



Office of Inspector General  
Pension Benefit Guaranty Corporation

May 30, 2017

**MEMORANDUM TO THE BOARD OF DIRECTORS**

FROM: Robert A. Westbrooks   
Inspector General

SUBJECT: Special Report on Review of PBGC Antideficiency Act Conclusion

The Office of Inspector General contracted with CliftonLarsonAllen LLP (CLA), an independent certified public accounting firm, to audit the PBGC financial statements for the years ended September 30, 2016 and 2015.<sup>1</sup> In its November 16, 2016 audit report, CLA found a “potential” Antideficiency Act violation arising out of PBGC’s “operating leases for all office site locations;” specifically, CLA found “PBGC did not record its full contractual obligation under its current multiyear lease arrangements.”<sup>2</sup> (Instead, PBGC incrementally funded, on an annual basis, those leases.)<sup>3</sup> Two weeks before CLA’s finding, on November 2, 2016, PBGC’s Office of General Counsel (OGC) issued a memo to PBGC’s Chief Financial Officer, in which OGC concluded “there are no Antideficiency Act issues with respect to the PBGC leases.”<sup>4</sup>

Under Section 4 of the Inspector General Act, it is the duty and responsibility of the Inspector General to review laws, and report on serious problems and deficiencies relating to the administration of programs and operations administered and financed by the Corporation.<sup>5</sup> In keeping with our duty, we conducted a review to determine if OGC erred in concluding in its November 2, 2016 memo, “there are no Antideficiency Act issues,” when PBGC incrementally funded, on an annual basis, its multiyear leases.

We obtained and reviewed information from OGC, and reviewed and analyzed the Antideficiency Act; GAO’s *Principles of Federal Appropriations Law*, also known as the Red Book; and relevant legal authorities. We have completed our review. This memorandum is to report to the Board our findings, analysis and conclusion. A draft copy of this special report was provided to PBGC management, and we incorporated some, but not all, of their technical comments into this final report.

## Summary

Based on our inquiry, we have determined that OGC's conclusion that there are no Antideficiency Act issues with respect to PBGC's 10-year leases is inconsistent with: (1) legal authority interpreting the Act; (2) the decisions of other agencies to report a violation of the Act under similar circumstances; and (3) PBGC's own report of a violation of the Act in connection with voluntary services by an independent contractor.

First, OGC concluded PBGC officials did not violate the Antideficiency Act because their decision to record PBGC's lease obligations on an annual basis was based on a good-faith belief that they had the authority to do so under ERISA. The Government Accountability Office (GAO), however, has long held that the good faith belief of agency officials is irrelevant for purposes of determining whether a violation of the Act occurred.

Second, OGC's conclusion that there are no Antideficiency Act issues because "nothing can be done about the lease funding situation in the past" is belied by the decisions of the Securities and Exchange Commission (SEC) and Commodities Futures Trading Commission (CFTC) to report past Antideficiency Act violations involving a long-term, good-faith practice of recording lease obligations on an annual basis.

Third, OGC's conclusion that PBGC did not violate the Antideficiency Act because officials acted in good faith is contrary to PBGC's previous decision to report a violation where it found the responsible official who accepted the voluntary services of an independent contractor had no intent to violate the Act.

In light of the above, we suggest the Board urge OGC to reconsider its conclusion that there are no Antideficiency Act issues with respect to the PBGC leases. Should OGC conclude that PBGC violated the recording statute, 31 U.S.C. § 1501(a)(1), when PBGC entered into its 10-year leases but did not record an obligation equal to its total liability for the leases, PBGC can adjust accounts to reflect proper funding of the leases or, if it is unable to do so, report in accordance with 31 U.S.C. § 1351, an Antideficiency Act violation to the President (through the OMB Director, the Congress, and the Comptroller General) as other agencies have done. If PBGC feels there are extenuating circumstances for a violation, it is appropriate to include them in the report. Alternatively, we suggest the Board urge PBGC to ask GAO whether recording statute and Antideficiency Act violations occurred.

## Details

*PBGC's history of incrementally funding real estate leases*

PBGC has independently executed multi-year real property leases, which often exceeded five years, since the Corporation's inception in 1974.<sup>6</sup> PBGC incrementally funded these leases on an annual basis.<sup>7</sup> According to OGC, the General Services Administration (GSA), which helps federal agencies acquire office space, "had been aware of PBGC's leasing practices since at least 1992."<sup>8</sup> Moreover, according to OGC, "PBGC's long-standing practice ... was open to scrutiny during the budget process by DOL and OMB every year."<sup>9</sup>

In December 2008, PBGC entered into its current headquarters leases at 1200 K Street and 1275 K Street.<sup>10</sup> It entered into its lease at 1225 I Street in 2014.<sup>11</sup> The two K Street leases are for 10 years.<sup>12</sup> The I Street lease is a four year term.<sup>13</sup> PBGC's annual rental obligation for its headquarters site in downtown Washington, DC is approximately \$20 million per year.<sup>14</sup>

