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THE HISTORY AND STRUCTURE OF THE MULTIEMPLOYER PENSION SYSTEM

HEARING

BEFORE THE

JOINT SELECT COMMITTEE ON SOLVENCY OF MULTIEMPLOYER PENSION PLANS UNITED STATES CONGRESS

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THE HISTORY AND STRUCTURE OF THE MULTIEMPLOYER PENSION SYSTEM

WEDNESDAY, APRIL 18, 2018

U.S. CONGRESS,
JOINT SELECT COMMITTEE ON SOLVENCY OF
MULTIEMPLOYER PENSION PLANS,
Washington, DC.

The hearing was convened, pursuant to notice, at 2:10 p.m., in room SD–215, Dirksen Senate Office Building, Hon. Orrin G. Hatch (co-chairman of the committee) presiding.

Present: Senator Brown, Representative Foxx, Senator Alexander, Representative Roe, Senator Portman, Representative Buchanan, Representative Schweikert, Representative Neal, Senator Manchin, Representative Scott, Senator Heitkamp, Representative Norcross, Senator Smith, and Representative Dingell.

Also present: Republican staff: Chris Allen, Senior Advisor for Benefits and Exempt Organizations for Co-Chairman Hatch; and Jeff Wrase, Chief Economist for Co-Chairman Hatch. Democratic staff: Jeremy Hekhuis, Legislative Director for Co-Chairman Brown.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM UTAH, CO-CHAIRMAN, JOINT SELECT COMMITTEE ON SOLVENCY OF MULTIEMPLOYER PENSION PLANS

Co-Chairman HATCH. We will call everybody to order. I would like to welcome everyone here to the first hearing of the Joint Select Committee on Solvency of Multiemployer Pension Plans.

Today we will begin our work in developing a deep base of knowledge on the issues surrounding multiemployer pension plans and the Pension Benefit Guaranty Corporation, or what we refer to as the PBGC.

We have an ambitious work plan, but like all great endeavors, we need to start with the basics, and that means reviewing what these plans are and how they operate; examining why the plans were established; and investigating what economic, demographic, and other forces have shaped and impacted the plans. Going forward, the committee will bring in experts from government and academia to help us better understand the issues surrounding multiemployer pension plans and the PBGC. This insight will be critical. We need to understand the numbers that shape the plans and PBGC, because the challenges we will look at fundamentally involve arithmetic, however unpleasant that arithmetic may be.

After getting a sense of those basic numbers, this committee will also examine the major legal and financial issues with the multiemployer plans, how the governing statutes have changed over time, and how finances have evolved for the various plans and for the PBGC. Certainly, the issues involved here are far broader and go much deeper, but to understand the scope of the problems that we face, we need basic measures of what is going on.

Looking ahead, we will likely have hearings in which we will listen to various stakeholders concerned with the operation of these plans. Those stakeholders include retirees, active employees, businesses that sponsor the plans, actuaries, plan managers, American taxpayers, and the PBGC. We will also look at how multiemployer plans are designed and how their finances are managed, along with the unique regulatory and workforce environments they operate in.

Following stakeholder input, the committee will examine policy options and the costs and benefits that come with them.

I do not doubt that the committee has a very heavy workload ahead. I also do not doubt the sensitivity of the issues we will discuss. The committee is charged with a very difficult task. No matter what direction we take, we are bound to anger some folks. But it is critical that we understand the core financial features of multiemployer pension plans as well as the PBGC to guide the path forward toward possible solutions.

For today's hearing, we have brought in two experts to provide us with information on the history, structure, operations, and evolution of the multiemployer plans since their inception in the 1940s. Their perspectives and insight will be critical as we begin this first phase of our process. And I look forward to hearing from them and learning more.

Now, let me close my opening remarks by noting that the staff of the Joint Committee on Taxation has prepared and posted on its website a publication titled, "Present Law Relating to Multiemployer Defined Benefit Plans," which will serve as one of many valuable resources to this committee. I appreciate the work of the JCT and thank Dr. Barthold and his team for what I am sure will be useful background information.*

So with that, I will turn to our distinguished co-chair, Senator Brown, and we will go from there.

[The prepared statement of Co-Chairman Hatch appears in the appendix.]

OPENING STATEMENT OF HON. SHERROD BROWN, A U.S. SENATOR FROM OHIO, CO-CHAIRMAN, JOINT SELECT COMMITTEE ON SOLVENCY OF MULTIEMPLOYER PENSION PLANS

Co-Chairman BROWN. Thank you. Thank you, Chairman Hatch. And thanks to my colleagues on the committee.

Mr. Barthold, thank you for being here. Your insight is always illuminating for us. Thank you, Mr. Goldman. Thank you for your acumen and what you will bring to this. We are very grateful to both of you.

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*For more information, *see also,* "Present Law Relating to Multiemployer Defined Benefit Plans," Joint Committee on Taxation staff report, April 17, 2018 (JCX–30–18) *https://www.jct.gov/publications.html?func=startdown&id=5089.*

We had a productive meeting the last time we met. It is clear that people in both parties on this committee are ready to work in good faith to find a solution to this crisis.

I spoke a moment ago to Congressman Buchanan about his desire to find out what got us here. And I think today the questions I will ask—and we have coordinated with Chairman Hatch to elicit the information that we need to understand—sort of build the framework so we understand these issues the way that we need to to come up with a bipartisan solution.

So, Vern, thank you for your insight.

There are some hundred multiemployer pension plans on the brink of failure. They have members in every single State in the country. A number of us in our States and our districts have literally thousands of people who could lose their pensions and hundreds of businesses that will be affected.

A million and a half workers and retirees are at risk of losing the security they earned at the bargaining table over a lifetime of hard work. Small businesses are at risk of collapsing if they end up on the hook for pension liability they cannot afford to pay.

Groups as diverse as the Chamber of Commerce and labor unions and the AARP are all pushing for a solution, because they know what is at stake for them, their businesses, their membership.

It is what we will explore here today: how we got here and what is at stake as we work to solve this crisis for retirees, for workers, for small businesses, for taxpayers.

These are workers and businesses who pretty much did everything right. They joined with other businesses, companies who thought that they were guaranteeing their workers a secure retirement because experienced trustees were managing the investment.

This year I talked with a small-business owner from Mahoning Valley in Ohio, in the Youngstown area, whose business participates in the Central States plan. He wrote me this letter afterwards: “I have owned my business for 18 years, and the company has been in my family for over 60 years. It has made contributions to this fund to ensure that the hard work and dedication of our employees pay off in the form of a pension.”

He then writes: “Many employers that once contributed to these plans have simply gone out of business, leaving the remaining employers to support the remaining employees and retirees of the companies that have closed.”

That is, in a nutshell, a pretty good explanation.

Then he says: “Please, we are asking you to get together with your colleagues, reach across the aisle.”

That is what we are doing; that is what this committee is constructed to do. We need five votes minimum on each side.

And then he says: “Find a solution that will help my employees keep their jobs.”

These are the kind of business owners we are talking about—honest men and women trying to do right by their workers. We need to remember what workers gave up to earn these pensions. Workers in these plans sat at negotiating tables. They gave up pay and other benefits in the short term today, money they could have used for their families, in order to guarantee a pension 10, 20, 30, 35 years later when they retired.

Too many people in Washington do not really understand what happens during these negotiations. We have to be clear. These workers earned these pensions, and they gave up pay to do it. They paid into the system for years. Now these plans are about to fail—again, through no fault of these businesses or these workers.

Each plan is different. There are many factors that played a role in getting them to this place. Many of these plans are in the same industries that have been affected by decades of bad trade deals, of outsourcing of jobs, of general shifts in the American economy.

There is no question that the economic collapse of 2008 devastated these plans and the people and the businesses who depend on them. Even the coal miners' pension—an industry that has been badly hurt, as we know, over the past few decades—even the coal miners' pension was nearly 90—nearly 90 percent—funded before the financial crisis.

If these plans fail, they take thousands of businesses and jobs with them. And the Pension Benefit Guaranty Corporation is supposed to step in. But the PBGC, as we know too well, is also on the brink of failure—$67 billion in the red, $2 billion in assets. If PBGC fails, it will be up to Congress to step in or to allow the entire multiemployer pension system to fail.

Failure should not be an option in this committee or for this Congress. Failure would wipe out the retirement of 10 million American workers and retirees and force American businesses to file bankruptcy, lay off workers, and close their doors.

The problem only gets more and more expensive to fix, and the problem gets greater, the longer we wait. That is why Chairman Hatch and I and this group of 14 others wanted to do this committee, wanted to have an end date in December, wanted it to be bipartisan, and wanted to fast-track this bill to the floor if, when—I like to think when—we come to agreement.

That is why our work is so important. We must fix it now. I am eager to hear from our witnesses today.

Thank you, Mr. Chairman.

Co-Chairman HATCH. Well, thank you.

[The prepared statement of Co-Chairman Brown appears in the appendix.]

Co-Chairman HATCH. Well, we are prepared to move ahead.

Let us go to Mr. Barthold.

STATEMENT OF THOMAS A. BARTHOLD, CHIEF OF STAFF, JOINT COMMITTEE ON TAXATION, WASHINGTON, DC

Mr. BARTHOLD. Well, thank you, Mr. Chairman and members of the committee. My name is Thomas Barthold. I am the Chief of Staff of the Joint Committee on Taxation, and it is my pleasure to present to the committee today an overview of the Internal Revenue Code provisions governing multiemployer plans.

As Chairman Hatch has noted, my colleagues have provided a detailed overview of present law related to multiemployer plans. The testimony that I have submitted today is really in outline form and works from general principles to specific application of rules in the case of multiemployer plans. And to make efficient use of your time, I will not go through every page in the outline.

But just as basis, defined benefit plans—and that is what we are really talking about when we look at multiemployer plans—generally provide accrued benefits as an annuity commencing at the normal retirement age of the individual.

The code and ERISA require that the benefits be funded using a trust for the exclusive benefit of employees and beneficiaries. And the Congress has created the Pension Benefit Guaranty Corporation to help guarantee that such benefits are available at retirement. An important aspect of these rules is that cutbacks are prohibited. And if you are following in my outline, I am on page 8.

Under the anti-cutback rules, plan amendments generally may not reduce benefits already earned and vested—accrued benefits as they are termed—or eliminate other forms of benefits linked to an accrued benefit. Benefit reductions or eliminations must be on a prospective accrual basis only.

Now, our topic today is multiemployer defined benefit plans. They are a special type of plan—turning to page 10 if you are trying to follow along with me. Multiemployer plans provide benefits based on the service of all participating employers and are common in industries where employees regularly work for more than one employer over the course of the year or over the course of their careers. But they also cover employees who work for only one employer over their entire career.

There are approximately 1,400 such plans now covering approximately 10½ million participants. Many employers participating are small employers and midsized to large employers, but increasingly, the majority of plans have at least one contributor providing more than 20 percent of their annual contributions to the trust funding the benefits.

The Pension Benefit Guaranty Corporation has two different programs, one for single-employer pension plans and a special program that provides financial assistance in the form of loans to insolvent multiemployer plans. This is in contrast to the single-employer program. When an underfunded single-employer plan is terminated, the Pension Benefit Guaranty Corporation steps in and takes over the plan and its assets and pays the benefits.

In addition to providing financial assistance to an insolvent multiemployer plan, the PBGC has authority with respect to mergers and asset transfers between multiemployer plans and may partition existing multiemployer plans. The PBGC provides a minimum guarantee level in the case of multiemployer plans, which, as noted on page 12 of the outline, is the sum of 100 percent of the first $11 of vested monthly benefits plus 74 percent of the next $33 of monthly vested benefits multiplied by the participant's number of years of service in the industry.

To help finance these guaranteed amounts for multiemployer plans, there is a per-participant flat-rate premium paid annually, and for 2018 that premium amount is $28 per participant.

Now, I mentioned the anti-cutback limitation as an important part of the general principle of defined benefit plans, because in multiemployer plans there are exceptions that actually permit current benefits to be reduced. And this depends upon a classification of the status of the plans.

Pages 13 through 16 in the outline define these classifications. The first classification is a critical status classification. To summarize, essentially, critical status is when a plan is currently underfunded and it also appears that the deficit is likely to increase. As noted on pages 14 and 15, there are four specific criteria, but I think it is fair to summarize those criteria in those terms.

The second status is insolvent status. Insolvency is when, in the current year, the resources of the plan are insufficient to pay plan benefits and the plan sponsor of a critical plan determines that the plan's available resources are not sufficient to pay benefits coming due in the next plan year. In other words, in short, there is not enough money to meet current need under the plan.

The final status is called critical and declining. This is if a plan is first critical and also, based on actuarial projections, it appears that in the current plan year or any of the next 14 years that the plan is likely to become insolvent.

If a plan meets any of those statuses, then it is possible for benefits to be reduced. So, for example, under critical plan status, participants and beneficiaries who begin receiving benefits after a notice has been given of the plan's critical status have certain limitations on the benefits that they may have expected to receive under the plan. For example, payments in excess of a single-life annuity can be eliminated if a plan is in critical plan status.

In the case of an insolvent plan—page 18 of the outline—benefits must be reduced to a level that can be covered by the plan's assets. The benefits may not be reduced below the level guaranteed under the PBGC program, as I described a moment ago, but there should be a suspension of benefit payments, and it should be substantially uniform across all participants.

In the case of critical and declining status plans, the plan sponsor may determine the amount of benefit suspensions. Again, it cannot be reduced below, in this case, 110 percent of the PBGC guarantee level. And there are special protections based on the age of beneficiaries.

