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A LEGACY OF PENSIONS: INTERVIEW WITH JOSH GOTBAUM

By Earl Pomeroy

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Editor's Introduction: *This interview was originally published by the American Benefits Council. It is being reprinted with permission. Pomeroy Perspectives is a recurring interview and opinion series prepared by former Congressman Earl Pomeroy (D-ND), now of Alston & Bird, LLP, on behalf of the American Benefits Council. The council is the national trade association for companies concerned about federal legislation and regulations affecting all aspects of the employee benefits system. For more information, visit* http://www.americanbenefitscouncil.org.

Earl Pomeroy has long been a champion of employee benefits and helping Americans achieve health and financial well-being. As the at-large member of Congress from North Dakota he served on the Ways & Means Committee, which has jurisdiction over employee benefits policy. Earl is now senior counsel at Alston & Bird LLP and a member of the American Benefits Council's Policy Board of Directors.

Drawing upon his legislative experience and background as a state insurance commissioner, Earl focuses his current work on financial services regulation, health care, pensions, tax, energy and agriculture policy.

In this occasional series, Earl will discuss trends, challenges and opportunities with leading thinkers and policymakers. He will also share his expertise and perspectives on public policy. Earl conducted the following interview with Josh Gotbaum, the former director of the Pension Benefit Guaranty Corporation (PBGC), in September, shortly after Gotbaum left the agency.

EARL POMEROY: Well, Josh, congratulations on the term you've now completed at PBGC, a tenure notable for its length and for the extraordinary energy you brought to the job. What are your feelings as you reflect back?

JOSH GOTBAUM: One, gratitude. I have been able to work with some of the most talented, most committed people in the federal government on an issue—retirement security—that is an important national issue. Second, pride, because I think over the past four years we have been able to establish that the PBGC is a force—not just for catching plans when they fail, but for preserving plans, for keeping them in place, and I think we have also established that PBGC is committed enough and knowledgeable enough to support the debate over what retirement policy should be in the future. Then, the third feeling is, of course, a sense of incompleteness. When [Secretary of Labor] Tom Perez and I were talking about leaving, he said "I have never left a job without a lot of unfinished business." And he's right. In this case, we have accomplished a lot, but we have yet to have congressional legislation to enable multi-employer plans to save themselves, we have yet to have a consensus on what changes in ERISA would facilitate retirement security for the next forty years, and so there is much that is not yet done. And those are the three.

EP: That's an excellent answer. I've watched several different directors in the PBGC, and I believe that your own participation in the national debate on retirement income security was particularly notable. What would your counsel be to your successor, relative to allocating time, on very specific and technical issues like a de-structuring case that might be before the PBGC versus the broader debate about the future of defined benefit plans and the role they play in retirement income security?

JG: The role of a chief executive is always to be concerned with the future and strategy. Sometimes, you have to go in and do organizational maintenance repair work, and I have done some of that; I'm proud to say that the majority of the senior management of PBGC is new people that I have brought

in during my tenure. But, the fundamental challenge for the CEO is not whether or not they can do benefits administration or whether they can do a reorganization. The fundamental challenge is whether the organization is well placed to succeed in the future. So my advice would be this: the future of the PBGC is tied inevitably and tightly, to the future of retirement plans. And if there are no retirement plans, if employers decide that it's too much hassle, then there will be no PBGC, and there will also be less retirement security.

ALLOCATION OF RISK WITHIN RETIREMENT PLANS

EP: There's a lot of reflection at the fortieth anniversary of ERISA about what has happened relative to private retirement plans; this wholesale shift from defined benefit to defined contribution. Do you think we're ready to have a sophisticated discussion in Congress and in the Administration about allocation of risk within retirement plans, how much the employer carries and how much the employee carries?

JG: It's already clear that the future of employee retirement income security relates fundamentally to the role of employers. If, in a voluntary system, you say that employers must be responsible for financial risk, must be responsible for fiduciary obligation, must be responsible for other kinds of legal risk and must be responsible for the result, then employers will decline to offer retirement plans. That has been what's happened. This fact is widely recognized.

It is not an accident that Senator Tom Harkin [chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee], in his last pension reform proposal, proposed that employers stop being fiduciaries, that they be a conduit for funds to regulated retirement plans, but that the regulation be focused on the plan, not the employer. Similarly, senators from both parties have proposed legislation to expand the availability of multiple employer plans. A multiple employer plan is a plan in which the role of the employer is to be a conduit, and the responsibility for operating the plan with integrity

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lodges in the plan rather than in the multiple employers. So, in one sense, the debate and discussion has already begun. The real challenge is whether or not the federal government, at a time when it is unfortunately a poster child for indecision, can act on the need for reform.

