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National Commission on Indian Trust Administration & Reform

MEMORANDUM

To: National Commission on Indian Trust Administration & Reform
From: Liz Mashie Gunsaulis and Erin Shirl
Re: Examining Public Programs as Trust Models
Date: June 11, 2012

The Trust Model Subcommittee has begun an exploration of existing trust models in an effort to provide the Commissioners with a general overview of current practices in trust management. This memorandum broadly summarizes research completed to date regarding six public trust models: the Pension Benefit Guaranty Corporation, Social Security, Public Pension Plans, the Railroad Retirement Board, the Illinois Office of Public Guardianship, and state veterans' trust fund programs. The Subcommittee has currently limited its exploration of these models to two basic general areas: the scope of each program and any specific fiduciary duties, as well as any remedies for breach of those duties, outlined in relevant statutes. The Subcommittee will continue moving forward with its research, refining the information reported here and expanding the search to include other public models. The trust models profiled here will not be the only models explored, and the Subcommittee welcomes the Commissioners' guidance as research continues, particularly with regard to any hard asset trust management.

PENSION BENEFIT GUARANTY CORPORATION

I. Scope & Description of Program

The Pension Benefit Guaranty Corporation (PBGC) was created by the Employee Retirement Income Security Act of 1974. The purpose of the PBGC was to encourage growth of defined benefit pension plans[1], provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at a minimum[2]. PBGC is a non-profit corporation that protects the pensions of workers and retirees in private-sector defined benefit pension plans. PBGC is solely funded by premiums and investment returns on assets held in its trust fund.[3]

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[1] "A defined benefit plan promises a specified monthly benefit at retirement. The plan may state this promised benefit as an exact dollar amount, such as $100 per month at retirement. Or, more commonly, it may calculate a benefit through a plan formula that considers such factors as salary and service — for example, 1 percent of average salary for the last 5 years of employment for every year of service with an employer." U.S. Dept. of Labor, Retirement Plans, Benefits, and Savings—Types of Retirement Plans (2012), http://www.dol.gov/dol/topic/retirement/typesofplans.htm.
[2] Pension Benefit Guaranty Corporation Factsheet (2012), http://www.pbgc.gov/res/factsheets/page/pbgc-facts.html.
[3] CRS Report for Congress, "Pension Protection Act of 2006: Summary of the PGBC Guarantee and Related Provisions", Jennifer Staman and Erika Lunder, December 20, 2006 (*available at* aging.senate.gov/crs/pension10.pdf).

PBGC guarantees "basic benefits" earned before a plan's termination date (or date employer's bankruptcy proceeding began), including:

- Pension benefits at normal retirement age;
- Most early retirement benefits;
- Annuity benefits for survivors of plan participants; and
- Disability benefits, except for:
  - Disability that occurs after a plan's termination date (or date that an employer's bankruptcy proceeding began).[4]

Termination of pension plans:

- "An employer can voluntarily ask to close its single employer pension plan in either a standard or distress termination. In a **standard termination**, the plan must have enough money to pay all benefits, whether vested or not, before the plan can end. After workers receive promised benefits, in the form of a lump-sum payment or an insurance company annuity, PBGC's guarantee ends. In a **distress termination**, where the plan does not have enough money to pay all benefits, the employer must prove severe financial distress - for instance. The likelihood that continuing the plan would force the company to shut down. PBGC will pay guaranteed benefits, usually covering a large part of total earned benefits, and make strong efforts to recover funds from the employer.
- In addition, PBGC may seek to close a single-employer plan without the employer's consent to protect the interests of workers, the plan, or PBGC's insurance fund. PBGC must act to terminate a plan that cannot pay current benefits.
- For multiemployer pension plans that are unable to pay guaranteed benefits when due, PBGC will provide financial assistance to the plan, usually a loan, so that retirees continue receiving their benefits."[5]