That describes special rules under multiemployer plans that can affect benefits that are paid. There are also special funding rules for multiemployer plans.

Basically, it is important to remember that funding is part of a negotiated contract cycle. So in making projections about necessary funding, it is part of the negotiation; often in a union contract, it is a 3- or a 5-year cycle. This is in contrast to single-employer plans, where you can always be reviewing your status on an annual basis, and you are only reviewing the status for one contributor to a plan with respect to yourself, as opposed to having multiple contributors to the plan. The basic funding is determined by calculating a funding standard account, which is trying to make a projection of what is coming in and what is going out of the plan over the life of the contract.

Let me see. Let me skip ahead to page 22.

The annual minimum required contributions are the amount that is needed to maintain a balance of the inflows and the outflows. There is a deficiency if the accumulated charges exceed the inflows. There is a credit balance if the opposite occurs.

Additional funding may be required in the case of plans that are deemed endangered or on critical status. And this essentially sets in progress a procedure to review the funding in the next cycle, where the employers and the employees in the negotiation get together and try to improve the funding status of the plan.

Key definitions here are, a plan's funding may be considered in endangered status—looking at page 23 of the outline—if the plan is not in critical status but the plan's funded percentage is less than 80 percent, or the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the next 6 plan years.

A plan would be deemed to be in seriously endangered status if both one and two above—if you are less than 80 percent and projected to have a funding deficiency in the current year or any of the next 6 years—if both those factors are the case. A plan that is already in critical status—remember, going back, that was essentially where we are in decline in terms of what is flowing in and flowing out of the fund. If plans are deemed to be endangered, they have to adopt a funding improvement plan. Critical plans have to adopt what is referred to as a rehabilitation plan.

Generally speaking—and as outlined on page 24—a funding improvement plan consists of actions that may include a range of options to be proposed as part of the bargaining of the parties, using reasonable actuarial assumptions to attain certain benchmarks for improvement over the ensuing 10-year period.

Likewise—as described on page 25—a rehabilitation plan, again, is a series of actions, options, a series of options proposed, again, to the bargaining parties, formulated on using reasonable actuarial assumptions to enable the plan to cease to be in critical status by the end of a 10-year period.

I know that is a lot of material in a short period of time. It is probably best for me to turn the microphone over to my colleague at the table. I would be happy to answer any questions that the members might have when it gets to question time. Thank you very much, Mr. Chairman.

Co-Chairman HATCH. Very nice; thank you.

[The prepared statement of Mr. Barthold appears in the appendix.]

Co-Chairman HATCH. Our second witness is Mr. Ted Goldman, a senior pension fellow from the American Academy of Actuaries.

Mr. Goldman, an actuary with 40 years of actuarial retirement experience, has been the senior pension fellow at the American Academy of Actuaries since January 2016. Prior to that, Mr. Goldman was a retirement consultant with several major benefit consulting firms.

In addition to being a member of the American Academy of Actuaries, Mr. Goldman is also a fellow of the Society of Actuaries, an enrolled actuary, and a fellow of the Conference of Consulting Actuaries. He received an undergraduate degree in mathematics from the University of Missouri Columbia.

I thank the witnesses for agreeing to join us today and look forward to your testimony. And hopefully you can help us to understand this better.

Go ahead, Mr. Goldman.

STATEMENT OF TED GOLDMAN, MAAA, FSA, EA, SENIOR PENSION FELLOW, AMERICAN ACADEMY OF ACTUARIES, WASHINGTON, DC

Mr. GOLDMAN. Thank you, Mr. Chairman.

And I apologize in advance if I repeat some of Tom's testimony, but I think it is good to hear this more than once. So here we go.

Distinguished Senators and House members, on behalf of the Pension Practice Council of the American Academy of Actuaries, I am Ted Goldman, senior pension fellow at the Academy. I appreciate this opportunity to provide testimony to the Joint Select Committee on Solvency of Multiemployer Pension Plans.

The Academy is a strictly nonpartisan professional association representing U.S. actuaries before public policymakers. The Academy's Pension Practice Council has diligently been working over the past few years to analyze the financial condition of troubled multiemployer plans.

In keeping with the purpose of today's hearing, I am here to provide you with information regarding the history and current status of U.S. multiemployer pension plans. Let me begin with an overview. More than 10 million people participate in about 1,400 multiemployer pensions plans. More than 1 million people are in approximately a hundred of these plans that will be unable to pay benefits in full.

The Pension Benefit Guaranty Corporation, the government-sponsored program designed to backstop troubled plans, is likewise projected to be unable to pay all of the multiemployer plan benefits that it guarantees. If the PBGC fails, participants in these plans could see their benefits cut by 90 percent or more; in other words, retirees could get less than 10 percent of the benefits that they had expected. In addition to impacting these million individuals, the reductions have broader implications for our economy and our social safety net programs.

Now let us talk about the basics. A multiemployer defined benefit pension plan is a retirement plan sponsored by at least two employers in the same industry or geographic region. These plans are established by collective bargaining agreements and managed by a board of trustees containing an equal number of members appointed by both labor and the employers. Plans can be local, regional, or national. These plans commonly cover occupations such as construction workers, truckers, mine workers, grocery clerks, and janitorial workers, among others. Employers are required to fund the plans in accordance with the negotiated contribution rates, subject to certain regulations. The plans pay PBGC premiums for underlying financial support in the event of a plan failure.

I now want to turn to a discussion of the rationale for these plans. Multiemployer pension plans were created as a way to deliver lifetime income retirement benefits to workers in blue-collar industries. Employers tended to be small, and it was common for workers to stay in an industry but work for many employers over the course of their career. The multiemployer approach captures economies of scale, offers benefit portability, and pools risks—an intended win-win for the employer and the employee.

Next, it is important to understand how we got here. Negotiated plans appeared in the 1930s and 1940s in industries such as the needle trades and coal mining. The Taft-Hartley Act of 1947 created the concept of joint labor and management trusteeship. Plans then grew in prominence during the 1950s and 1960s. Such plans covered about a million workers in 1950, ultimately peaking at over 10 million workers in 1989. And the system today still covers over 10 million participants.

In 1974, the Employee Retirement Income Security Act, ERISA, brought a fundamental change to private-sector pension plans. Among other provisions, ERISA protected benefits that plan participants had already accrued, often referred to as the anti-cutback rule. Employers contributing to multiemployer plans became responsible not only for the negotiated contributions, but also for any funding shortfalls that developed in these plans. ERISA also established the PBGC.

During the late 1990s, very strong asset returns led many plans to increase benefits in order to share the gains with participants and to protect the tax deductibility of the employer contributions. These years were followed by a period of very poor asset returns that erased much of the investment gains. While the investment gains proved to be temporary, the increased benefit levels that plans adopted were protected by the anti-cutback rules. This combination of temporary asset gains and permanent benefit improvements is a contributing factor to the challenges facing multiemployer plans today.

The Multiemployer Pension Plan Amendments Act of 1980 was intended to prevent employers from exiting a financially troubled multiemployer plan without paying a proportional share of the unfunded liability. Under this law, withdrawals are recognized as a potential problem that threatens the long-term financial health of plans. As employers withdraw, the liability for these employees, often termed "orphan liabilities," will become the ongoing responsibility of the employers remaining in the plan. This is often referred to as "the last man standing" problem and could result in significant financial burdens for the remaining employers.

While this law took steps to address the problem of employer exits, the new withdrawal liability rules were not fail-safe. Bankruptcies, poor investment performance, and the ability to collect the full amounts all resulted in additional liabilities for the remaining employers in these plans.

The primary contributors to the current challenge relate to investment performance, past benefit increases, the maturation of plans, the decline of collectively bargained workforces in some industries, and weaknesses in the withdrawal liability requirements. Typically, a combination of these factors has contributed to a projection that a plan will be unable to pay benefits.

The Pension Protection Act of 2006, PPA, made certain changes to multiemployer funding rules. The changes were designed to give plan trustees more flexibility in dealing with funding challenges and require plans to identify and address problems early.

PPA classifies multiemployer plans into one of three categories based on current and projected funding levels: critical status, which is referred to as a "red zone;" endangered status, the "yellow zone;"

and neither, which is the "green zone" plans. Plans that are in critical or endangered status are required to take corrective action. The tools available under PPA were largely limited to increases in employer contributions and reduction in benefits for non-retired participants.

While these tools enabled many plans to recover from the dramatic asset losses and economic contraction that immediately followed the effective date of the law, they proved to be insufficient for others. The severely distressed plans that were unable to recover using the tools under PPA are often characterized by high maturity levels. In other words, the number of active participants in the plans is dwarfed by the number of inactive and retired participants in those plans.

The Multiemployer Pension Reform Act of 2014, MPRA, provided additional tools and strategies for these severely distressed plans. MPRA added a fourth category of "critical and declining" status to further differentiate those plans projected to become insolvent within the next 20 years. Of particular note, MPRA allows distressed-plan sponsors to voluntarily reduce benefits that have already been earned. While mandatory benefit reductions that occur when plans become insolvent were part of the law prior to MPRA, the ability of trustees to implement discretionary reductions in order to prevent insolvency and preserve long-term benefit levels was a significant departure from prior law.

The sponsor of a distressed plan that elects to suspend benefits under MPRA must submit an application for review and approval to the Department of the Treasury. Of the first 25 applications for benefit suspensions, however, only four have been approved. While MPRA may remain a viable option for some distressed plans, many others may be too far down the road toward insolvency to take advantage of it.

Finally, I would like to wrap up with five important observations. Number one, the status quo is not sustainable. Taking no action will not keep things the same; it will result in the loss of retirement income for many hardworking Americans and the financial collapse of the PBGC multiemployer program. These losses have the potential to impact the broader economy.

Second, many plans remain healthy, having withstood the financial market collapse of 2008 and the Great Recession. Plans and industries that are experiencing declines in their collectively bargained membership, however, remain at risk.

Third, addressing employer withdrawal liability is important. Withdrawal liability remains a barrier to attracting new employers into the system, and it also contributes to the "last man standing" concerns of current participating employers.

And fourth, there are several layers to the challenge: one, delivering on PBGC guarantees; two, delivering on plan commitments; and three, delivering on retirement security to future workers, which is something important.

And finally, time is of the essence. The more time that passes, the bigger this problem will become and the harder it will be to restore multiemployer pension plans to stability and sustainability.

Moving forward, possible actions can be grouped into one of three categories: modify workers' benefits, increase funds available to troubled plans, or shift risks from plans to third parties. A combination of these actions would result in sharing the burden.

Thank you for inviting me to testify before this distinguished panel today. The Pension Practice Council of the American Academy of Actuaries stands ready to help you by providing our objective and nonpartisan input as you work to fulfill your charge to address these challenging issues.

I thank you for this opportunity to appear before you today, and I look forward to addressing your questions.

Co-Chairman HATCH. Well, thank you for your wise counsel.

[The prepared statement of Mr. Goldman appears in the appendix.]

Co-Chairman HATCH. And we appreciate all of you there at the table. Let me just ask a question of Mr. Barthold.

Funding rules for multiemployer plans, I am concerned about. Under funding rules for multiemployer plans, actuarial assumptions used by a plan must be, quote, "reasonable," unquote. In addition, the funding rules do not specify the interest rate or mortality tables that must be used.

Mr. Barthold, I would like you to answer two brief questions about funding rules, which I will run through, after which you may respond. First, do the same or similar funding rules that apply to multiemployer plans also apply to single-employer plans?

Mr. BARTHOLD. No, sir. The single plans—there are specific segment rates that are specified in terms of calculating liabilities. Those are some of the changes that were enacted in the Pension Protection Act in 2006.

Co-Chairman HATCH. Okay.

Mr. BARTHOLD. So there are somewhat different rules.

Co-Chairman HATCH. Okay. Secondly, if the rules are not the same across plan types, and you say they are not, then why are funding rules for multiemployer plans different?

Mr. BARTHOLD. Mr. Chairman, I could only speculate, as that was a decision in terms of the rules that the Congress enacted for different plans. One factor that I mentioned and that Mr. Goldman mentioned is that multiemployer plans are collectively bargained plans involving multiple parties. And so that might be the basis for which you would enact different rules to apply in a collectively bargained environment with multiple employers.

Co-Chairman HATCH. Mr. Goldman, let me ask you this question. One of the primary concerns of many on this committee is the funding standards for multiemployer pension plans. The issue is whether the funding standards are adequate and whether they provide a reasonable, prudent, and actuarially sound level of assets to cover future liabilities of the plans.

Let me briefly run through two related questions, after which I would like you to respond. First, could you describe the funding methods for the multiemployer plans prior to the enactment of the Employee Retirement Income Security Act? And second, could you discuss what new funding standards were established by ERISA along with the impact those standards have had on the funding of the plans themselves?

Mr. GOLDMAN. Yes. Let me start at basics. The goal of pension funding is to, as people earn benefits, make enough contributions and invest those assets so that, by the time they get to retirement, those assets are there to pay them. And then how you determine that is the actuarial funding method, and to do that requires a lot of assumptions.

If you think about it, we look at an entire population and say, you know, what is the probability somebody is going to make it to retirement? When are they going to leave? What is the benefit going to be at retirement? How long are they going to live? So the valuation is an estimate. And there are, arguably, as many ways to make an estimate as there are actuaries out there.

But having said that, before ERISA—to answer your question—plans basically negotiated the contribution level in multiemployer plans. And that contribution level then—from there, the actuaries would work with the plan trustees to determine the level of benefit that could be paid from that. So there were not a lot of rules around that. And the plans remained healthy for a long, long time without a lot of requirements.