*GAO Opinion: SEC's incrementally funded headquarters lease violated the Recording Act*

On October 3, 2011, GAO issued an opinion that SEC, in violation of the Recording Act, 31 U.S.C. § 1501(a)(1),<sup>15</sup> failed to fully record its obligations when it entered into a 10-year lease for additional headquarters space in Washington, DC.<sup>16</sup> GAO stated: "Any authorization to record an obligation for an amount less than the full amount of the government's contractual obligation must be explicit" and concluded SEC lacked explicit statutory authority.<sup>17</sup> GAO suggested SEC record the entire amount for the 10-year lease in the first fiscal year and, if such an adjustment were not possible, report a violation of the Antideficiency Act.<sup>18</sup> Because SEC did not have sufficient remaining unobligated funds in the year in which the leases were entered to record the full amount of each lease upfront, the agency reported Antideficiency Act violations in FY 2010 dating back over 20 years – the length of time of SEC's practice of recording multiyear lease obligations on an annual basis.<sup>19</sup>

*PBGC requested an OLC opinion on incrementally funding its headquarters leases*

According to OGC, "[i]n 2012, OGC began reviewing the leasing issue at the request of [the Corporation's Workplace Solutions Department], which was in the initial stages of planning for a replacement headquarters lease."<sup>20</sup> OGC believed GAO's SEC opinion – that agencies may not incrementally fund leases exceeding five years unless the agency has an explicit statutory exception to the recording statute of the Antideficiency Act – was "erroneous."<sup>21</sup> OGC believed ERISA – PBGC's enabling statute – conveyed broad and specific powers to the Corporation regarding the acquisition of real property, including the power to incrementally fund leases exceeding five years on an annual basis.<sup>22</sup> According to OGC, because GAO's SEC decision, though not binding on PBGC and executive branch agencies, is given "serious consideration" and the decision created "uncertainty" at PBGC about its real estate leasing practice, on

December 31, 2012, it sought a binding legal opinion from DOJ's Office of Legal Counsel (OLC) regarding the extent of PBGC's leasing authority.<sup>23</sup> Specifically, OGC asked, "may PBGC enter into long-term leases with fixed terms that *exceed* five (5) years, and incrementally fund those leases on an annual basis?"<sup>24</sup>

*GSA General Counsel's opinion to OLC: "PBGC lacks the authority to incrementally fund its multi-year leases."*

In response to OGC's request to OLC for an opinion on the extent of PBGC's leasing authority, on January 3, 2013, OLC asked GSA's General Counsel for his office's views.<sup>25</sup> On February 25, 2013, GSA's General Counsel wrote:

GSA is unaware of any authority by which PBGC may avoid the normal requirements of the Antideficiency Act, including the recording statute, which requires that agencies obligate the full amount of funding related to a contract award at the time of the award, and we do not believe that PBGC possess such authority.<sup>26</sup>

GSA's General Counsel concluded, "PBGC lacks the authority to incrementally obligate the funding necessary to support its multi-year leases."<sup>27</sup> This conclusion, according to OGC, "was a reversal of GSA's course of dealing with [PBGC] before 2012."<sup>28</sup> On March 8, 2013, GSA sent a copy of this letter to PBGC.<sup>29</sup>

OLC intended to ask OMB for its view on PBGC's ability to incrementally fund its leases.<sup>30</sup> OMB, however, would not submit an official opinion to OLC.<sup>31</sup> According to OGC, "OMB considered GAO's position on independent agency leasing problematic," but "OMB was concerned that there was a climate of uncertainty in independent agency leasing and that expressing an official OMB position on the matter could upset other agency leasing programs[.]"<sup>32</sup> Also according to OGC, however, PBGC's "OMB contact expressed an interest in giving the agency greater authority to execute long-term leases, but also expressed doubt regarding the agency's authority to act accordingly in light of the Recording statute and the Antideficiency Act."<sup>33</sup>

*PBGC withdrew its request for an OLC opinion*

In April 2013, PBGC withdrew its request for an OLC opinion on PBGC's authority to incrementally-fund, on an annual basis, its real estate leases.<sup>34</sup> OGC told us it withdrew the request "[g]iven OMB's refusal to assert an official position on independent agency leasing and their indication of a variance in the executive branch on the matter, it appeared PBGC might have been premature in seeking an official opinion from OLC, especially given that it could have

an effect on other agencies.”<sup>35</sup> Withdrawing the request also allowed OGC “further consultations and exploration of other leasing approaches including flexible lease terms that might resolve the incremental funding issues.”<sup>36</sup>