It is important to note that PBGC insurance is not the first tier of protection for covered employees. [6] "PBGC insurance is the third layer of protection for employees. The first layer is the responsibility of firms to provide pension benefits they promise. The second layer is the collateral provided by funding a trust. PBGC steps in only when both sponsor and trust seem unlikely to give adequate protection. In that event, it assumes the trust's liabilities, assets, and activities or, for multi-employer plans, lends the necessary funds to the trust."[7]

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[4] Guaranteed Benefits (2012), http://www.pbgc.gov/wr/benefits/guaranteed-benefits.html.
[5] Pension Benefit Guaranty Corporation Factsheet (2012), http://www.pbgc.gov/res/factsheets/page/pbgc-facts.html.
[6] Center for Federal Financial Institutions, "PBGC: A Primer", April 7, 2004 (available at http://www.coffi.org/pubs/PBGC%20A%20Primer.pdf).
[7] Id.

As the third step in the process, "PBGC is effectively the successor trustee for plans it takes over [in bankruptcy proceedings] and it acts as a creditor in this capacity. Although there are exceptional circumstances where PBGC has a higher recovery priority, it generally acts as an unsecured creditor, at the bottom of the bankruptcy priority list."[8]

II. Duties of Trustee

ERISA provides standards for fiduciary duties in discharging trust responsibilities.[9] All acting fiduciaries under ERISA must with act with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[10] All plans have at least one fiduciary; common fiduciaries include "the trustee, investment advisers, all individuals exercising discretion in the administration of the plan, all members of a plan's administrative committee (if it has such a committee), and those who select committee officials."[11] A trustee, including PBGC when it acts as a successor trustee, has a statutory duty to make certain that plan assets are administered in a way that actually provides benefits to intended beneficiaries.[12]

SOCIAL SECURITY

I. Scope & Description of Program

"Congress established trust funds managed by the Department of the Treasury to account for Social Security and Medicare income and disbursements. The Treasury credits Social Security and Medicare taxes, premiums, and other income to the funds. There are four separate trust funds. For Social Security, the Old-Age and Survivors Insurance (OASI) Trust Fund pays retirement and survivors benefits and the Disability Insurance (DI) Trust Fund pays disability benefits. (OASDI is the designation for the two trust funds when they are considered on a combined basis.) For Medicare, the Hospital Insurance (HI) Trust Fund pays for inpatient hospital and related care. The Supplementary Medical Insurance (SMI) Trust Fund comprises two separate accounts: Part B, which pays for physician and outpatient services, and Part D, which covers the prescription drug benefit."[13]

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[8] Id.
[9] 29 U.S.C. § 1104.
[10] 29 U.S.C. § 1104 (a) (1) (B).
[11] *Meeting Your Fiduciary Responsibilities*, U.S. Dept. of Labor, Employee Benefits Security Admin., Oct. 2010 (*available at* http://www.dol.gov/ebsa/pdf/meetingyourfiduciaryresponsibilities.pdf).
[12] 29 U.S.C. § 1104 (a)(1)(A)(i); *see also* Piech v. Pension Ben. Guar. Corp., 744 F.2d 156, 158 (D.C. Cir. 1984).

[13] Trustees Report Summary (2012), http://www.ssa.gov/OACT/TRSUM/index.html.

"The only disbursements permitted from the funds are administrative costs and benefit payments. Federal law requires that all excess funds be invested in interest-bearing securities backed by the full faith and credit of the United States. The Department of the Treasury currently invests all program revenues in special non-marketable securities of the U.S. Government which earn a market rate of interest. The balances in the trust funds represent the accumulated value, including interest, of all prior program annual surpluses and deficits, and provide automatic authority to pay benefits."[14]

The Board of Trustees currently consists of six members, four of whom are the active Secretary of the Treasury (the Managing Trustee), Secretary of Labor, Secretary of Health and Human Services, and Commissioner of Social Security. The other two members are appointed by the President, and confirmed by the Senate, as required by the Social Security Amendments of 1983.[15]