And then when ERISA came in, ERISA did several things. It added the minimum funding requirements, which had a structural way of saying, we want to make sure that that money is there in time for people to retire. And later, MPRA introduced the withdrawal liability piece. So the withdrawal liability is a major differentiator from the multiemployer plans.

And another thing under ERISA—actuaries, as you said, make their best estimate and determine the contribution based on the expected return on the assets, which is the same as the discount rate, and other assumptions under the plan.

Co-Chairman HATCH. Well, thank you.

Senator Brown?

Co-Chairman BROWN. Mr. Chairman, thank you.

I know that a number of my colleagues on both sides of the aisle in both houses want to talk about the impact of this issue on working families and small businesses. To be sure, that should always be the focus of our discussions.

It is pretty clear—I mean, you are laying out the history, Mr. Goldman, Mr. Barthold, the reasons workers and employees agreed to enter into these agreements. Employers wanted them for the well-being of their workers, to attract good workers. Employees wanted them to be there for retirement security.

So if the two of you would, lay out sort of general purposes and just describe the basic structure of a multiemployer plan. How are they governed? How are trustees selected? Are they equally, jointly managed by labor and industry? Just each of you, if you would, either of you, walk through sort of the governing structure of these from the moment they are set up to how they run year by year.

Mr. BARTHOLD. A multiemployer plan is governed by a joint labor and management board, Senator Brown. There is equal representation of employees and employers. But as a qualified plan, as is sort of the general rule, the assets have to be administered for the exclusive benefit of the employees and their beneficiaries.

And then as I noted, in terms of governing and planning, the planning is done over the collective bargaining cycle.

Co-Chairman BROWN. Okay. Go ahead, Mr. Goldman.

Mr. GOLDMAN. Yes; I do not have a lot to add there.

Co-Chairman BROWN. Okay. And trustees are selected—there will be trustees both for the employer and the employee, I assume. And how are they selected?

Mr. BARTHOLD. That would be part of the bargaining.

Co-Chairman BROWN. The collective bargaining agreement.

Mr. BARTHOLD. The agreement.

Co-Chairman BROWN. Okay.

Mr. Goldman, you talked about the flexibility provided in the 2006 PPA Act. And shortly after that, the economy went into recession. The new rules began to be eased, I guess were able to, under the flexibility that was provided. How has the easing of the rules contributed to the current financial condition of the plans?

Mr. GOLDMAN. The easing of the rules was an attempt to help employers fund the plans. Keep in mind, the plans that have experienced the biggest shocks, in terms of this maturity that I talked about and having a smaller active participant base supporting a higher retirement base, are the ones that are in trouble.

And PPA gave them more tools. Look, think of it as giving you more tools. Flexibility equals more ways to figure out how to fund the plans and get them strong again.

Co-Chairman BROWN. And the most serious shortfall, I assume, came through these years post-2006, after the 2006 act was signed by President Bush. The faltering of the plans was mostly, I assume, because of the number of employers that went out of business and quit paying into the plans?

Mr. GOLDMAN. That was a component of it. Like I said, it is the decline of industries, and also the decline in membership in the collective bargaining too. We are finding a lot more of the younger people are not joining the collective bargaining agreement side, so you have a smaller and smaller base of people. I would say, if I had to point to one issue, it is the smaller base supporting the larger liability.

And a lot of it, you know, is these plans have been around for a while. So if you think about it, to fund a plan, you have to have enough money to pay all the benefits and the expenses of the plan. And the only two sources of income are the contributions from the employers and the investment earnings. So when a plan is young, the contributions cover most of the needs. But as a plan ages and the assets accumulate, more and more of that income comes from the assets. So when there is a shock to the system and those assets do not perform, you have a shortfall that now has to be spread amongst the remaining employers.

Co-Chairman BROWN. So the smaller base is both employers and employees paying in.

Mr. GOLDMAN. That is right. Well, only employers pay in. It is collectively bargained, so it comes out of the wage.

Co-Chairman BROWN. I mean, excuse me, the smaller base is the employers paying in and the employees who choose to be in. Correct?

Mr. GOLDMAN. That is right.

Co-Chairman BROWN. And so were you seeing, as in cases where employers were paying in, even in those companies that did not go out of business, were you seeing employees withdraw during that period? I think people withdraw more out of the necessity. There are some withdrawals of healthy plans, so you have two kinds.

That is just the last part of my question. So employers go out of business, that is clear. Those employers that were in business, their employees, in some cases, were withdrawing from the plans because they wanted the income, they wanted the money now? I mean, they did not want to pay any employee share at that point, they just did not trust the health of the plan? What was it mostly?

Mr. GOLDMAN. Well, for employees who withdraw, there is the withdrawal liability. And the withdrawal liability, in theory, is the employer has to pay their fair share of the remaining liability for the people who remain in the plan.

So if an employee withdraws, the employees who had benefits in those plans stay in the plan. You do not pull out the employees. And the reasons are probably all over the map in terms of why. Some of it is, we want to get out now because we do not like where this is going. Some get out for other business purposes—a wide range of reasons.

Co-Chairman HATCH. Representative Foxx?

Representative FOXX. Thank you, Mr. Chairman.

I want to thank both of our witnesses here today.

Mr. Barthold, we know that employer contributions and promised benefits for multiemployer plans, as you all have described, are determined pursuant to collective bargaining agreements.

In the context of multiemployer pension benefits, can you discuss which parties are involved in the collective bargaining process? Who determines the employer contribution and participant benefit amounts?

Mr. BARTHOLD. Well, in any collective bargaining situation, employers and employee representatives, union representatives, negotiate how much compensation will be in the form of current cash wages, how much might be in terms of other benefits, such as health benefits and retirement benefits. And so it is that negotiation that then determines amounts of necessary contributions to these plans, because if we are promising certain pension benefits, the parties work with actuaries, such as Mr. Goldman, to determine, well, what does that mean future liabilities will be; what sort of funding is necessary?

And then in the current situation, as was noted, an important part of the overall liabilities of these plans is based on people who had previously worked in the industry, covered by the plans and currently retired. So the current retiree liabilities, that would also be a factor in the negotiations that the parties have to consider, because they are funding not just current employees, but also the legacy employees.

Representative FOXX. When a multiemployer plan fails, what liability attaches to unions, which are one half of this bargaining operation, and what liability attaches to employers?

Mr. BARTHOLD. In a bankruptcy? These are——

Representative FOXX. No, when a multiemployer plan fails.

Mr. BARTHOLD. Oh, when a plan fails. If a plan goes insolvent—as I noted and we have provided some detail on—the Pension Benefit Guaranty Corporation provides loans, guaranteeing certain minimum payments. It is not divided between employers and employees. What has failed is the trust that governs the pension benefits, and so this is a transaction between, in this case, the Pension Benefit Guaranty Corporation and the trust.

Representative FOXX. And the trust. Thank you.

Another question, Mr. Barthold. Changes made by the Multiemployer Pension Reform Act of 2014 allowed plans in critical and declining status to apply to the Department of Treasury for suspended benefits in order to prevent plan insolvency. How many plans have successfully applied for suspension of benefits under this law and remain solvent to continue providing the pension benefits that employers have promised their employees?

Mr. BARTHOLD. I do not have those numbers at my fingertips, but I believe Mr. Goldman cited at least half of the answer to your question in his testimony. So if I could defer.

Representative FOXX. Please feel free, Mr. Goldman.

Mr. GOLDMAN. Yes. There have been four approvals to date under the MPRA applications. And it is too soon to tell whether the cutbacks are going to be effective long-term. The way MPRA works is, the proposed cutbacks they present need to be equitable and need to have at least a 50-percent chance of being successful. So we are projecting things way into the future, and there is a lot of scrutiny put over each and every assumption that is used in those calculations. And time will tell us what happens.

Representative FOXX. Thank you, Mr. Chairman. I will continue to try to be a good role model and yield back the balance of my time.

Co-Chairman HATCH. Great. Representative Neal?

Representative NEAL. Thank you, Mr. Chairman.

In 2016, Central States applied to the Treasury Department to cut retiree benefits, which gave us a glimpse of what insolvency for a large national pension plan would look like.

A retiree from my home State of Massachusetts barely escaped those benefit cuts. He worked as a car hauler for almost 30 years. Then, years into his retirement, he received a notice from his plan telling him that his benefit could be cut by more than 50 percent. Fortunately, the pension plan's benefit cuts application was denied, but the plan is still troubled. And this retired Massachusetts couple's financial security remains very much at risk.

I introduced legislation to address the multiemployer crisis for retirees and workers just like Norman Proulx. And while we are focused today more on understanding the multiemployer funding problem than on solutions, I think talking about solutions might help us to better understand the issue.

In fact, the legislation that I introduced is bipartisan and I believe has about 10 Republicans who are on the bill.

Mr. Goldman, last year, you and other members of the American Academy of Actuaries provided a bipartisan briefing entitled "Multiemployer Pension Plans: Potential Paths Forward." In your materials, you mentioned that a loan program could help solve the multiemployer funding crisis by allowing plans to borrow money at low interest rates and invest the proceeds in the plan, which would, in your words, quote, "provide a longer time frame for employers to pay the costs and to provide leverage on plan investment returns relative to the borrowing rate."

As you know, Senator Brown and I also introduced additional legislation which, if enacted, would create this loan program.

Mr. Goldman, it has been a year since you previously spoke about loan programs. How has the landscape for multiemployer plans changed during that time frame?

Mr. GOLDMAN. Well, the looming multiemployer insolvency crisis grows with each passing year. What my final comment on the urgency of time was, you know, the car is going toward the side, and it is getting closer and closer.

Most multiemployer pension plans had favorable returns in 2016 and 2017 in particular, but those gains have not significantly changed the projected dates of insolvency for those plans.

The healthier plans with more assets, that was a bigger deal. But you have to keep in mind, the level of assets relative to the liability in these plans is low. So a good return for a year or two is not going to materially change the outlook.

Representative NEAL. Yes.

Mr. Goldman, I have proposed a solution, as I noted a few minutes ago, that would work in terms of the recognition that you have offered in terms of testimony, if we act now. In your expert opinion, what will be the economic impact to retirees and at large if we do not act in the near future?

Mr. GOLDMAN. Well, we have said several times today there are over a hundred plans that are in critical and declining status and have projected insolvency within the next 20 years. These plans facing insolvency cover a million participants and beneficiaries and they pay over $7 billion in benefits each year.

If these plans become insolvent, it will go to the PBGC. They will be unable to uphold its guarantees, meaning that these benefits for these participants will be reduced to near zero.

There is another topic that is probably worth mentioning called a “contagion effect.” And what the dynamics here are, in some of the troubled multiemployer plans—there are perhaps hundreds of employers in those plans. These employers also may be in multiple other plans that are healthy.

So if the plan that they are in has a financial challenge that they have to step up for and puts pressure on them, it could actually start to impact the healthy plans as well and then expand to bring down, to collapse, the whole system. So that is another potential risk that is out there.

Representative NEAL. Thank you, Mr. Chairman. I will yield back my time.

Co-Chairman HATCH. Okay.

Congressman Roe, I believe, is next.

Representative ROE. Thank you, Mr. Chairman.

And I first of all thank both of you for being here. And I think we pretty well understand.

Mr. Goldman, I want to just read from the last paragraph of your testimony that you have given. It says, from a conceptual standpoint, the options are straightforward. One of three actions must be taken. Either benefits are to be reduced—this is the current course if there is no intervention—or contributions to the plan have to be increased, or as a third option, more risk would be taken by plans to achieve prospective investment gains.

So it is just an arithmetic problem. You have more going out than coming in. And that is basically what it is, am I correct?

Mr. GOLDMAN. Right. It simplifies down to those three choices. It is simple from that point. Anything beyond that is not simple.

Representative ROE. Now, the solutions are not simple.

Mr. GOLDMAN. Right.

Representative ROE. And I understand that.

Just a couple of quick questions, and this is maybe out of your purview, but why are the PBGC premiums different for a single-employer plan than a multiemployer plan? Why is there a huge discrepancy?

Mr. GOLDMAN. Yes, there is a huge discrepancy between the two programs. I actually did some research on the background of that. And part of the challenge, as PBGC looked at this back in the late 1970s, was that if they made premiums too high, it would chase employers out of the plan. So everything is about a balance, right? We have to find the right balance of enough to keep employers in the plan, but not topple things down.

And so they actually delayed the implementation of the multiemployer program to get a couple of experiences. And in the early days, they had, I think, the milk industry, the people who used to deliver milk to your door—the industry declined—and millenaries. So they had some data.

And people thought too, because of the joint trusteeship, that there was a lot less risk. And the way these multiemployer plans are set up with a lot of small employers, if an employer goes out of business, that is fine. It is just when a whole industry is impacted that it is a problem. So it was deemed as a small risk.

Representative ROE. And it did not work.

Mr. GOLDMAN. Right.

Representative ROE. If they had had those premium increases, the PBGC might be able to cover these benefits at the level of the single employer, which is a much higher level.

Mr. GOLDMAN. Right.

Representative ROE. What assumptions are made when these benefits are looked at? Actuarially, when you look at it, what return? In other words, I can pencil in a 6-percent return, a 5-percent return, an 8-percent return, to get the number I want. What are they using actuarially to calculate these returns?

Mr. GOLDMAN. Well, that is a great question. And the answer is, there is no one right number. So there are a couple of approaches.