*PBGC renewed its request for an OLC opinion*

According to OGC, by March 9, 2015, “time was running out” for PBGC’s Executive Management Committee (EMC) to make a decision on which leasing “approach to take.”<sup>37</sup> “In light of the need for the EMC to make an informed decision,” OGC recommended to the EMC that PBGC resubmit its request for an OLC opinion.<sup>38</sup> On March 9, PBGC, on the ground that “following the terms of the GAO opinion could cost the corporation millions of dollars,” again asked OLC for an opinion on PBGC’s independent leasing authority.<sup>39</sup> On April 22, 2015, PBGC reiterated to OLC that “the limitations on leasing expressed in GAO’s opinions (and underlying the arguments in GSA’s letter) should not be applied to PBGC leasing.”<sup>40</sup> PBGC concluded “the leasing constraints recommended by GAO are incongruous with the broad powers conveyed to PBGC via its enabling statute” – ERISA.<sup>41</sup>

*OLC’s opinion: PBGC may not incrementally fund its leases exceeding five years on an annual basis*

On September 30, 2015, OLC provided its opinion to OGC on “whether [PBGC] may enter into leases exceeding five years and, if so, whether it may incrementally fund, on an annual basis, the obligations incurred in connection with such multiyear leases.”<sup>42</sup> OLC understood OGC’s position to be:

under an incremental funding approach, PBGC would recognize and record as an obligation on its books in each fiscal year only the rent that would come due during that year, rather than recognizing and recording, in the year the lease is executed, an obligation representing the government’s total contractual liability under the lease.<sup>43</sup>

OLC concluded PBGC has the authority to enter into leases of more than five years; however, “[i]n exercising this authority, PBGC falls within the plain terms of the Antideficiency Act.”<sup>44</sup> According to OLC:

As [GAO] has noted, the recording statute ‘does not explicitly state that obligations must be recorded as they arise or are incurred.’ The statute has long been construed to impose this requirement, however, because that reading furthers agencies’ obligations ‘to comply with the Antideficiency Act.’ ... ‘[P]roper

recording of obligations permits compliance with the Antideficiency Act by ensuring that government agencies have adequate budget authority to cover all of their obligations' when those obligations are undertaken. (Citations omitted.)<sup>45</sup>

Thus, OLC found "PBGC must ... recognize and record in full, at the time it enters into any such lease agreement, all contractual obligations incurred in connection with that agreement, as required by the Antideficiency Act and the recording statute."<sup>46</sup> OLC rejected PBGC's argument that, "GAO's SEC Opinion notwithstanding, PBGC has the authority to continue to execute and to incrementally fund leases exceeding five years, even though PBGC lacks an express exception to the Antideficiency Act or the recording statute."<sup>47</sup>

According to PBGC management, in response to the concerns raised by OLC in its opinion, PBGC reformed and restructured its leases and "acted to move its leasing procurement to GSA. PBGC also has corrected its current lease, which will move to an annual basis on June 1, 2017."<sup>48</sup> Finally, according to PBGC management, it "reported on the status of [its] leasing program to Congress in 2016[.]"<sup>49</sup>

*In a November 2, 2016 memo to the CFO following OLC's opinion, OGC concluded there are no Antideficiency Act issues regarding PBGC's "current" leases*

At the request of PBGC's Chief Financial Officer, OGC "reviewed PBGC leases for compliance with the Antideficiency Act[.]"<sup>50</sup> OGC produced a review that "concluded that there are no Antideficiency Act issues with respect to the PBGC leases."<sup>51</sup> OGC reached its conclusion based upon the following analysis:

The current headquarters leases (1200 K Street, 1275 K Street and 1225 I Street) expire in December 2018. Although the first two originally were ten year leases ... at the time they were entered into PBGC reasonably believed it had the authority to incrementally fund them. Nothing can be done about the lease funding situation in the past; therefore, OGC finds it to be reasonable to deal with the funding of the lease solely on a going-forward basis. PBGC has taken corrective action by placing its headquarters leasing with GSA. There are only two years remaining on the existing leases. Therefore, OGC does not believe that, based on the current status of these leases, PBGC has an Antideficiency Act issue with the headquarters leases. In fact, even if we viewed the 1200 and 1275 K Street leases as ten year leases rather than two year leases, the Antideficiency Act would require only that the PBGC have sufficient funds to cover the

remaining two years. We have confirmed that such funds are available. ...  
Therefore, the headquarters leases do not raise Antideficiency Act issues.<sup>52</sup>

*CLA found a “potential” Antideficiency Act violation arising out of PBGC’s incremental funding of its real estate leases*

On November 16, 2016, CLA, in its audit of the FY 2015 and 2016 financial statements of PBGC’s Single-Employer and Multiemployer Program Funds, issued a finding of a “potential” Antideficiency Act violation: “PBGC maintains operating leases for all office site locations[.] ... However, PBGC did not record its full contractual obligation under its current multiyear lease arrangements.”<sup>53</sup> (Instead, PBGC incrementally funded, on an annual basis, those leases.)<sup>54</sup> CLA also found that, “[o]n August 23, 2016, PBGC reported a violation of [the Antideficiency Act] in connection with voluntary services of an independent contractor.”<sup>55</sup> PBGC “determined that the responsible party had no knowing and willful intent to violate the [Antideficiency Act].”<sup>56</sup>