EP: It's very clear without leadership, it's just evolving toward a complete shift to all risk and responsibility upon the employee. This is not a new phenomenon, we have plenty of market experience to evaluate how this is working for people and I believe that some of the obvious conclusions are alarming, in terms of assets actually saved by people within the baby boomer cohort about to enter retirement, whether or not these assets can last or whether or not they'll be matched in a lifetime payout instrument that assures that they'll not run out of cash flow before their years on Earth are done.

JG: Robert Merton, an economist, has been pointing out that we have changed the goal posts from the Employee Retirement Income Security Act to asset aggregations. That the regulated retirement plans under ERISA are now predominately not retirement income security plans. They are asset savings plans. And Merton's point is that we have, without debate, moved away from the fundamental goal of ERISA. I think that is the reason there needs to be a fundamental rethinking about how we do this, because the goal of ERISA was in the name: employee retirement income security. It wasn't employee retirement nest egg creation, and for a long time, throughout the '90s, the difference didn't matter, because in the '90s, nest eggs grew so much that the average person said "Oh, my nest egg is growing. I'll be okay!" And then you have the crashes in the early 2000s and 2008-9, and the average person (who is not a financial expert) realized "Holy cow! My nest egg is broken!" All of a sudden, since then, people have begun to realize that there is a difference between a retirement savings account and retirement income security, and it is no accident that since then, the percentage of the population that is worrying about retirement income has risen and continues to rise. Most important of all, this is not just a concern of people who are within five years of retirement. Concern about inadequate retirement income is now a concern of thirty-year-olds as well as sixty-year-olds. That tells us there is a real problem.

THE POSSIBILITY OF ALTERNATIVE PLAN DESIGNS

EP: So you've mentioned that employers have voted with their feet relative to the notion of carrying all of the risk and all of the fiduciary responsibilities; they've simply walked away from the traditional defined benefit plan. You've also mentioned the nest egg approach is leaving households wanting in terms of retirement income security. Are there alternative designs? Can you reallocate risk in ways where there is a sharing of risk going forward that is represented neither in the defined benefit nor the defined contribution plan as we commonly know them today?

JG: If there is any lesson that one learns from looking at the range of retirement options, both in this country and across the world, is there are plenty of approaches that can provide better retirement security than the limited offerings we currently have. Within the traditional defined benefit notion, the industry has for years said "Let us share financial risk with employees in the form of hybrid defined benefit plans." Sadly, the legal and regulatory structure to support that notion has never fully been put in place. This is a microcosm of the general point, that there needs to be more flexibility. But let me give you some other examples; within the traditional defined benefit or defined contribution model, there are plenty of ways to embed lifetime income products—TIAA-CREF has offered one for generations.

However, we've actually made it harder for an employer within defined contribution plans to offer a lifetime income product than to offer a mutual fund. We've raised the bar on offering better retirement security, and so it is not a surprise that as a result we are getting worse retirement security. But could you have defined contribution plans that offer lifetime income purchase components? Of course you could. Could you have facilitated by government compulsory savings plans, the way it is done in many other nations? Of course you could. And so the issue here is not whether there are better designs. There needs to be much more flexibility to recognize that all situations are not alike. In some cases, employers can afford to be generous and take risks and in other cases they cannot; in some cases, employees can afford to save more and in some cases they cannot and in almost all cases, employers are better situated than employees to form judgments about plans, products, services and fees. So we should find a way to enable them to do it without fear of lawsuits.

MULTIEMPLOYER PLANS

EP: You mentioned, among things on the uncompleted agenda, the pending legislation relative to multiemployer plans. Now that Congress recently passed a smoothing proposal relating to single employer plans, the remaining action item before this Congress would be discussions involving the future of multiemployer plans. What are your thoughts on that?

JG: I think the debate and discussion on multiemployer plans has advanced very dramatically over the past year or two. There is no longer a denial that there is a major problem. The issue now is, can we get to a consensus on a compromise solution that will permit multiemployer plans to survive? Two things are clear: one is, that if the law is not changed, multiemployer plans covering one to two million people will fail. But the major problem is that long before that happens, employers will say "I'm getting out. I'm going to leave the ship before it sinks." So if there is not legislation to enable plans to save themselves, the entire system will collapse.