One is to use a discount rate that is equal to the expected return on the assets of the plan. And that has some risk attached to it. It is all about risk/return tradeoff.

Others would argue that we should be valuing these liabilities on a risk-free rate and that is a better measure of the true obligation.

So there is not one number that is more right than the other number, they just provide different types of information. And the more information that is available, the better you can understand the problem.

Representative ROE. You described in the 1990s, during the dot-com boom, plans that were, quote, "overfunded." I have never seen a pension plan that had too much money. I have not had anybody come to me yet and complain about that.

But the rules and the laws at that time prevented an employer from funding it more. So we as employers will always take a chance this year, because the gains have been so much that you do not need to put anything in this year. That is a temptation that is out there. That was a mistake also.

And that is one that Mr. Norcross and I, in a bill that we have together, a hybrid plan going forward—but that is going forward; that is not solving the problem with these plans right here.

Is anyone from the government, since we are now being looked to, as Mr. Neal says, for loan guarantees or whatever—I think the PBGC has only had one loan paid back, so that is a pretty stark reality. But is anybody from the government there at this or is it just employers and the union representatives, because we are now involved.

Mr. GOLDMAN. Anybody where?

Representative ROE. From the Federal Government when these benefits are determined, what they are going to be.

Mr. GOLDMAN. No, the collective bargaining process determines the level of benefit.

Representative ROE. Bargaining determines the level. And the last question I have very quickly is, when I put money in—I can certainly see the argument. I put this money in, I should be getting it out. Why is that not true? In other words, I put money in, I should have covered myself, just like a defined contribution plan does. I have what I have. Why does it not do that?

Mr. GOLDMAN. And that is a fundamental difference between a defined benefit and a defined contribution plan. Defined contributions go into an individual's account that earns however they choose to invest it, and then that is the money they have at the end of retirement. In the defined benefit, it is a pooled approach. So everybody in the plan contributes, and those contributions are for everybody.

And then we project out who is going to get it and when they are going to need it, and that drives the funding of that plan.

Representative ROE. Yes. I yield back, Mr. Chairman.

Co-Chairman HATCH. Representative Scott?

Representative SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I would like to get some information on what kind of problem we are in to kind of quantify the problem we have. I mean, there is the old adage: if you do not change directions, you are going to end up where you are headed. If we do not do anything, where are we headed?

Mr. Goldman, if one of the plans becomes insolvent, does the "last man standing" rule require all of the remaining participating corporations to pay the benefits?

Mr. GOLDMAN. It is complicated. In concept, I think that is true: the fewer employers in the plan take on more, but there are some complex rules that might limit how much people pay on the way out. And there are payments over time.

Representative SCOTT. Well, if you are participating in a plan and you owe some money, are all of the corporate assets exposed to pay these benefits?

Mr. GOLDMAN. I am not sure on that. I do not know. I will defer to Tom on that. I know there used to be a 30-percent limit; I am not sure what it is.

Mr. BARTHOLD. Generally not, sir.

Representative SCOTT. They are not obligated to pay the benefits if they are——

Mr. BARTHOLD. Not with all the assets of the corporation.

Representative SCOTT. Okay. If the plan becomes insolvent, are the Pension Benefit Guaranty Corporation's assets sufficient to pay the hundred plans that you expect to become insolvent? Does the PBGC have enough assets to pay those benefits?

Mr. GOLDMAN. No, they do not. And as we mentioned before, the guarantee levels of the PBGC are already fairly low. The maximum a 30-year employee could get is just under $13,000. And if these plans all go as expected, the PBGC may pay less, 5 or 10 cents on the dollar from that smaller amount.

Representative SCOTT. Okay. So if that happens, the retirees in the plans that become insolvent and the tens of thousands who are already receiving PBGC assistance would see catastrophic reductions in their income?

Mr. GOLDMAN. You are saying the existing people?

Representative SCOTT. Well, the existing people and the retirees who are in insolvent plans who are not going to get anything, they will be getting less money than promised. And I guess they will be paying less Federal, State, and local tax, is that right?

Mr. GOLDMAN. Yes.

Representative SCOTT. Do you know how much less they are going to be paying?

Mr. GOLDMAN. No; I have not done that analysis.

Representative SCOTT. Are they more likely to become reliant on the social safety net programs like food stamps, Medicaid, job training programs? Do you have an idea of how much we are on the hook for?

Mr. GOLDMAN. I do not, but I think that is an important part to measure as you all move forward.

Representative SCOTT. Is it possible to get that number, particularly with a contagion effect where one company is jeopardized because of one plan and cannot contribute to the next plan?

Mr. GOLDMAN. There have been at least two places that have tried to measure that, but I am not familiar with the analysis. So it is possible to do an analysis, but you are going to have to make a lot of assumptions.

Representative SCOTT. Are there other foreseeable costs to the Federal Government if we do not do anything?

Mr. GOLDMAN. I think you touched on the major ones.

Representative SCOTT. Just from an actuarial point of view, I think following up on Dr. Roe's question, if these plans are solvent, they should not have to rely on ongoing contributions to pay out the benefits, is that not right?

Mr. GOLDMAN. Well, ongoing contributions from the collective bargaining?

Representative SCOTT. Yes. Like, you have workers today paying into the plan.

Mr. GOLDMAN. So solvent means that, assuming the contributions continue to come in, that they will be able to pay in the future.

Representative SCOTT. Well, no, no, no. If it is solvent, they should be able to pay the benefits, even if people stop paying.

Mr. GOLDMAN. No, that is not necessarily true. Solvency means that the plan is not expected to run short and will be able to make good on its future obligations.

Representative SCOTT. So the plan assets, then—are you not into a Ponzi scheme if you are relying on ongoing revenues?

Mr. GOLDMAN. No, because what happens is, you only have to pay benefits that accrue, that are earned.

Representative SCOTT. Right. And so if you stop, if everybody stops paying in, you ought to have enough assets to pay what you have promised.

Mr. GOLDMAN. That is the "last man standing" problem, yes.

Representative SCOTT. No, that is not the "last man standing" problem. You ought to have enough assets to pay what you have promised.

Mr. GOLDMAN. And that is the maturity issue of a bigger retiree base. And you know, the funding rules would take care of that as long as there are not extreme events that take place.

Co-Chairman HATCH. Okay.

Senator Heitkamp?

Senator HEITKAMP. Thank you, Mr. Chairman.

Important and complicated information, and I think that is one of the great problems that we have. This is a complex issue with no simple solutions. This is a problem that has festered for a long time without appropriate and proper attention.

And here we are, having people's retirement threatened, having the economy, in many ways, threatened. I do not think we can overstate that. I think these are incredibly challenging times. And we are looking for creative solutions. We are looking for ways that everybody can win and ways that we can send a message to people who would save that their retirement is going to be secure, that they will have something for all the sacrifice that they make by doing the right thing in America, and that is saving for their retirement.

And so I just have a couple of questions that I think, hopefully—I had another committee hearing—have not been overly discussed here, which involve timing.

When you look at the problem that we have, and let us look forward—for either of the gentlemen who are testifying—what is our window for a solution? What is our time envelope for a solution to this problem? How much worse can it get if we wait beyond the year that this committee has to try to resolve this problem?

And we will start with you, Mr. Goldman.

Mr. GOLDMAN. Timing is of the utmost importance. And the longer you wait, the more that you think of it as plans going off the side of the cliff. The closer you get to that side, the less choices you have of slamming on the brakes or making a turn. So the longer you wait—some of these plans are on the precipice right now, others are farther up the hill, so one issue is, the longer you wait, the more plans will go bad.

Senator HEITKAMP. Yes. If I can just, I mean, going with your analogy, how close to the cliff are we right now?

Mr. GOLDMAN. Well, the PBGC's projection was 2025 before they will run short of funds.

Senator HEITKAMP. Do you agree with that?

Mr. GOLDMAN. Yes.

Senator HEITKAMP. Okay. So that would be a catastrophic cliff event, 2025.

Mr. GOLDMAN. It would give you some marker.

Senator HEITKAMP. And so some of the options that we may have had 5 years ago, 10 years ago, are no longer available to us, is that correct?

Mr. GOLDMAN. Right, or at least some of the plans will not be able to be helped by those solutions.

Senator HEITKAMP. Well, Mr. Barthold, do you disagree with any of that?

Mr. BARTHOLD. Senator, my colleagues and I have not undertaken an independent analysis of the PBGC, so I really should not comment.

Senator HEITKAMP. Have not taken——

Mr. BARTHOLD. We have not undertaken an independent analysis of the PBGC.

Senator HEITKAMP. Economic analysis.

Mr. BARTHOLD. Correct.

Senator HEITKAMP. Okay. When you look at additional tools and you look at some of the plans—have either one of you had an opportunity to look at some of the plans, even the 2014 plan, and analyze those? Obviously, the 2014 plan did not result in approval of the Central States recommendation. But have you had a chance to look at various methods and plans that have been considered and evaluated? And do you have a preference for any of those?

Mr. Goldman?

Mr. GOLDMAN. And can you clarify that?

Senator HEITKAMP. Have you looked at the Butch Lewis bill that was introduced last year?

Mr. GOLDMAN. Yes. I am going to keep my comments on kind of what led up to it at this point, if that is okay.

Senator HEITKAMP. Okay, that is fine.

Mr. Barthold?

Mr. BARTHOLD. Senator, the Joint Committee staff does not make policy recommendations to the Congress. We work with the members on their policy recommendations.

Senator HEITKAMP. But you do evaluate proposals. I am not asking for a recommendation. I am asking because we need to have a range of tools in our toolbox. Let us put it this way. Are there tools that have been considered by the Joint Committee that we should be considering right now?

Mr. BARTHOLD. Well, things that lead to underfunding are, what are the level of benefits that are promised and what are the funding requirements? What are investment returns? What risks are we willing to accept, both in terms of investment plan and risks that might be borne by the residual guarantor of the Pension Benefit Guaranty Corporation—and additional funding from the outside were we just to supplement the assets of the PBGC, for example? So those are all possible policy tools that members may want to consider.

Senator HEITKAMP. Yes, I think—if can just comment quickly—I think when we look at this, I think one of the questions is, this is not something that can happen independent of intervention from the Congress, and I think that seems clear in all the evaluation. And so I thank you for your answers.

Co-Chairman HATCH. Senator Portman?

Senator PORTMAN. Thank you, Mr. Chairman.

And thank you both for your in-depth analysis today. The information that you are able to provide us is critical to figuring this thing out. And it is complicated, and there are different rules for multiemployers, as we have talked about today.

I think there is a consensus around the table, I hope, that the status quo is not acceptable. And that was your first summary comment, Mr. Goldman.

I think also, there is a deep interest in figuring out what we can do going forward to not just provide some solvency for Central States' plan and a PBGC that otherwise could go insolvent as soon as 2025, but also to put rules in place going forward that avoid some of the problems that have occurred, and one is withdrawal liability. And you talked about that a little bit, Mr. Goldman. I think it was your third point. You said the status quo is not acceptable, though many plans remain healthy. And you talked about withdrawal liability. And your point was that it keeps employers from being able to effectively help solve the problem, right?

Mr. GOLDMAN. Yes.

Senator PORTMAN. The key question I think we need to spend a lot of time on is figuring out the extent to which this insolvency is going to drive more employers into bankruptcy and create more issues. And one of the issues that concerns me is that, for the roughly 200 employers in Ohio in Central States, they would be reducing contributions to other multiemployer plans too, right, creating a contagion effect, as you all call it.

Mr. GOLDMAN. It could happen.

Senator PORTMAN. Which threatens to compound the entire multiemployer system. And there are many ways this could happen under current law, as is evident from reading your report: the withdrawal liability issue and the possibility of a mass withdrawal once Central States becomes insolvent.

On page 46 of the Joint Committee report that we got, you noted, Mr. Barthold, that the amount of an employer's withdrawal liability is in theory determined by the plan sponsor and generally based on the employer's portion of the plan's unfunded vested benefits. However, it is my understanding that the amount of withdrawal liability that employers actually pay is calculated based on their previous contributions to the plan and is payable with interest in annual installments and that those can last up to a maximum of 20 years. It can also be paid in a lump sum based on the net-present value of that 20 years or it can be a negotiated solution between the plan sponsor and the employer for a different amount.

Can either of you comment on how often employers pay the full withdrawal liability, pay it off within the 20-year period versus having some of the withdrawal liability forgiven at year 20? Do you know the answer to that?

Mr. BARTHOLD. Senator Portman, I do not know the answer.

Mr. GOLDMAN. I think it is not uncommon for employers to not pay that full liability. There is a mechanism that has a 20-year payment cap, and after you have paid those 20 years, you are done. It does not necessarily always align with the total amount that you should have paid, so that is another kind of leakage from the process. And sometimes there is a negotiation up-front and a lump-sum settlement that is often well below the total value of that withdrawal liability, mostly dependent on the ability of the withdrawing employer to be able to pay. So it is better to get something than nothing.

Senator PORTMAN. Yes. So it is not uncommon, you are saying, at year 20 to have the withdrawal liability forgiven, and in fact it is leakage; the money never comes back in.

How would the employer withdrawal burden change in the event of a mass withdrawal once a plan becomes insolvent?

Either one of you.

Mr. GOLDMAN. In the mass withdrawal, then, let us see, I am blanking out on how that works. Let me see.

I will have to get back to you on that one.

Mr. BARTHOLD. Yes, I think when there is a mass withdrawal, there is no 20-year cap on the payment.