## **Findings and Analysis**

*OGC’s conclusion that there are no Antideficiency Act Issues with respect to the PBGC leases is inconsistent with GAO and OLC opinions interpreting the Act.*

OGC’s November 2, 2016, memo to the CFO did not explicitly address whether an Antideficiency Act violation occurred when PBGC entered into its headquarters leases in 2008. Instead, because “[n]othing can be done about the lease funding situation in the past,” OGC’s review addressed the application of the Act to the “current status” of the leases, as well as the Act’s impact on future leases entered into after the headquarters leases expire in 2018.<sup>57</sup> Regarding the “current” leases, OGC concluded they do not “raise Antideficiency Act concerns.”<sup>58</sup>

OGC views the “current status” of the headquarters leases as two-year leases, rather than 10-year leases, because only two years remain on the leases PBGC signed in 2008.<sup>59</sup> According to OGC, as two-year leases, PBGC can incrementally fund them because of a statutory exception to the Antideficiency Act – the five-year contracting authority of the multi-year contracting statute, 41 U.S.C. 3903.<sup>60</sup> And, even if the leases are viewed as 10-year leases, “the Antideficiency Act would require only that the PBGC have sufficient funds to cover the remaining two years.”<sup>61</sup> As the OLC and GAO opinions make clear, though, the Act requires executive agencies to cover the total liability from appropriated amounts current at the time the lease is entered into – in this case 2008.

Although OGC's memo to the CFO did not explicitly address whether an Antideficiency Act violation occurred when PBGC entered into its headquarters leases in 2008, OGC appears to acknowledge that the Antideficiency Act was implicated at that time. OGC noted that "at the time they were entered into PBGC reasonably believed it had the authority to incrementally fund them."<sup>62</sup> By raising PBGC's reasonable belief, OGC implied it does not believe PBGC intentionally violated the Antideficiency Act when it entered into the leases without the statutory authority to incrementally fund them.

According to OGC, the basis for PBGC's "reasonable belief" that it had the authority in 2008 to incrementally fund the 10-year headquarters leases was, essentially, it had no reason to believe otherwise. First, OGC explained to us that PBGC "has been openly [incrementally funding the headquarters leases] since its inception."<sup>63</sup> Moreover, "[i]ts initial lease of 1200 K Street in 1993 was reviewed by GSA at the [PBGC] Chair's request."<sup>64</sup> And, despite both OMB and GSA being "aware of PBGC's leasing practices for many years," neither agency told PBGC that it could not incrementally fund the leases.<sup>65</sup> In essence, GSA and OMB tacitly approved PBGC's practice. Second, OGC explained, other agencies "had the same practice."<sup>66</sup> Third, according to OGC, it was unaware of any legal authority before the leases were signed in 2008 (GAO's SEC opinion was issued in 2011) that would have caused PBGC to seek a legal opinion.<sup>67</sup> And, even if PBGC had sought an opinion in 2008, "OGC would not have found legal authority that contradicted PBGC's long-standing practice[.]"<sup>68</sup>

According to GAO, however, PBGC's reasonable or good faith belief or lack of intent is irrelevant for determining whether a violation of the Antideficiency Act occurred.<sup>69</sup> "Although these factors may influence the applicable penalty, they do not affect the basic determination of whether a violation has occurred."<sup>70</sup> The Comptroller General long ago stated this principle:

Where a payment is prohibited by law, the utmost good faith on the part of the officer, whether in ignorance of the facts or in disregard of the facts, in purporting to authorize the incurring of an obligation the payment of which is so prohibited, cannot take the case out of the statute, otherwise the purported good faith of an officer could be used to nullify the law.<sup>71</sup>

Subsequent to OGC's November 2, 2016 memo to the CFO, in a response to our request for information for this review, OGC did explicitly state its belief that PBGC did not violate the Antideficiency Act by incrementally funding the two 10-year headquarters leases.<sup>72</sup> OGC posited there can be no finding that PBGC violated the Act based on its instances of incremental funding of leases that occurred before the OLC and GAO opinions prevented it from funding the leases in that manner.<sup>73</sup> OGC's position is:



When the agency entered into its headquarters leases, the law had not been interpreted to prevent it from incrementally funding the leases. The interpretation to the contrary was new. Finding that PBGC violated a legal interpretation before it had been announced would be arbitrary and capricious. In fact, since ADA violations by individuals carry criminal penalties, retroactive application of a legal interpretation to them would violate the Constitution's ban on ex post facto laws. *See Smith v. Scott*, 223 F.3d 1191, 1196 (10<sup>th</sup> Cir. 2000); *Knuck v. Wainwright*, 759 F.2d 856, 858 (11<sup>th</sup> Cir. 1985).<sup>74</sup>

As shown below, however, OGC's position that there can be no finding of an Antideficiency Act violation under these circumstances is inconsistent with the law.