The other fact is that if legislation allows plans to save themselves and allows the multiemployer defined benefit system to restructure and refinance itself, that it can do so and that pension plans covering 10 million people and their families, plans that provide lifetime income, can survive and that the model can survive. So the real issue here is, can you get to a consensus on these admittedly difficult issues? The good news is that both business and labor, and both Democrats and Republicans in the Congress are engaged. They are looking for a set of compromises that can enable pension plans to live. There are such compromises.

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EP: Of all the appointees the Administration has made, I think very few would bring to their position the background you had as Assistant Secretary of the Treasury, time in the Office of Management and Budget, Assistant Secretary of Defense, as well as considerable experience on Wall Street. Can you identify whether it was the public sector experience, the private sector experience, or perhaps all of it together that played a particularly useful role in preparing you for the time and the challenges you had at PBGC?

JG: One of the reasons I admire PBGC is because it must live in both worlds. PBGC, in order to decide whether or not it must terminate a pension plan, has to understand what business can afford and cannot afford. In that respect, PBGC is different from the vast majority of government organizations. The vast majority of government organizations do not have to ask whether business can or cannot afford to comply with their requirements. PBGC does. And it has. So as a result, it is an organization which must be steeped both in the world of processes, the requirements of government, and the world of business, of finance and economics. So, from my perspective, PBGC used both parts of my life, both parts of my experience, and that's part of the reason why I think the agency is so unusual.

FUNDING AND PBGC PREMIUMS

EP: On the funding issue, one facet of your leadership that has produced perhaps more discussion on the outside than any other is your focus on the sufficiency of PBGC premiums. How do you see this in the context of what you were trying to achieve for the agency?

JG: I actually don't think there is any controversy about PBGC premiums from the plan sponsor community. They all agree that they don't want to pay any more and they would like to pay less. However, the fact is that absent adequate funding, PBGC will not be able to do its job and will go bankrupt. But that actually isn't the only reason why there needs to be reform of PBGC premiums. The other one is because the premium structure has the effect of convincing employers that they want to get out of the system too! Does it make any sense that the premium should be the same for a modest, terminated vested account as for an active account? And yet, they are. Why are employers moving to de-risk terminated, vested employees? Now, is it because of the major financial risk? No; part of it is they are paying premiums as if these were major accounts and they're not major accounts! So that's a case in which the one-size-fits-all approach of premiums is driving employers to saying "I'm getting out. I'm either going to do a lump sum, or I'm going to buy an annuity, but I'm getting out." It's dumb. It's bad business, it's bad for retirement security, and it's another reason I think PBGC premiums need to be reformed. We've already made the point that if they are not reformed, two things will happen: one is, the PBGC will go bankrupt, but long before it goes bankrupt, employers will say "I should get out so that I don't get the bill when they are bankrupt."

EP: I hope this interview is read by some significant number of plan sponsors. What would you say to them, by way of your hopes for the future of their relationship with their workforce when it comes to their retirement benefit?

JG: One thing, I think, has always been true—and is still true—is that employers rely upon and care about their employees. Are there a few bad apples? Of course, but that is not the rule. In a knowledge-based economy, it's even more true. When the assets of a business go out the door when employees leave, employee satisfaction matters more, not less. So, this isn't an issue about whether employers care about what employees care about. They do. At the moment, we are giving them so few choices that they are choosing the one that provides the least retirement security. But, to come all the way back, this is the 40th anniversary of the signing of ERISA.

ERISA was an enormously creative act, it was a bipartisan act, it was an act that brought together business and labor to solve a problem. That same creativity could save multiemployer pension plans, and that same creativity could provide retirement security for generations to come.

EP: Because of your energetic outreach on behalf of the agency and the administration, many of us have gotten to know you and feel very fondly to our time of working together. Inevitably, we'll be wondering "Well, what's next for the always energetic Josh Gotbaum?" What are your plans from here?

JG: I have done so many things that it's hard to describe it as a profession. I think what I do is fix things. So I'm going to look for a place where someone who has managed in business, has managed in government, has managed in non-profits can make a difference. Do I know where that might be? No, but that's what I'll spend the next three to six or nine months to do.

EP: Well, you have many friends and admirers who wish you well. Thank you for this interview, and very best of luck in the future. Congratulations on a job well done.

JG: Thank you. ■