Mr. GOLDMAN. Right. That is right. There is no 20-year cap.

Mr. BARTHOLD. That is the answer.

Mr. GOLDMAN. And everybody has to pay up at that point.

Senator PORTMAN. Yes, which is very hard to imagine, right?

Mr. GOLDMAN. Right.

Senator PORTMAN. So, I mean, look, we have lots of issues here, but one is, you know, what is the current law with regard to withdrawal liability doing to make these plans even riskier and to take away some of the possibility of us solving this problem?

Another question that I am not going to have time to ask but I would like to get an answer for in writing if I could, is on the rate of return. You know, what do we assume the rate of return is? Which is really the discount rate. And I think in multiemployer plans, it is about 7 to 8 percent. And how often has that been true?

In other words, is part of our problem here just that we have estimated that there be a much higher return on investment than there actually has been?

Mr. GOLDMAN. Yes. And by the way, on the cap, you are right: the cap goes away and the payment is in perpetuity, in theory.

Senator PORTMAN. Yes.

Mr. GOLDMAN. On the interest rate, one thing to keep in mind is, this is very long-term; pension plans have a long timeline, a long investment horizon. So you are funding for people when they join the plan in their 20s and projecting out when they are actually going to get their last payment at death.

So the long-term rate reflects long-term expectations and also reflects the investment mix of a plan. So it is unique to a plan, and each plan has to go through a process of assuring that the rate that they select is defensible and appropriate.

Co-Chairman HATCH. Representative Norcross?

Senator PORTMAN. If you could give me some comments in writing on how many times the 7 or 8 percent has been achieved, that would be great. Thanks.

Thanks, Mr. Chairman.

Co-Chairman HATCH. Representative Norcross—is he here?

Representative NORCROSS. Thank you, Mr. Chairman and others, for coming here today.

The history and structure of multiemployer plans in 15 minutes—it is almost an impossible task, yet we are asking to understand not only the history, the structure, but the problems. And so I want to move forward rather quickly.

The difference in this and other plans is you have a joint board that is appointed by either the companies or their employees. And the one thing that struck me—and something that we know—is the funds that are accumulated in that joint plan are for the exclusive use of the employees—the exclusive use—which means it is the pensioners' money. Any use other than that we see as a problem.

But let us go back a little bit further and start talking about the very function of—how is it determined what the pension numbers are going to be for an individual? Is it done on a yearly basis? Every 10 years? How are those assumptions made from day one for a pensioner?

Mr. Goldman?

Mr. GOLDMAN. So you have, let us say, 1,000 people in your pension plan, right?

Representative NORCROSS. Right.

Mr. GOLDMAN. So the way the model works is, we actually take each of those people—we know how old they are, if it is a pay-related thing—and you make assumptions probably of turnover, of early retirement, and so forth. So all those assumptions go into determining——

Representative NORCROSS. That is the human side.

Mr. GOLDMAN. And there is value for each person, but it rolls up to the present value of the liability for the whole plan.

Representative NORCROSS. But the point is, who makes the determination, okay, you are going to get one credit year, two credit years? Who actually makes the determination? They do it on a yearly basis as trustees, do they not?

Mr. GOLDMAN. Yes, an annual valuation.

Representative NORCROSS. So on a yearly basis, they are going to understand, taking all those factors in, and they are going to throw a dart and hit a point.

Mr. GOLDMAN. And the beauty of it is that you do not have to be right, because every year you are redoing it and we have what we call our experience gains and losses. So we thought this was going to happen, instead that happened, and we are able to quantify that.

Representative NORCROSS. Exactly the point. So you should make those adjustments year by year.

Mr. GOLDMAN. Yes.

Representative NORCROSS. So if you make a rosy assumption, you end up paying for it later on if you do not make those assumptions.

Mr. GOLDMAN. That is correct.

Representative NORCROSS. Which takes me into the question about bankruptcy which, to a large degree, is the "last man standing"—Chapter 7, Chapter 11. When an employer goes bankrupt, Chapter 7, and has no appreciable assets to distribute, what happens to its unfunded liability?

Mr. GOLDMAN. It stays in the plan, and the remaining employers——

Representative NORCROSS. It gets distributed to those healthy employers that are left.

Mr. GOLDMAN. Distributed to the healthy employers, correct.

Representative NORCROSS. Okay. If he wants to reorganize, where in the bankruptcy position does the employer's obligation to that plan lie?

Mr. GOLDMAN. I am not sure of the answer to that; I will have to get back to you.

Representative NORCROSS. Low—because that is part of the problem. They end up reorganizing, shedding this massive liability, and coming back healthy, which is part of the problem.

So when a plan goes insolvent and there is a difference between when we think about the end of the line, insolvent versus terminating of the plan, if you terminate it, everyone left there has to pay for that obligation. Correct?

Mr. GOLDMAN. Correct.

Representative NORCROSS. If it goes insolvent, what happens to the employers that are still left in that plan?

Mr. GOLDMAN. The employers left in that plan continue to make their contributions. The PBGC—this is probably important too—the program for multiemployer plans works very differently than the single employer. PBGC essentially makes a loan to the plan for financial assistance to——

Representative NORCROSS. The trustees still operate it——

Mr. GOLDMAN. Trustees still operate it, right.

Representative NORCROSS. They get the money from PBGC and continue to pay. The maximum amount, no matter how much a pensioner might be receiving—$20,000, $40,000, $70,000—the most they can ever get is $12,870. Is that correct?

Mr. GOLDMAN. That is correct.

Representative NORCROSS. So if you have a $70,000 pension and it goes insolvent, the most you are ever going to get is $12,870. And then, if a large one goes under, within a year they might go down to zero because PBGC goes under.

Mr. GOLDMAN. Right, exactly.

Representative NORCROSS. I think that is the most important thing that we are talking about today: the costs of doing nothing. Forget everything else. If we do not create this loan program to smooth out the numbers, we are talking about, within 2 years of that plan going under, those pensioners, those millions whom you are talking about, are going to get zero and in fact will be worse off because that will contribute to other plans going under, will it not?

Mr. GOLDMAN. Yes, it could.

Representative NORCROSS. I yield back the balance of my time.

Co-Chairman HATCH. Our next one is Representative Schweikert.

Representative SCHWEIKERT. Thank you, Mr. Chairman.

Can we play—let us play a speed round, just to help me sort of get my head around a number of things.

Mr. Goldman, give me, quickly, what are the attributional differences between a plan we say is in the green and in the red? So if I lay them side to side, what do I see is different?

Mr. GOLDMAN. The red one is apt to be insolvent.

Representative SCHWEIKERT. But what did they do? Did they make different baseline financial decisions, yield decisions, NPV?

Mr. GOLDMAN. Well, once they become red, they have more options. They need to come up with an improvement plan, right? So they really exhaust every possible avenue to get out of being red. You can increase contributions. You can reduce benefits, to a certain extent.

Representative SCHWEIKERT. Well, that is what they can do. I am sort of trying to understand why, when you say there are 1,400 plans but only a couple hundred that are truly in the red zone, okay, what are some of the green plans doing that the red zones were not doing?

Mr. GOLDMAN. The main difference is this industry decline.

Representative SCHWEIKERT. Okay.

Mr. GOLDMAN. The decline of the active base versus the retiree base.

Representative SCHWEIKERT. All right.

Mr. GOLDMAN. A lot of the green plans survived all the economic stress and did the exact same things; they did not do anything different.

Representative SCHWEIKERT. In that same category, should I be worried that a number of the green plans, if I actually used a discount rate or net-present value that personally I would be more comfortable with, all of a sudden, by my math, they start to look a lot closer to the red plans?

Mr. GOLDMAN. Yes.

Representative SCHWEIKERT. Okay. So we need to understand that it is more than just the ones that are in the red. We have a number that we are calling green, that if we were to all agree that the benchmark is going to be high-quality corporate bonds, and that is our net-present value calculation, a number of those that today we are calling green would not look so green.

Mr. GOLDMAN. Yes.

Representative SCHWEIKERT. Okay. That is a real concern that we need to understand. A lot of them we are saying are healthy may not be nearly as healthy. And we also probably need to set a standard of what that net-present-value dollar is. Because the fact of the matter is, right now, the equal number of employer representatives and union representatives act functionally as an investment board.

Mr. GOLDMAN. Yes. Keep in mind, though, that however you decide to measure that liability, whether the plan is insolvent or not depends on whether there are enough assets to pay all the benefits back.

Representative SCHWEIKERT. Yes, and then your population statistics.

Mr. GOLDMAN. And the other point to keep in mind is, a lot of these green plans have gone through a couple of hardships themselves. So if we were to see another shock to the market, a lot of the green plans may end up in the red zone as well.

Representative SCHWEIKERT. Yes; okay.

Mr. Barthold, so in a multiemployer plan, I have my union representatives, my business representatives. Is it fair for me to think of them sort of as an investment board?

Mr. BARTHOLD. They select the managers and they oversee, like the trustees.

Representative SCHWEIKERT. Okay. And as part of that negotiation, do they also have an option of saying, hey, here is what we are saying our NPV is or here is what we think we are going to——

Mr. BARTHOLD. It is supposed to be under reasonable actuarial assumptions. So the trustees should be blessing the reasonableness.

Representative SCHWEIKERT. Do they carry any personal fiduciary liability that, like the rest of us, if we ever sat on a pension or investment board for our charity or for our school——

Mr. BARTHOLD. The board is a fiduciary.

Representative SCHWEIKERT. Okay, so do they carry fiduciary insurance?

Mr. BARTHOLD. I would imagine they might, but I do not know.

Representative SCHWEIKERT. Okay. That would be fascinating to know.

Mr. GOLDMAN. Yes, they do.

Representative SCHWEIKERT. So the investment board, Mr. Goldman—if I came to you and said, right now I would love a good population census—and these sometimes are very uncomfortable to talk about, but it turns out workers from certain professions often have variance in longevity.

Mr. GOLDMAN. Correct.

Representative SCHWEIKERT. And so I have been curious on the elegance and the quality of the calculations of what our actual liabilities are. And are we seeing that this particular fund had more individuals that were from a profession that actually has different lifespans? And is that being properly calculated in as we are actually starting to work out our math?

Mr. GOLDMAN. Yes. Each assumption has to be reasonable. And with the larger plans, there is usually enough data to do experience studies.

Representative SCHWEIKERT. I am actually not asking for reasonable, I am asking for population census data that you would put in as an actuary. Because, you know, if I had only 1,000 or 2,000 or 10,000—I mean, you are going to have really very good, down-to-the-individual population data.

Mr. GOLDMAN. A lot of effort is made to get it correct. At the same time, it is a large population, so there are blue-collar tables, for example, in mortality that reflect certain workforces. And the actuary makes sure that the mortality that is used reflects that experience.

Representative SCHWEIKERT. At some point, for some of those who are interested in that and staff, for some of those, we think there may be a number of inputs that may not have been discussed here completely, and some of that is also going to be needed for us to get some calculations.

And I am already over time. Thank you for your patience, Mr. Chairman.

Co-Chairman HATCH. Senator Smith?

Senator SMITH. Thank you very much, Mr. Chairman.

And thank you very much for this testimony. This is a very complicated issue, and I appreciate the questions that are being asked today to really try to understand this.

And actually, many of my questions have been touched on, so let me just see if I also can make sure I am understanding this.

So the reason we have this problem, it sounds to me, is complicated, right? We have industry decline and economic stress as one issue. Another is just sort of the reality of demographic changes and more people leaving the pension, not enough people paying for the people who are still there. Right?

And then we have the impact of the 2007, 2008 market crash. And then we also have this weird sort of the tax incentive issue. Can you just explain that to me a little bit, either one of you?

Mr. GOLDMAN. Yes. So at the time when things were great and the markets performed beautifully and the plan assets grew to what we call a surplus, there were actually more assets than you needed, and your minimum contribution might have been zero—the government's concern about making sure you put in at least enough to pay the benefits but not too much to take too much of a tax deduction.

So the tax-deductible limits were getting in the way. And the response to that was, well, let us increase benefits to use up the surplus so we do not have excess taxes.

Senator SMITH. So that was to make sure that companies were not taking too big of a tax credit——

Mr. GOLDMAN. Exactly.

Senator SMITH [continuing]. For the money that they were paying into the pensions. But the result was that then benefits got increased at an unsustainable rate, just based on number, right?

Mr. GOLDMAN. Well, they were sustainable at the time.

Senator SMITH. Right, they were sustainable at the time.

Mr. GOLDMAN. But then the future events put that at risk.

Senator SMITH. But not them, right?

Mr. GOLDMAN. Correct.

Senator SMITH. But there has also been this interesting conversation about sort of assumptions that were made, actuarial assumptions about rate of return. Is that sort of another issue or problem here? Or is that not the right way of characterizing that?

Mr. GOLDMAN. I think your bigger issues are the points that you raised.

Senator SMITH. Okay. But there is nothing in here about—it is not as if there was some sort of mismanagement or bad acting.

Mr. GOLDMAN. No, not at all.

Senator SMITH. Right. And then also at the end, the question is, what do we do? And not that this is simple. And you say basically at the end—and I appreciated the simplicity of this—we know either benefits can be cut or reduced or contributions to the plans have to go up, or you can assume more risk in the system, which basically is kind of like taking the "wish and a prayer" approach. Right?

Mr. GOLDMAN. Yes.

Senator SMITH. And I have a couple of minutes left, but you also say there are obviously pros and cons to each of these approaches. And I do not mean to ask for your advice so much. Could you just describe for us a few of the pros and cons that you see for each one of these approaches?