OGC's claim that PBGC cannot be held responsible for a violation of the Antideficiency Act under a "new interpretation" of the Act is a restatement of its "reasonable belief" or good faith position – PBGC had no reason to believe prior to GAO's SEC opinion that incrementally funding the leases violated the Act. As shown above, PBGC's reasonable or good faith belief is irrelevant to the finding of an Antideficiency Act violation. Even if it were relevant, GAO's SEC opinion was not a "new interpretation" of the Act.

Although PBGC believed it had GSA, OMB and DOL's tacit approval to incrementally fund its leases because it "openly" engaged in the practice without their objection, believing it had their approval is not the equivalent of having a legal interpretation or opinion from them. We found no legal opinion from them, GAO or any other legal authority from which PBGC could reasonably conclude its practice of incrementally funding its leases did not violate the Antideficiency Act.

Contrary to OGC's statement that there was no legal authority before the leases were signed in 2008 that would have caused PBGC to seek a legal opinion, in 1979, GAO held that although FEMA had authority to enter into multi-year leases, it was required to obligate the rental charges for the full term of the lease because it lacked explicit statutory authority to do otherwise.<sup>75</sup> GSA's General Counsel cited GAO's FEMA opinion when explaining to OLC that PBGC lacked the authority to incrementally fund its multiyear leases. He wrote:

PBGC asserts that its broad leasing authority would be rendered virtually useless if it is not exempted from the Antideficiency Act requirement that agencies obligate the total costs of its contracts, including leases, in the year it enters into those contracts. This argument, however, has been previously advanced and rejected by GAO, and cannot be the basis for inferring such an exception.<sup>76</sup>

Moreover, the Constitutional ban on *ex post facto* laws does not prevent a finding of an Antideficiency Act violation. The evidence indicates PBGC did not intentionally violate the Act; PBGC believed it could incrementally fund the 10-year leases. Because there is no evidence of intent, the criminal provisions of the Act are not applicable.<sup>77</sup>

If there was evidence of intent and criminal penalties were possible, the Constitutional ban on *ex post facto* laws still is inapplicable. An *ex post facto* law is a substantive change in the law that alters the definition of criminal conduct.<sup>78</sup> Here, no change in the Antideficiency Act was enacted. A change in a regulation, which is legislative in nature, also can be subject to the *ex post facto* ban.<sup>79</sup> But, unlike the *Smith* case cited by OGC, where the court held retroactive application of an *amendment to a regulation* violated the *ex post facto* clause, no regulation was amended.<sup>80</sup> The present case is also distinguishable from *Knuck*, another *ex post facto* case cited by OGC. There, the court held the *ex post facto* clause was violated where one interpretation of a law relied upon for 10 years was overturned by another interpretation.<sup>81</sup> Again, here, there was no previous legal authority that interpreted the Antideficiency Act to allow PBGC to incrementally fund its 10-year leases.

*OGC's decision not to report an Antideficiency Act violation because "nothing can be done about the lease funding situation in the past" is belied by the decisions of the SEC and CFTC to report past Antideficiency Act violations involving a long-term, good-faith practice of recording lease obligations on an annual basis.*

We acknowledge that PBGC management, in its words, "proactively took steps to obtain a binding legal opinion to eliminate the uncertainty about its authority and immediately took steps to follow it."<sup>82</sup> Nonetheless, although OGC believes that "[n]othing can be done about the lease funding situation in the past,"<sup>83</sup> PBGC may address its decision not to cover the total liability of the leases from appropriated amounts current at the time the leases were entered into in 2008. As shown below, as other agencies have done, PBGC can adjust accounts to reflect proper funding of its 10-year leases or, if it is unable to do so, it can report an Antideficiency Act violation.

GAO issued a decision that SEC's 20-year practice of recording lease obligations on an annual basis, which SEC followed when entering into a headquarters lease in 2010, violated the recording statute, 31 U.S.C. § 1501(a)(1).<sup>84</sup> Although SEC had the authority to enter into multi-year leases, GAO found SEC lacked statutory authority to obligate an amount less than the government's total liability under the leases.<sup>85</sup> GAO indicated SEC should record the entire amount of the 2010 lease in the first fiscal year of the lease and, if such an adjustment were not possible, SEC should report a violation of the Antideficiency Act, 31 U.S.C. § 1351.<sup>86</sup> Because it

did not have sufficient unobligated funds in 2010, the year in which it entered into its leases, to record the full amount of the leases upfront, the agency reported Antideficiency Act violations in 2010 going back 20 years. SEC determined that “[t]he funding and program officials responsible for each of the leasing actions for which there was a violation of the Antideficiency Act did not willfully violate the Act.”<sup>87</sup> SEC acknowledged its responsibility to report its Antideficiency Act violations for the past 20 years, even though it, like PBGC for the leases it entered into in 2008, believed it had a good faith basis – its interpretation of its legal authority – to record its leasing obligations on an annual basis.<sup>88</sup>

