGC single-employer premiums have to "the viability of the defined benefit system, completely contrary to the statutory mission of the agency to maintain and preserve the private defined benefit structure."[9] The Advocate goes on to state that, "More troubling, the agency has not shown leadership to help policymakers and legislators come to terms with options to relieve this extraordinary financial burden that is driving plan sponsors from the defined benefit structure, threatening the retirement security of upcoming generations who lack the economic security of a lifetime income in retirement."[10] I'm disappointed to hear the Advocate's criticism of a lack of leadership from you as the head of the PBGC. What options can you provide us to relieve the extraordinary financial burden driving plan sponsors from the defined benefit structure?

   **Response:**

   See answer to question from Rep. Walberg above.

**Rep. Lucy McBath (D-GA)**

1. The PBGC created the Smaller Asset Manager Program to try to give diverse firms a greater opportunity to participate in managing a very small portion of the PBGC's investments. My understanding is that there are plans to expand this program, but there are very few Black owned firms who currently support these asset management functions.

   a. Recognizing the importance of affording more diverse owned asset management firms some role in the work of this multi-billion enterprise, can you please detail any plans that

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[9] https://www.pbgc.gov/sites/default/files/documents/pbgc-advocate-report-2023.pdf.
[10] *Id.*

PBGC may have to ensure that more diverse managers can participate?

**Response:**

PBGC started the Smaller Asset Managers Program (SAMP) as a pilot program in 2015 to reduce barriers to competition and to create opportunities for smaller asset investment management firms, including those owned by people of color and women. Before the pilot program, PBGC's investment management contracts were out of reach for small firms because the minimum required assets under management, often in the billions of dollars, were too large for small firms to qualify.

With the success of the pilot, PBGC's Board of Directors approved making the SAMP an ongoing component of the investment program in 2022. In 2024, PBGC expanded the SAMP and selected six firms through a competitive procurement process. Three of the firms selected are returning to the program after being part of the pilot program.

Although the agency is primarily focused on ensuring the success of its recently awarded SAMP vendors, we will continue exploring opportunities to bring new, diverse managers into the SAMP program.

PBGC engaged in extensive outreach to advertise the SAMP procurement, including to professional organizations. Furthermore, we hosted a virtual Industry Day in November 2022 for asset management firms that could be interested in SAMP; it was attended by 28 potential applicants. PBGC will continue to promote this program and engage the investment community and other diverse investment managers.