Mr. GOLDMAN. Well, let us start with the benefit cuts. That is the easiest. The con of that is that you are impacting people who thought they had a pension and now it is less and puts them in a difficult position.

Senator SMITH. And how much, roughly? Is there an average dollar amount for the pension that we are talking about? Or what is the range? I am not clear on that.

Mr. GOLDMAN. It is all over the map. It could be $10,000 a year to $60,000, $70,000 a year.

Senator SMITH. Depending on how much they put in.

Mr. GOLDMAN. Depending on the industry and how long the person worked.

Senator SMITH. Okay. All right. Continue.

Mr. GOLDMAN. And then on the issue of more contributions, the second one, again, the pro is, it puts more money into these plans, which is needed. The con is, we have already stretched the participating employers to the limit in many cases, so asking them to contribute more brings the employers down or pushes them out of the system.

And then the sharing of risk is a way to say, all right, we all take risks every day, every time we walk out of our front door. But how much risk? It is a tradeoff, it is a balance of how much risk you are willing to take in order to solve the problem. And the loans are a form of that, where somebody is putting an influx of cash into the system. That is a good thing, and if these plans have more money, it gives them an opportunity to pay benefits for a longer time and work their way out of the process.

Again, it ties back to the industry and what is going to happen on those other factors that you mentioned.

Senator SMITH. Right. One of the things that I think I really struggle with on the question of reducing benefits is that it is sort of the problem we have sometimes in health care. You reduce the amount of money that you are paying, but you do not reduce the need. So somehow the need has to be paid for in another way.

Mr. GOLDMAN. Right. And that is where you get into some of the social insurance systems and so forth. Somebody has to pick that up somewhere along the way or people reduce their standard of living in retirement.

Senator SMITH. Right. Okay, thank you. I appreciate it.

Co-Chairman HATCH. Representative Dingell?

Representative DINGELL. Thank you, Mr. Chairman.

Like most of my colleagues, many of my questions have been answered. But I want to try to fill in under them.

My district is one of those districts—I have the largest number of members of the Central pension fund in the country, and I see them every single weekend. And I have had grown men just come to my front door and cry in my arms. Women too, but a lot of them are men.

But I have small businesses that are threatened if these pension systems go down. And you have talked about what the impact is going to be, so this is really one of the most serious issues we have. We have to work together. This has to be nonpartisan, and we have to work together.

I want to follow up on my colleague's question about the impact of the failure of a multiemployer plan on a union. It is my understanding—and please clarify if I am wrong—that unions are comprised of their members.

So, Mr. Goldman, do union members negotiate smaller current wages in order to get this later benefit?

Mr. GOLDMAN. That is absolutely how they would look at it, sitting at the table. You have a choice between current compensation, health care, retirement; you agree on something, and you think you are going to get a payback from that at some point.

Representative DINGELL. So now they are losing that.

Mr. Barthold, would you classify that as deferred compensation?

Mr. BARTHOLD. Pension benefits are a form of deferred compensation, yes, ma'am.

Representative DINGELL. So I am going to ask both of you, do a union and its participants face reduced benefits from the PBGC at this point of insolvency?

Mr. GOLDMAN. Can you clarify? Do they face reduced benefits once the plan becomes insolvent——

Representative DINGELL. Right.

Mr. GOLDMAN. Once the plan becomes insolvent, then the PBGC takes over at the lower guaranteed limits. So they would lose some of their benefits at that point.

Representative DINGELL. Mr. Barthold, did you want to——

Mr. BARTHOLD. That is correct.

Representative DINGELL. So let me, Mr. Goldman, go to another point, although I want to follow up on Senator Smith's questions, because I was going to ask those questions too.

A lot of people want to say that these funds were mismanaged. Can we really be clear that that is not what we are dealing with, that we are dealing with all of the other factors and this is not mismanagement, especially as seen by those who are supposed to be receiving these benefits?

Mr. GOLDMAN. I mean, I think I cannot speak for all the plans, but from my perspective, the issues you cited are the ones that are responsible for this.

Representative DINGELL. I think that that is really—you know, we have talked about some of the economic impacts and the reasons, but also, I mean, especially when you talk about the single-employer pensions, they were underfunded quite frankly. How much does underfunding of these funds contribute to this? And what was the cause of that underfunding?

Mr. GOLDMAN. Well, the underfunding is an outcome of all these issues, and again, not enough money coming in relative to the benefits that are getting paid.

Representative DINGELL. Right.

Mr. GOLDMAN. I also want to add, on your prior question, just to clarify from an actuarial profession standpoint, we have qualifications and standards that govern our profession, and each actuary has to sign off and verify that the assumptions they picked were reasonable and appropriate for the purpose for which the calculations were made.

Representative DINGELL. That does get into the other questions about fiduciary responsibilities and who assumes that ultimate liability.

I am going to ask one—I only have about a minute left, so I will go to another question.

Mr. Goldman, in your testimony, you state that some plans may be too far down the road to utilize the MPRA. Could you elaborate on this?

Mr. GOLDMAN. Well, Central States is a good example where, had action been taken earlier, there would have been more options, and other things could have been done. But as the amount of assets that remain in the plan relative to the benefits that are about to be paid gets smaller and smaller, then the solution gets harder and harder.

Representative DINGELL. Mr. Chairman, I do not have enough time to ask another question, so I will follow my colleagues.

Co-Chairman HATCH. Thank you so much.

Senator Manchin?

Senator MANCHIN. Thank you. Thank you, Mr. Chairman.

Thank you all.

Again, a lot of good questions have been asked here. I bring a little different perspective. I come from the coal fields, UMWA pension plan—you know what we are doing. We would be the first major pension plan to go defunct by 2022. If that goes down, then it starts tumbling—PBGC, everything starts happening.

And you have been talking about no fault of their own, this and that. Where is the fault? Is the fault in bankruptcies? What has caused this? I know we have had downturns, 2001, 2008 market crashes, but if it is no fault of the men and women who work—they take it out of their pay, they pay for their benefits, the company contributes and matches—at the end of the day bankruptcy laws happen and they walk away with nothing. The financial institutions get in front of the human being, and there is nothing left for anybody.

Why? This is not going to change anything. And we are going to fix something maybe for a short period of time, but the pension plans that are coming after, we are going to be back in the same hole. We need answers and help from you all, the experts, Mr. Goldman. How do we prevent this from ever happening again? How do we fix the wrong that we have? How do we prevent it from happening?

To me, bankruptcy laws in America are the absolute atrocities of what is going on. Do you agree or disagree?

Mr. GOLDMAN. I will leave the fault question to the committee.

Senator MANCHIN. Well, do you agree that it is a problem? Just tell me the facts, sir; do not be politically correct. We have enough people around here trying to do that. I need answers. I need help here. We need people with your expertise to help fix these laws that have caused the problems we have.

I do not think another miner, another worker in any type of a factory, or any pension person should be faced with, hey, everybody else got something, I got nothing. Where did my money go? I mean, they have all worked for it. That is what we are dealing with. And how do we subvert that?

So I know everybody has asked you some good questions. There have been some good contributions, but I have a serious situation. I have 63,000 miners in West Virginia, a pension they are depending on. The average pension in West Virginia for a miner—the average—is $595. Most of that is for widows; their husbands are gone. You take any amount of that away from them, and they are done; they cannot make it.

Now, I know there are some big pensions, and God bless everybody. I am dealing with necessities now. I need your help.

Mr. GOLDMAN. I am happy to provide it.

Senator MANCHIN. So could you help us change the bankruptcy laws so the human being——

Mr. GOLDMAN. That would be a "no."

Senator MANCHIN. Do you want to comment? Do you think the human being should get the same type of consideration that a financial institution does during a bankruptcy hearing?

Mr. GOLDMAN. I am not going to answer that.

Senator MANCHIN. But you would if it was you.

Mr. GOLDMAN. I will focus on explaining the reasons why we got here.

Senator MANCHIN. Well, we are not going to get out of this unless you all have enough guts to start speaking out. I have to be honest with you. Unless you all who have the knowledge to do something are willing to speak up and help us, we are not getting out of this mess.

Mr. GOLDMAN. I promise to contribute on the future sessions.

Senator MANCHIN. Well, let me go into some other things; maybe I can get an answer from you. Let me get off the bankruptcy; I know you are not going down that path.

What happens to the insolvency at 2022? When does PBGC, when do they go into problems, the way it is right now? You have evaluated that, I am sure.

Mr. GOLDMAN. Twenty twenty-five is what the PBGC has projected to be——

Senator MANCHIN. That is because of the——

Mr. GOLDMAN [continuing]. The likely date.

Senator MANCHIN. Is that the Central States pensions?

Mr. GOLDMAN. That is even independent of Central States.

Senator MANCHIN. That is if nothing changes right now.

Mr. GOLDMAN. Central States is, how big is the problem, not necessarily, when is the problem?

Senator MANCHIN. So from the miners to the Central States, this thing is on a doomsday course no matter what.

Mr. GOLDMAN. Correct.

Senator MANCHIN. That is pretty daunting. Do you have a recommendation of what we could do for the miners' pension to prevent this domino effect by 2022?

Mr. GOLDMAN. Not at this time. I think that is the challenge that is ahead of us.

Senator MANCHIN. Yes, year 2025, there will be nothing left by the time they get done with us—2022, we are all gone. We are looking—I mean, we really are. I think this is a good committee, wants to find answers. We can do all the history that you want. We need to start getting to the crux of this thing, because this thing is going to come to a head very quickly.

And I have people right now, they do not know what to do. I mean, they are in limbo. And we have to figure a way to fix it. And we have looked at this loan program.

What are your thoughts on the loan? You know the bill that we have in front of us. You have seen it, right?

Mr. GOLDMAN. Yes.

Senator MANCHIN. Do you support that or not? Or would you modify it, or do you have any contribution to that bill that would make it better?

Mr. GOLDMAN. Not at this time, no.

Senator MANCHIN. So you would recommend that the government should loan us the money that it takes.

Mr. GOLDMAN. I do not have a recommendation.

Senator MANCHIN. Does anybody?

Mr. Barthold, do you want to say something?

Mr. BARTHOLD. No, Senator. [Laughter.]

Senator MANCHIN. What the hell are we having this meeting for then? We are not giving up, but you guys have to help us.

Mr. GOLDMAN. We are here to help. Today was about context and background. We have to crawl before we walk.

Senator MANCHIN. I am done.

Co-Chairman HATCH. Okay.

Co-Chairman BROWN. Mr. Chairman, I have gotten a request from a number of people on our side about a second round.

Co-Chairman HATCH. I am not going to give you a second round.

Co-Chairman BROWN. I am co-chair: I think we should. I am willing to stay, Mr. Chairman. And we are equally co-chairs, and I have a couple more questions to tie up loose ends.

Co-Chairman HATCH. Well, I am not going to foreclose questions, but I am not going to go through a second round.

Co-Chairman BROWN. Okay. Well, however we do it.

Co-Chairman HATCH. If a few of you have some extra questions——

Co-Chairman BROWN. Okay, I have a couple of questions——

Co-Chairman HATCH [continuing]. You can stay here and ask them.

Co-Chairman BROWN [continuing]. And I know Representative Norcross does.

Co-Chairman HATCH. Okay.

Co-Chairman BROWN. All right. Thank you, Mr. Chairman.

Co-Chairman HATCH. Okay. Well then, let us turn to you.

Co-Chairman BROWN. Yes, let us tie up a couple of loose ends.

And, Mr. Barthold, who set the standard for the lower PBGC premiums for the multiemployer program?

Mr. BARTHOLD. Congress did, sir.

Co-Chairman BROWN. Congress did? Okay, that is what I thought.

Mr. Goldman, a handful of questions to you—and it will not nearly take 5 minutes, Mr. Chairman.

We talked about rate of return. You are an actuary, correct?

Mr. GOLDMAN. Correct.

Co-Chairman BROWN. Congress does not prescribe rates of return is my understanding. Do you think Congress should prescribe rates of return?

Mr. GOLDMAN. The single-employer plan does prescribe rates of return. But there are significant differences between the single and multiemployer plans.

Co-Chairman BROWN. And we do not, and you are not saying we should prescribe them for the multiemployer plans.

Mr. GOLDMAN. I am not.

Co-Chairman BROWN. Okay. Briefly describe how an actuary makes their assumptions on rates of return.

Mr. GOLDMAN. In the case of multiemployer plans, it is really a function of how the assets are invested and then looking at capital market projections, you know, 10-, 20-, 30-year projections. Usually with projections, it is hard to find more than 10 or 20 years. And then based on the mix of your portfolio, you align it back to the expected returns on each of those.

Usually, they will look at a wide array of projections, because there are surveys out there that will show a fairly significant range of expected returns for each asset class.

Co-Chairman BROWN. And you actuaries, you represent—you as an actuary yourself, you are governed by professional standards, I assume; correct?

Mr. GOLDMAN. Correct.

Co-Chairman BROWN. And if you violate those standards, there is real punishment, I assume.

Mr. GOLDMAN. That is correct. There is a standards board.

Co-Chairman BROWN. Could you tell us, roughly, your view? Do you know what the average, say, since ERISA and multiemployer plans, what is the average, roughly, in these 40, 42, 43 years, what is the average annualized return of the S&P 500?

Mr. GOLDMAN. I do not know, but probably 7 to 8 percent is not a bad——

Co-Chairman BROWN. Well, my understanding is, it is more like 10 or 11 or even 12 percent. Would that be in the range, do you think?