Similarly, in 2016, GAO concluded that when CFTC entered into multiple year leases as far back as FY 1995 and FY 2002, it was required to record an obligation equal to the government’s total liability over the term of each lease.<sup>89</sup> Because it did not do so, GAO found CFTC violated the recording statute, 31 U.S.C. § 1501(a).<sup>90</sup> GAO also stated, “CFTC should determine whether the failure to properly record these obligations has resulted in the obligation of funds in excess of appropriations in violation of the Antideficiency Act. If so, CFTC should report any violations in accordance with the law.”<sup>91</sup> On January 13, 2017, CFTC reported, as required by 31 U.S.C. § 1351, a violation of the Antideficiency Act arising out of its 20 year practice of only obligating “the lease payments due in that fiscal year, consistent with the amount funded by each year’s annual appropriation, rather than the full amount of the Commission’s legal liability under its contracts to lease real property.”<sup>92</sup> Like SEC, CFTC concluded that none of the employees involved in executing the leases “knowingly or willfully acted to violate the Antideficiency Act.”<sup>93</sup>

In sum, when GAO found SEC and CFTC lacked authority to incrementally fund contracts and they were unable to adjust their accounts to reflect proper funding of their long-term leases, they reported Antideficiency Act violations. Likewise, given OLC found that PBGC lacked authority to incrementally fund its headquarters leases, if PBGC is unable to adjust its books, it appears it should report an Antideficiency Act violation.

*OGC’s conclusion that PBGC did not violate the Antideficiency Act because PBGC officials acted in good faith is contrary to its previous decision to report a violation where it found the responsible official had no intent to violate the Act.*

On August 23, 2016, PBGC Director Reeder reported to the President, President of the Senate, the Speaker of the House of Representatives, and the Comptroller General, a May 2015 “voluntary services” violation of the Antideficiency Act, 31 U.S.C. § 1342, when a PBGC department director accepted services from a contractor after the contractor’s contract funding expired.<sup>94</sup> In that report, PBGC noted that it “has determined that the responsible party had no knowing and willful intent to violate the Antideficiency Act.”<sup>95</sup> That decision by PBGC is

inconsistent with the present matter where PBGC has not reported a violation on the ground that there was no intent to violate the Act (“at the time [the headquarters leases] were entered into PBGC reasonably believed it had the authority to incrementally fund them”).<sup>96</sup> We found no reason why PBGC should treat the matter of the voluntary services violation differently from the apparent violation involving the headquarters leases.

## Conclusion

In sum, we found that although OGC concluded PBGC officials did not violate the Antideficiency Act because their decision to record PBGC’s 10-year lease obligations on an annual basis was based on a good-faith belief that they had the authority to do so under ERISA, their good faith or lack of intent is irrelevant for finding a violation of the Act. SEC and CFTC reported past Antideficiency Act violations involving a long-term, good-faith practice of recording multiyear lease obligations on an annual basis. Even PBGC, in a voluntary services case, reported an Antideficiency Act violation where there was a finding that the responsible officials had no intent to violate the Act.

In light of the above, we suggest the Board urge OGC to reconsider its conclusion that there are no Antideficiency Act issues with respect to the PBGC leases. Should OGC conclude that PBGC violated the recording statute, 31 U.S.C. § 1501(a)(1), when PBGC entered into its 10-year leases but did not record an obligation equal to its total liability for the leases, PBGC can adjust accounts to reflect proper funding of the leases or, if it is unable to do so, report in accordance with 31 U.S.C. § 1351, an Antideficiency Act violation to the President (through the OMB Director, the Congress, and the Comptroller General) as other agencies have done. If PBGC feels there are extenuating circumstances for a violation, it is appropriate to include them in the report.<sup>97</sup> Alternatively, we suggest the Board urge PBGC to ask GAO whether recording statute and Antideficiency Act violations occurred.<sup>98</sup>

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<sup>1</sup> *Audit of the Pension Benefit Guaranty Corporation's Fiscal Year 2016 and 2015 Financial Statements (AUD 2017-2/FA-16-110-1)*, November 15, 2016.

<sup>2</sup> *Id.*

<sup>3</sup> Letter from Judith R. Starr, General Counsel, PBGC to Virginia Seitz, Assistant Attorney General, DOJ Office of Legal Counsel, p. 1, December 31, 2012.

<sup>4</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 1, November 2, 2016.

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<sup>5</sup> Inspector General Act of 1978, as amended, 5 U.S.C. App. § 4.

<sup>6</sup> Letter from Judith R. Starr, General Counsel, PBGC to Virginia Seitz, Assistant Attorney General, DOJ Office of Legal Counsel, p. 1, December 31, 2012; Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 2, November 2, 2016.

<sup>7</sup> Letter from Judith R. Starr, General Counsel, PBGC to Virginia Seitz, Assistant Attorney General, DOJ Office of Legal Counsel, p. 1, December 31, 2012.

<sup>8</sup> Memo from Judith R. Starr, General Counsel, PBGC re: OIG Request for Information (OIG #16-0112-C), p. 1, March 16, 2017.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, pp. 1-2, November 2, 2016.