A fixed portion of the taxes received under the Federal Insurance Contributions Act and the Self-Employment Contributions Act are deposited in the Old-Age and Survivors Trust Fund to the extent that such taxes are not needed immediately to pay expenses. Taxes are deposited in the fund on every business day. The trust fund provides automatic spending authority to pay monthly benefits to retired-worker (old-age) beneficiaries and their spouses and children and to survivors of deceased insured workers. With such spending authority, the Social Security Administration does not need to periodically request money from the Congress to pay benefits.[16]

II. Duties of Trustee

The duties of the Social Security Board are included in Title VII of Social Security Act of 1935. The Act creating Social Security contains no mention of fiduciary duties of the Board.

PUBLIC PENSION PLANS

I. Scope & Description of Program

"Differences exist in the funding of federal government defined benefit plans. Of these 34 plans, 28 use trust funds, while 6 of the agency plans are referred to as pay-as-you-go plans. Trust funds are separate accounting entities established to account for government and employee contributions, investments, and benefits paid. The pay-as-you-go plans do not have trust funds to accumulate assets to pay plan benefits. For these six

[14] Id.
[15] Old-Age & Survivors Insurance Trust Fund (2009), http://www.ssa.gov/OACT/ProgData/describeoasi.html.
[16] Id.

plans, benefits are paid to annuitants from appropriations in the year in which the benefits are due."[17]

"The primary purpose of the trust funds is not to provide a source of cash for the government to pay benefits, but to provide budget authority to allow the Treasury to disburse monthly annuity checks without annual appropriations. Because these securities represent assets of the trust funds and offsetting liabilities of the Treasury, under accounting procedures, the trust fund assets are eliminated in the governmentwide financial statements."[18]

"The defined benefit plans of the nonappropriated fund activities and federal reserve and farm credit entities, as well as TVA, use trust funds to set aside money or marketable assets during employees' working years for the accruing cost of their retirement benefits."[19]

II. Duties of Trustee

Because each program is operated as an individual agency plan, each plan contains its own trustee (usually a board of trustees) and the fiduciary duties of each trustee and remedies in case of breach of trust are specific to each plan.

RAILROAD RETIREMENT BOARD

I. Scope & Description of Program

Nat'l Railroad Retirement Investment Trust

"The sole purpose of the Trust is to manage and invest Railroad Retirement assets. The Act authorizes the Trust to invest the assets of the Railroad Retirement Account in a diversified investment portfolio in the same manner as those of private sector retirement plans. Prior to the Act, investment of Railroad Retirement Account assets was limited to U.S. government securities.

The Trust has no powers or authority over the administration of the benefits under Railroad Retirement. Responsibility for administering the railroad retirement program, including eligibility determinations and the calculation of beneficiary payments, remains with the Railroad Retirement Board (RRB). "[20]

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[17] Public Pensions: Summary of Federal Pension Plan Data, GAO B-261187, Feb. 16, 1996 (*available at* http://gao.gov/assets/230/222263.pdf).
[18] Id.
[19] Id.
[20] NRRIT (Apr. 1, 2010), http://www.rrb.gov/mep/nrrit.asp.

The Railroad Retirement Board consists of seven Trustees, three selected by railroad labor unions and three by railroad companies while the seventh Trustee is an independent Trustee selected by the other six Trustees.[21] The Trustees' obligations include discharging all duties solely in the interest of the RRB and the participants and beneficiaries of the programs funded under the Railroad Retirement Act. The fiduciary rules are similar to those required by the Employee Retirement Income Security Act.[22]

"Under the Act, the financial statements of the Trust are required to be audited annually by an independent public accountant. In addition, the Trust must submit an annual management report to Congress on its operations, including a statement of financial position, statement of cash flows, a statement on internal accounting and administrative control systems, the independent auditor's report, and any other information necessary to inform Congress about the operations and financial condition of the Trust. A copy of the annual report must also be submitted to the President, the RRB, and the Director of the Office of Management and Budget."[23]