Mr. GOLDMAN. That would be.

Co-Chairman BROWN. That would sound like it could be right, 10 or 11, 12?

Mr. GOLDMAN. Right, right.

Co-Chairman BROWN. So it would not be unreasonable, that being the case, for an actuary to assume a 7- or 8-percent return on investment over those 4 decades on a long-term investment. Correct?

Mr. GOLDMAN. Right, but it is more than looking at history. I think we are in an interesting economic time with very low rates, so you may look at history for patterns and parts of the process, but it is much more complicated than that to take into account what you think is going to happen, what has happened in the past, and how your assets are managed.

Co-Chairman BROWN. When the return is significantly more than assuming a 7- or 8-percent return, it is a pretty clear signal, correct?

Mr. GOLDMAN. Correct.

Co-Chairman BROWN. Okay. Thank you.

Mr. GOLDMAN. And a portfolio is made up of stocks and bonds. And now we are seeing more alternative investments as well into the portfolio.

Co-Chairman BROWN. Thank you.

Co-Chairman HATCH. Any more last-minute questions?

Co-Chairman BROWN. Mr. Scott?

Representative SCOTT. Thank you, Mr. Chairman.

Mr. Goldman, you are an actuary, but staff showed me what the definition of insolvency is, and you are right, it is cashflow. And so, if you have no assets in the trust fund but you have enough money coming in to pay the benefits, you call that solvent?

Mr. GOLDMAN. Correct.

Representative SCOTT. That does not shock you?

Mr. GOLDMAN. I had not thought about it before, but now that you raise it——

Representative SCOTT. Zero assets, but you have enough coming in so you can pay the bills.

Mr. GOLDMAN. It is all about——

Representative SCOTT. And then you wonder why we are in the trouble we are in when you call that solvent. [Laughter.]

Can you quantify the contagion problem?

Mr. GOLDMAN. I cannot; I have not tried to quantify that, no.

Representative SCOTT. Mr. Barthold, do you want to try to make a comment about the contagion problem?

Mr. BARTHOLD. As I noted before, we have not, my colleagues have not, undertaken an independent analysis, anything different from that done by the Pension Benefit Guaranty Corporation.

Representative SCOTT. Thank you, Mr. Chairman.

Representative NORCROSS. Well, hopefully we are going to be addressing some of the same issues, but let us talk about PBGC premiums. Back during MPRA 2014, they more than doubled the premium to $26 per, so that was a hell of a spike for those who are paying it.

But let us talk about some of the causes, because we have heard a lot of them. You had the decline of the industry or of membership. Some of the older industries, we understand that. The investment performance, the downturn, those are things that, in some way, you can predict or at least use a history of it.

Bankruptcy—bankruptcy is an issue that would be to the individual company at the individual time, whether or not they want to escape their liabilities. Some of these have the potential to take down some of the biggest employers in our country. They have to make a decision.

“Last man standing”—you have to be doing the right thing, making all the right decisions. Those rosy assumptions each year that we as trustees make might have been a little bit too high, but somehow the company next to you bails out and now you are not only carrying your weight, but carrying their weight.

The assumptions—and this is something that we have to touch on—should be reasonable. I would love to say that, if I could make my mortgage payment reasonable, but that is a real problem. Two different companies, two different pension plans, two different trustees, can look at this. So the pension smoothing issue, in many ways, is like a loan program.

But let us go on and talk about the tax issue. You were allowed to increase the benefit because you did not want to go over that 110 percent over funding and jeopardize your taxes. But when things went south, there was no mechanism, not to take you down below where you originally were, but you could not even take it to where it was before you gave that. Is that correct?

Mr. GOLDMAN. That is correct.

Representative NORCROSS. So of all those issues—and we can talk about a loan program, and I think it is so important to help smooth out this issue. Because certainly, if you save the banks, you save Wall Street, this is saving people, and I think that is so important. But structurally, we have to make the changes or we just come back here. Would you agree to that and the fact that if you do not make structural changes moving forward——

Mr. GOLDMAN. I think you've got it.

Representative NORCROSS. A loan program to help smooth out the spikes that we are looking at, is it reasonable to assume that this can be done within the confines of some of the programs that have been put forward to you?

In other words, if you look at the dollars and the rate of return over the course of the program for 20, 25 years, depending on what we end up with, the costs of doing nothing would far exceed the cost of the loan program?

Mr. GOLDMAN. That is possible. I have not done any of the analysis on any of the specific loan proposals. We are actually working on an issue brief that outlines the benefits and risks of a loan approach in general, but not for any specific proposal.

Representative NORCROSS. Well, just in rough numbers, you talked about the 10 million if this were to go down, the cost of the loan program versus the cost to our society—and the human side of it far exceeds that.

And we will follow up on some additional questions at our next hearing. But I yield back, and thank you, Mr. Chairman.

Co-Chairman HATCH. Well, thank you.

These are really tough questions at a really tough time to try to figure all this out. But unless somebody has——

Co-Chairman BROWN. Mr. Schweikert has a couple of questions.

Co-Chairman HATCH. Do you have some questions?

Representative SCHWEIKERT. Do not look at me so disappointed, Mr. Chairman. [Laughter.]

Co-Chairman HATCH. I am looking at you disappointed. And I tell you——

Representative SCHWEIKERT. And I apologize to everyone in the room and the committee. This is some of the most fascinating stuff I have ever gotten to do, which probably explains why I have no friends. [Laughter.]

Mr. GOLDMAN. You could have been an actuary.

Representative SCHWEIKERT. And I will do this one quickly.

Some of the discussion from my brothers and sisters on the other side, on the loan program functioning—the mechanism there is almost the arbitrage of government loan, low interest rate, we will actually invest it in equities or something like that, and we basically pick up the arbitrage difference. And that is where the yield kicker is.

Mr. GOLDMAN. Some of the loan proposals have that as a way to get additional cash. Others use the money to immunize and either buy annuities or invest those assets in risk-free investments and align them directly with the benefits.

Representative SCHWEIKERT. Okay. But the payback on that actually becomes——

Mr. GOLDMAN. You lose. Yes, it is all about balance and the tradeoffs.

Representative SCHWEIKERT. Yes, because you lose the benefit, and then with the time value, if there is, you know, a yield back to the taxpayers——

Mr. GOLDMAN. It is how much risk you want to take.

Representative SCHWEIKERT. Yes. Okay. Actually this goes back to—we got our hands on something from PBGC. It is a couple years old. And it was their calculations of how many of our plans are actually in trouble if we used their sort of NPV. And I am sure you have seen this. You are an expert on this.

But it is disturbing. If I will do something like my corporate bond, which I seem to personally sort of like as a benchmark or, you know, 30-year treasuries plus a couple of kickers, you are starting to look at the vast majority of the plans, even those we are calling green, as being 60, under 70-percent funded. Am I being fair if I use that as my benchmark, that many of what we are calling green plans are actually also in trouble?

Mr. GOLDMAN. Yes. The difference would almost double the liability.

Representative SCHWEIKERT. Okay. That is actually a brilliant way to phrase it.

Mr. GOLDMAN. And there is actually some analysis being done now—it is not ready yet—that will show you how many participants and how many plans move based on the different assumptions and different returns in the future too.

Representative SCHWEIKERT. Thank you. I think that is really important as we are starting to put together what we are hoping is a workable solution. It is not only just dealing with those that we know to be in great stress, but those that, if we actually set up some benchmarks, we pull just by the definition of the benchmark, into the stress category.

Also, as you do that work, maybe just because I have been around a lot of this, it is also helpful for a lot of those members here to understand that there are lots of levers. There is more than just the yield; it is the population, it is how many workers, what their compensation is compared to previous retirees' compensation. It is more complex than just rate of return.

And you know, even dealing with lifespan calculations, you have many levers you have to calculate.

Mr. GOLDMAN. And one more consideration too. I think it is worth mentioning, on the single-employer plan, that does use the risk-free rates. Take a look at that system. And a lot of the plans are now frozen, employers have exited from defined benefit to defined contribution. It is arguable whether defined contribution is going to give the same retirement security, so you could almost make a case that by moving to lower rates and increasing contributions, you have pushed some employers out of the plan because they cannot afford it.

Representative SCHWEIKERT. But at the same time, I do not have millions of my brothers and sisters who are looking at retirement insecurity coming crashing down upon them. So I may lose some employers, which we do not want, but I really do not want people moving into the retirement age and realizing they have such fragility in their future payments.

Mr. Barthold, is there anything you want to say before I hit the button and make the chairman happy that I have stopped talking? [Laughter.] My chairman would probably like you to make him happy.

Mr. Chairman, I yield back.

Co-Chairman BROWN. Mr. Chairman, I ask that members submit questions for the record by 5 p.m. next Wednesday and that Mr. Barthold and Mr. Goldman answer as quickly as they can.

Co-Chairman HATCH. Well, thank you. We will agree with that.

I want to thank you all for your attendance and participation today. As we have heard today, these are really important and complex issues, and I look forward to working with each of you on both sides of the Capitol as well as both sides of the aisle.

So I ask any member who wishes to submit questions for the record to do so by close of business Thursday, April 26th.

And with that, I want to compliment all my colleagues for putting in the time on this, because this is important stuff. And I wish I had the answers, but we will see what we can do to keep this working.

And we are very appreciative of your patience down there at the table. And we hope that you will think about it and help us to find some answers to this as well, if there are any.

So with that, this hearing is adjourned.

[Whereupon, at 4:05 p.m., the hearing was concluded.]

A P P E N D I X

Additional Material Submitted for the Record

Prepared Statement of Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation

My name is Thomas A. Barthold. I am the Chief of Staff of the Joint Committee on Taxation. It is my pleasure to present to the Joint Select Committee on the Solvency of Multiemployer Pension Plans an overview of the Internal Revenue Code ("the code") provisions governing multiemployer defined benefit plans.

Most individuals covered by a pension plan are covered by single-employer plans. These plans may be defined benefits plans or defined contribution plans. The code provides rules governing employer funding of the future pension benefits provided by defined benefit plans. However, at present, approximately 10.5 million individuals are participants in one or more of approximately 1,400 multiemployer defined benefit plans. A multiemployer plan (also known as a "Taft-Hartley" plan) is a plan maintained pursuant to one or more collective bargaining agreements with two or more unrelated employers and to which the employees are required to contribute under the collective bargaining agreement(s). A multiemployer plan is not operated by the contributing employers; instead, it is governed by a board of trustees ("joint board") consisting of labor and employer representatives. In applying code and ERISA requirements, the joint board has a status similar to an employer maintaining a single-employer plan and is referred to as the "plan sponsor."

The outline that follows highlights the defined benefit code provisions governing multiemployer plans.

Overview of Multiemployer Defined Benefit Plans

TOPICS

- Qualified Retirement Plans Generally.
- Defined Benefit Plans.
  - Structures, general requirements, selected requirements (including anti-cutback rule).
- Multiemployer Plans.
  - Background, Pension Benefit Guaranty Corporation ("PBGC") program.
  - Exceptions to anti-cutback rules.
  - Funding rules (including withdrawal liability).
  - History of multiemployer plan funding issues.
- Appendix: Brief Legislative History of Significant Changes Relating to Multiemployer Plans.

EMPLOYER-SPONSORED QUALIFIED RETIREMENT PLANS

- Tax-favored treatment applies to a deferred compensation plan that meets qualification requirements under the code, as a "qualified retirement plan," of which there are two general types:
  - *Defined contribution*—benefits based on separate account for each participant (employee), with contributions, earnings, and losses allocated to each indi-

vidual participant account; participant benefits from investment gain and bears risk of investment loss.

- *Defined benefit*—benefits are under a plan formula and paid from plan assets, not from individual accounts; employer responsible for providing sufficient assets to pay benefits at retirement.

- Tax-favored treatment generally includes:
  - Pretax treatment of contributions, with current deduction for employer (both subject to limits).
  - Tax-deferred earnings for participant.
  - Income inclusion to participant at distribution (with option to rollover for certain plans)
  - Tax-exempt status for trust holding plan assets.

GENERAL REQUIREMENTS FOR QUALIFIED RETIREMENT PLANS

- Plan qualification requirements:
  - Participant and beneficiary protections (*e.g.,* age and service conditions, vesting, spousal protections) that parallel protections in Employee Retirement Income Security Act of 1974 ("ERISA").
    - ERISA is within Department of Labor ("DOL") jurisdiction.
  - Limits on benefits and contributions (code only).
  - No discrimination in favor of highly compensated employees (code only).
  - Requirements generally apply on a controlled-group basis.
- Prohibited transaction rules, *i.e.,* no self-dealing (code and ERISA).
- Limitations on employer deduction for contributions (code only).
- Rules specific to defined benefit plans, and to multiemployer plans.

DEFINED BENEFIT PLANS—IN GENERAL

- A defined benefit plan generally provides accrued benefits as an annuity commencing at normal retirement age in the amount determined under the plan's stated benefit formula (generally based on years of service and compensation of participant).
  - The accrued benefit is the portion of the participant's normal retirement benefit that has been earned as of a given time.
  - Optional forms must provide payments that are not less than actuarial equivalent of accrued benefit.
- The code and ERISA require benefits to be funded using a trust for the exclusive benefit of employees and beneficiaries.
- The employer (or employers) must fund the trust by making a minimum level of annual contributions.
  - Investment gains and losses on trust assets affect employers' funding obligations.
- Private plan benefits generally (and all multiemployer plan benefits) are insured by the PBGC, subject to guarantee limits.