<sup>11</sup> Email from Tom Reeder, Director, PBGC to Robert Westbrook, Inspector General, PBGC, and Judith Starr, General Counsel, PBGC, May 25, 2017.

<sup>12</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 2, November 2, 2016.

<sup>13</sup> *Id.*

<sup>14</sup> Letter from Judith R. Starr, General Counsel, PBGC to Virginia Seitz, Assistant Attorney General, DOJ Office of Legal Counsel, p. 7, December 31, 2012.

<sup>15</sup> The “Recording Act” governs how federal government obligations must be recorded on an agency’s books. “[P]roper recording of obligations permits compliance with the Antideficiency Act by ensuring that government agencies have adequate budget authority to cover all of their obligations” when the obligations are entered into. The Honorable Christopher Bond, B-300480 (Comp. Gen. Apr. 9, 2003), 2003 WL 1857402. (Citation omitted.)

<sup>16</sup> Decision Matter of: Securities and Exchange Commission – Recording of Obligation for Multiple-Year Contract, B-322160 (Comp. Gen.), 2011 WL 4586467 (Oct. 3, 2011).

<sup>17</sup> *Id.* (Citation omitted.)

<sup>18</sup> *Id.*

<sup>19</sup> Letter from Mary L. Shapiro, Chairman, SEC to the President, February 6, 2012.

<sup>20</sup> Memo from Judith R. Starr, General Counsel, PBGC re: OIG Request for Information (OIG #16-0112-C), p. 1, March 16, 2017.

<sup>21</sup> Letter from Judith R. Starr, General Counsel, PBGC to Virginia Seitz, Assistant Attorney General, DOJ Office of Legal Counsel, p. 1, December 31, 2012.

<sup>22</sup> *Id.*

<sup>23</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 1, November 2, 2016; Memo from Judith R. Starr, General Counsel, PBGC re: OIG Request for Information (OIG #16-0112-C), p. 1, March 16, 2017.

<sup>24</sup> Letter from Judith R. Starr, General Counsel, PBGC to Virginia Seitz, Assistant Attorney General, DOJ Office of Legal Counsel, p. 2, December 31, 2012. (Emphasis in original.)

<sup>25</sup> Letter from Kris E. Durmer, General Counsel, GSA to Daniel L. Koffsky, DOJ Office of Legal Counsel, p. 1, February 25, 2013.

<sup>26</sup> *Id.* at 4-5.

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<sup>27</sup> Id. at 10.

<sup>28</sup> Email from Tom Reeder, Director, PBGC to Robert Westbrook, Inspector General, PBGC, and Judith Starr, General Counsel, PBGC, May 25, 2017.

<sup>29</sup> Email from Dawn Verlarde, Attorney, PBGC, to Steve Block, Director, Procurement Department, PBGC, March 15, 2013.

<sup>30</sup> Memo from Judith R. Starr, General Counsel, PBGC re: OIG Request for Information (OIG #16-0112-C), p. 2, March 16, 2017.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Email from Dawn Verlarde, Attorney, PBGC to Steve Block, Director, Procurement Department, PBGC, March 15, 2013.

<sup>34</sup> Email from Dawn Verlarde, Attorney, PBGC to Daniel L. Koffsky, DOJ Office of Legal Counsel, March 9, 2015.

<sup>35</sup> Memo from Judith R. Starr, General Counsel, PBGC re: OIG Request for Information (OIG #16-0112-C), p. 2, March 16, 2017.

<sup>36</sup> Id.

<sup>37</sup> Id. at 3.

<sup>38</sup> Id.

<sup>39</sup> Email from Dawn Verlarde, Attorney, PBGC to Daniel L. Koffsky, DOJ Office of Legal Counsel, March 9, 2015.

<sup>40</sup> Email from Dawn Verlarde, Attorney, PBGC to Daniel L. Koffsky, DOJ Office of Legal Counsel, April 22, 2015.

<sup>41</sup> Id.

<sup>42</sup> *Memorandum for Judith R. Starr, General Counsel Pension Benefit Guaranty Corporation*, p. 1, September 30, 2015.

<sup>43</sup> Id.

<sup>44</sup> Id. at 7.

<sup>45</sup> Id. at 4.

<sup>46</sup> Id. at 15.

<sup>47</sup> Id. at 5.

<sup>48</sup> Email from Tom Reeder, Director, PBGC to Robert Westbrook, Inspector General, PBGC, and Judith Starr, General Counsel, PBGC, May 25, 2017.

<sup>49</sup> Id.

<sup>50</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 1, November 2, 2016.

<sup>51</sup> Id.

<sup>52</sup> Id. at 2.

<sup>53</sup> *Audit of the Pension Benefit Guaranty Corporation's Fiscal Year 2016 and 2015 Financial Statements (AUD 2017-2/FA-16-110-1)*, p. 4, November 15, 2016.

<sup>54</sup> Letter from Judith R. Starr, General Counsel, PBGC to Virginia Seitz, Assistant Attorney General, DOJ Office of

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Legal Counsel, p. 1, December 31, 2012.