"Pursuant to the Act, the Trustees have adopted Investment Guidelines that address such issues as the diversification of Trust assets into broad asset classes, such as domestic and international equity, private equity, and investment grade and high yield bonds. The Guidelines set out the criteria for investments made by the Trust and are regularly updated to ensure that they are responsive to the ever-changing investment environment. These Guidelines are implemented by the Trust's professional staff and outside investment managers who may be retained by the Trust. Investment performances are rigorously monitored by the Trust's Chief Investment Officer and staff and are subject to regular oversight by the Board of Trustees."[24]

II. Duties of Trustee

The Powers and duties of the Railroad Retirement Board are codified at 45 U.S.C. 231N(j)(5)(A)(ii). This statute contains a standard of care for the discharge of fiduciary duties similar to the language found in ERISA, and provides that each member of the Board act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

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[21] NRRIT: Questions & Answers (Mar. 29, 2010), http://www.rrb.gov/nrrit/QandA.asp.
[22] Id.
[23] Id.
[24] Facts About The National Railroad Retirement Investment Trust(Apr. 1, 2010), http://www.rrb.gov/nrrit/ib_7.asp.

ILLINOIS OFFICE OF PUBLIC GUARDIANSHIP

I. Scope & Description of Program

"The Office of the Public Guardian renders guardianship to adults with disabilities, acts as Guardian ad Litem and/or attorney for minors whose parents are charged with abuse and neglect, and acts as Guardian ad Litem for minors whose parents are [involved] in disputed proceedings."[25]

"The [Illinois Guardianship and Advocacy] Commission's Office of State Guardian serves as "guardian of last resort" for individuals with disabilities when no other person is available to serve. Most of its wards are indigent or have limited assets. The Office of State Guardian also assists the court, as the court directs, in guardianship proceedings. In addition, the Office of State Guardian counsels and assists families or others willing to become guardians, with the goal of locating non-public guardians and structuring alternatives to guardianship."[26] "The Office of State Guardian, like any other guardian, has a legal responsibility to seek the best interests of its wards. This may mean dealing with individuals or institutions, public or private, to defend the rights of a ward or to obtain services which are due. However, in cases where the ward and the Office of State Guardian do not agree on what is in the ward's best interest, the Office of State Guardian takes steps to obtain an advocate independent of GAC to assert the ward's wishes."[27]

II. Duties of Trustee

This office has no trustee. Duties for guardians are outlined in relevant state statutes.[28]

STATE VETERANS' AFFAIRS PROGRAMS

I. Scope & Description of Program

Thirteen states have created state-sponsored veterans' trust funds to support veterans and their families. The programs vary from state to state with respect to funding, administration, and services provided. Most programs are funded by some combination of private donations from state citizens, a portion of citizens' state income taxes, a portion of states sales taxes on particular goods (most commonly, "sin" taxes on cigarettes and alcohol), money collected from the sale of state lottery tickets, and money appropriated

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[25] Cook County Government, Illinois, Public Guardian (2011), http://www.cookcountygov.com/portal/server.pt/community/public_guardian/275/public_guardian.
[26] Office of State Guardian, FAQ (2012), http://gac.state.il.us/osg/osgfaq.html.
[27] Id.
[28] ESTATES (755 ILCS 5/) Probate Act of 1975; (755 ILCS 5/Art. XIa GUARDIANS FOR DISABLED ADULTS.

into the fund by the state legislature. Typically, these programs are run out of each state's office of veterans' affairs and overseen by a board of trustees appointed by the state's governor, though not every state is set up this way.

II. Duties of Trustee

Because each program is operated by state offices, each plan is structured differently and the existence of and duties of trustees vary between programs. The Subcommittee is continuing to explore various state plans.