<sup>55</sup> *Audit of the Pension Benefit Guaranty Corporation's Fiscal Year 2016 and 2015 Financial Statements (AUD 2017-2/FA-16-110-1)*, p. 4, November 15, 2016.

<sup>56</sup> Letter from W. Thomas Reeder, Jr., Director, PBGC to Shaun Donovan, Director, OMB, August 23, 2016.

<sup>57</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 2, November 2, 2016.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Memo from Judith R. Starr, General Counsel, PBGC re: OIG Request for Information (OIG #16-0112-C), p. 4, March 16, 2017.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> GAO, *Principles of Federal Appropriations Law*, 4<sup>th</sup> ed., 2016 rev., Ch. 6, § C.2.f., GAO-06-382SP (Washington D.C.: Feb. 2016).

<sup>70</sup> *Id.* (Citation omitted.)

<sup>71</sup> *Id.*, citing A-86742 (June 17, 1937); *See also*, Matter of: Reconsideration of B-214172, 64 Comp. Gen. 282 (1985) (“The statute flatly prohibits an agency from making expenditures or entering into obligations exceeding the amount available for that purpose regardless of the reason.”); In the Matter of Currency Exchange Rate Fluctuations, 58 Comp. Gen. 46 (1978) (exceeding funding limitations due to fluctuation in currency exchange rates, not fault of agency, does not justify exception to Antideficiency Act); To the Secretary of State, 35 Comp. Gen. 356 (1955) (where overobligation resulted from misinterpretation of regulation, official’s state of mind not relevant in deciding violation).

<sup>72</sup> Memo from Judith R. Starr, General Counsel, PBGC re: OIG Request for Information (OIG #16-0112-C), pp. 4-5, March 16, 2017.

<sup>73</sup> *Id.* at 5.

<sup>74</sup> *Id.*

<sup>75</sup> Matter of: Federal Emergency Management Agency – Authority to Rent Space in District of Columbia, B-195260 (Comp. Gen.), 1979 WL 12324 (July 11, 1979).

<sup>76</sup> Letter from Kris E. Durmer, General Counsel, GSA to Daniel L. Koffsky, DOJ Office of Legal Counsel, p. 6, February 25, 2013.

<sup>77</sup> GAO, *Principles of Federal Appropriations Law*, 4<sup>th</sup> ed., 2016 rev., ch. 6, § C.5.a., GAO-06-382SP (Washington D.C.: Mar. 2016). (“[C]riminal penalties are linked to a determination that the law was ‘knowingly and willfully’ violated, but the administrative sanctions provisions do not contain similar language.”)

<sup>78</sup> *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citations omitted). (“To fall within the *ex post facto* prohibition, a law must be retrospective – ‘that is, it must apply to events occurring before its enactment’ – and it ‘must disadvantage the offender affected by it,’ by altering the definition of criminal conduct or increasing the punishment for the crime[.]”)

<sup>79</sup> *Smith v. Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000). (Citations omitted.)

<sup>80</sup> *Id.*

<sup>81</sup> *Knuck v. Wainwright*, 759 F.2d 856, 859 (11<sup>th</sup> Cir. 1985).

<sup>82</sup> Email from Tom Reeder, Director, PBGC to Robert Westbrook, Inspector General, PBGC, and Judith Starr, General Counsel, PBGC, May 25, 2017.

<sup>83</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 2, November 2, 2016.

<sup>84</sup> Decision Matter of: Securities and Exchange Commission – Recording of Obligation for Multiple-Year Contract, B-322160 (Comp. Gen.), 2011 WL 4586467 (Oct. 3, 2011).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Letter from Mary L. Shapiro, Chairman, SEC to the President, p. 4, February 6, 2012.

<sup>88</sup> *Id.*

<sup>89</sup> The Honorable Robert Aderholt, *et. al*, Subject: Commodity Futures Trading Commission – Recording of Obligations for Multiple-Year Leases, B-327242 (Comp. Gen.), 2016 WL 423697 (Feb. 4, 2016).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Letter from Timothy G. Massad, Chairman, CFTC to the President, p. 1, January 13, 2017.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> Letter from W. Thomas Reeder, Jr., Director, PBGC to Shaun Donovan, Director, OMB, August 23, 2016.

<sup>95</sup> *Id.*

<sup>96</sup> Memo from Judith Starr, General Counsel, PBGC to Patricia Kelly, Chief Financial Officer, PBGC, p. 2, November 2, 2016.

<sup>97</sup> *See*, To the Secretary of State, 35 Comp. Gen. 356 (1955) (where Act appeared to have been violated, GAO instructed State Department to submit formal type of report required by the Antideficiency Act though obligation resulted from misinterpretation of regulation).

<sup>98</sup> *See*, GAO Office of the General Counsel, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington D.C.: Sept. 2006). (“By statute, accountable officers and heads of agencies and agency components are entitled to an advance decision of the Comptroller General concerning the obligation, expenditure, and accounting of appropriated funds. 31 U.S.C. § 3529.”)