GENERAL REQUIREMENTS FOR DEFINED BENEFIT PLANS

- Cannot make in-service distributions before earliest of normal retirement age, age 62, or plan termination.
- Spousal protections (applicable if present value of accrued benefit is more than $5,000).
  - For married participant, benefit must be a life annuity for employee with a survivor annuity for spouse (unless spouse consents otherwise).
  - If employee dies before benefits commence, an annuity for surviving spouse generally required.
- Limits on benefits—Benefits under a defined benefit plan are generally limited to lesser of 100 percent of high 3-year average compensation or annual dollar

amount ($220,000 for 2018), with actuarial adjustments depending on form of benefit and age of commencement.

  - However, the 100 percent of compensation limit does not apply to multiemployer plans.

- Nondiscrimination requirements—prohibit discrimination in favor of highly compensated employees.
  - Collectively bargained plans, including multiemployer plans, are generally deemed to automatically satisfy the nondiscrimination requirements.

SELECTED RULES FOR DETERMINING A PARTICIPANT'S BENEFIT IN A DEFINED BENEFIT PLAN

- *Definitely determinable benefit*—plan must specify the formula for objectively determining normal retirement benefits (*e.g.,* traditional formula or hybrid formula, such as cash balance) and actuarial factors for determining other forms of benefit.
  - Cannot be subject to plan sponsor discretion.
  - Formula may include a variable factor, such as a market index, as long as specified in the plan and determinable without plan sponsor discretion.
- *Accrual rules for benefit*—plan must specify the method used to determine a participant's accrued benefit under of three permissible methods (133⅓ percent, fractional, or 3 percent).
- *Vesting requirements*—Participant's entitlement to accrued benefit without additional service, *i.e.,* as if terminating employment, cannot be forfeited ("vested accrued benefit").
  - Traditional plan: 5-year cliff (zero vesting before 5 years, then 100-percent vesting at 5 years) or 3- to 7-year graduated vesting (20 percent per year).
  - Hybrid plan: 3-year cliff.
- *Anti-cutback requirements.*

ANTI-CUTBACK REQUIREMENTS FOR DEFINED BENEFIT PLANS

- Under the "anti-cutback" rules, plan amendments generally may not reduce benefits already earned (accrued benefits) or eliminate other forms of benefit linked to accrued benefit (*e.g.,* subsidized early retirement benefit or lump sum).
- Benefit reductions or elimination of benefit forms must be for prospective accruals only, subject to some exceptions, including for underfunded plans.
- Reductions in dollar amount of benefits allowed if resulting from application of permissible variable factors.

DEFINED BENEFIT PLAN STRUCTURES

- Three structures:
  - *Single-employer plan*—maintained solely for employees of a single employer with controlled group members treated as a single employer.
  - *Multiple-employer plan*—maintained for employees of unrelated but associated employers, such as employers in the same industry (*e.g.,* rural electric co-ops); subject to much the same funding rules as single-employer plans.
  - *Multiemployer plan* (also called "Taft-Hartley")—maintained under collectively bargaining agreements with two or more unrelated employers, generally in the same industry (*e.g.,* hotel and restaurant).

MULTIEMPLOYER PLANS—BACKGROUND

- Multiemployer plans provide benefits based on service for all participating employers and are common in industries where employees regularly work for more than one employer over the course of the year or over their careers, but they also cover employees who work for only one employer over their careers.
- A multiemployer plan is generally governed by a joint labor-management board of trustees ("joint board") with equal representation of employees and employers; however, as a legal matter, like all qualified plans, the plan (and plan as-

sets) must be administered for the exclusive benefit of the employees and beneficiaries.

- Multiemployer plans cover employees in many industries across the economy, including construction, transportation, retail food, hotel and restaurant, health care, manufacturing, and entertainment.
- Based on PBGC premium filings for 2016, there are nearly 10.5 million participants in 1,375 multiemployer plans; some very large (10,000 or more participants), some small (fewer than 250 participants), and some at all sizes in between.
- Many employers participating in multiemployer plans are small employers; many midsized and large employers also have employees covered by multiemployer plans.

MULTIEMPLOYER PROGRAM OF THE PBGC

- The PGBC, a corporation within the DOL, was created under ERISA to provide an insurance program for benefits under most defined benefit plans maintained by private employers.
  - Insures pension benefits under separate programs for single-employer and multiemployer defined benefit plans.
  - Board of directors consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce.
- The PBGC provides "financial assistance" in the form of loans to insolvent multiemployer plans (plans unable to pay basic PBGC-guaranteed benefits when due) in the amount needed for the plan to pay benefits at the guarantee level (to be repaid if the plan's funded status later improves).
  - Under the single-employer program, when an underfunded single-employer plan terminates, the PBGC steps in, takes over the plan and its assets, and pays benefits.
- In addition to providing financial assistance to an insolvent multiemployer plan, the PBGC has authority with respect to mergers and asset transfers between multiemployer plans and partitions of multiemployer plans.
- For multiemployer plans, the PBGC benefit guarantee level is the sum of (1) 100 percent of the first $11 of vested monthly benefits and (2) 75 percent of the next $33 of vested monthly benefits, multiplied by the participant's number of years of service.
  - For single-employer plans, the formula for the guarantee level is determined differently (including being based on the participant's age and payment form).
- For a multiemployer plan, the per-participant flat-rate premium for 2018 is $28.
  - For a single-employer plan, the per-participant flat-rate premium for 2018 is $74; for a plan with unfunded vested benefits, a variable rate premium of $38 per $1,000 of unfunded vested benefits also applies; a termination premium could also apply.

EXCEPTIONS TO ANTI-CUTBACK RULES FOR MULTIEMPLOYER PLANS OF CERTAIN STATUS

- Exceptions (subject to notice and other procedural requirements) apply to three categories of plan:
  - Critical status plans.
  - Insolvent status plans.
  - Critical and declining status plans.

EXCEPTIONS TO ANTI-CUTBACK RULES: DEFINITION OF CRITICAL STATUS PLAN

- *Critical status*—four separate standards. If as of the beginning of the plan year:
  - The plan's funded percentage is less than 65 percent, and the sum of (a) plan assets' market value and (b) the present value of reasonably anticipated employer and employee contributions for the current year and next 6 years (assuming that the terms of the collective bargaining agreements continue in effect) is less than (c) the present value of all benefits projected to be payable during that same period of time (plus administrative expenses);

- The plan, not taking into account any amortization extensions, either: (1) has an accumulated funding deficiency for the current year, or (2) is projected to have an accumulated funding deficiency for any of the next 3 years (4 years if the funded percentage of the plan is 65 percent or less);
- Either (1) the sum of (a) the plan's current year normal cost and (b) interest for the current year on the amount of unfunded benefit liabilities as of the last day of the preceding year, exceeds (c) the present value of the reasonably anticipated employer contributions for the current year, (2) the present value of inactive participants' vested benefits is greater than the present value of active participants' vested benefits, or (3) the plan has an accumulated funding deficiency for the current year, or is projected to have one for any of the next 4 years, not taking into account amortization extensions; or
- The sum of (a) the plan assets' market value and (b) the present value of reasonably anticipated employer contributions for the current year and each of the next 4 years (assuming that the terms of the collective bargaining agreements continue in effect) is less than (c) the present value of all benefits projected to be payable under the plan during the current year and each of the next 4 years (plus administrative expenses).

If the plan is not in critical status under one of these standards, but is projected to be in critical status in any of the next 5 years, the plan sponsor may elect to treat the plan as in critical status.

EXCEPTIONS TO ANTI-CUTBACK RULES: DEFINITIONS OF INSOLVENT AND CRITICAL AND DECLINING STATUS PLANS

- Exceptions apply to three categories of plan—(1) critical, (2) insolvent, (3) critical and declining:
  - *Insolvent status*—occurs when available resources in a plan year are not sufficient to pay plan benefits for that plan year, or when the plan sponsor of critical plan determines that the plan's available resources are not sufficient to pay benefits coming due in next plan year.
  - *Critical and declining status*—occurs when the plan otherwise meets one of the definitions of critical status and is projected to become insolvent in the current plan year or any of the next 14 plan years (19 years if the ratio of inactive plan participants to active plan participants is more than 2:1 or the plan's funded percentage is less than 80 percent).

EXCEPTIONS TO ANTI-CUTBACK RULES FOR CRITICAL STATUS PLANS

- For critical plans:
  - For participants and beneficiaries whose benefits begin after receiving the notice of the plan's critical status:
    - Payments in excess of single life annuity (plus any social security supplement, if applicable) can be eliminated.
    - Plan sponsor may make certain reductions to "adjustable benefits" that the plan sponsor deems appropriate.
      - "Adjustable benefits" include disability benefits not in pay status, early retirement benefits or retirement-type subsidies, and most benefit payment options, but not the amount of an accrued benefit payable at normal retirement age.

EXCEPTIONS TO ANTI-CUTBACK RULES FOR INSOLVENT STATUS PLANS

- For insolvent plans:
  - Benefits must be reduced to level that can be covered by plan's assets.
  - Suspension of benefit payments must apply in substantially uniform proportions to benefits of all persons in pay status (although Treasury rules may allow for equitable variations for different participant groups to reflect differences in contribution rates and other relevant factors).
  - Benefits may not be reduced below level guaranteed under PBGC's multiemployer program.
    - If plan assets are insufficient to pay benefits at the guarantee level, PBGC provides financial assistance.

EXCEPTIONS TO ANTI-CUTBACK RULES FOR CRITICAL AND DECLINING STATUS PLANS

- For *critical and declining* plans where (1) actuary certifies that benefit suspensions are projected to avoid insolvency and (2) plan sponsor determines (despite taking all reasonable measures) that plan is projected to become insolvent unless benefits are suspended, then:
  - Plan sponsor may determine the amount of benefit suspensions and how the suspensions apply to participants and beneficiaries.
    - Benefits cannot be reduced below 110 percent of the monthly PBGC guarantee level.
    - Limited reductions for those between ages 75 and 80; no reductions for those age 80 and over.
    - In the aggregate, benefit suspensions must be "reasonably estimated" to achieve—but not materially exceed—the level needed to avoid insolvency.

GENERAL FUNDING RULES FOR MULTIEMPLOYER PLANS

- Funding rules exist to ensure that plan trust maintains sufficient assets to meet its anticipated obligations to pay current and future benefits to participants and beneficiaries.
- Each plan must maintain a "funding standard account"—a notional account maintained over the entire life of the plan into which "charges" and "credits" are made each plan year.
  - "Charges" include the cost of benefits earned that year ("normal cost"), increased liabilities from any benefit increases, and losses from worse than expected investment return or actuarial experience.
  - "Credits" include contributions for that year (including withdrawal liability payments), reduced liabilities resulting from any benefit decreases, gains from better than expected investment return or actuarial experience.
- A multiemployer plan is required to use an acceptable actuarial cost method (plan's funding method) to determine the elements included in its funding standard account for a year.
  - Actuarial assumptions used in funding computations, including interest rate, must be reasonable—but no specific interest rate or mortality assumptions are prescribed by statute.
  - Value of plan assets generally are determined using an actuarial valuation method, which recognizes better or worse than expected investment experience over a period of years, thereby smoothing changes in asset values.
  - Charges and credits attributable to benefit increases or decreases and actuarial experience are also amortized (that is, recognized for funding purposes) over a specified number of years (generally 15 years).
- Annual minimum required contributions are the amount (if any) needed to balance the accumulated charges and credits to the funding standard account—calculated using an acceptable actuarial funding method.
- A "funding deficiency" results when accumulated charges to the funding standard account exceed credits, which generally triggers an excise tax on employers unless a waiver is obtained.
- A "credit balance" results when accumulated credits to the funding standard account exceed charges, which reduces the employer contributions needed to balance the funding standard account in future years.

ADDITIONAL FUNDING REQUIREMENTS FOR SIGNIFICANTLY UNDERFUNDED PLANS
(IN ENDANGERED OR CRITICAL STATUS)

- There are three categories of underfunded multiemployer plans: (1) endangered; (2) seriously endangered; and (3) critical.
  - *Endangered status* generally means the plan is not in critical status and as of the beginning of the plan year (1) the plan's funded percentage for the year is less than 80 percent or (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the next 6 years (taking into account amortization extensions).

  - *Seriously endangered status* means the plan meets both requirements of an endangered plan.
  - *A critical status* plan is defined as it is for purposes of the exceptions to anti-cutback rules.
- Endangered plans must adopt a funding improvement plan.
- Critical plans must adopt a rehabilitation plan.
- ERISA penalties or code excise taxes may apply (depending on funding status and certain other rules) to violations of applicable rules.
- An annual actuarial certification as to the plan's status is required within a certain time frame.

FUNDING IMPROVEMENT PLAN FOR ENDANGERED PLANS

- Generally, a funding improvement plan consists of actions, including options (or a range of options), to be proposed to the bargaining parties by the plan, based on reasonable anticipated experience and reasonable actuarial assumptions for the attainment of certain "applicable benchmarks" over the "funding improvement period."
  - Possible actions include contribution increases and benefit reductions, such as reducing future accrual rates and elimination of benefits not protected under the anti-cutback rules (for example, most disability and death benefits).
  - The funding improvement period is generally a 10-year period—and may end earlier if the plan is no longer in endangered status or if the plan enters critical status.
  - The funding improvement period generally cannot begin until the plan year that begins after the second anniversary of the date of adoption of the funding improvement plan. However, it could begin earlier depending on when collective bargaining agreements expire.
- For plans that are *endangered, but not seriously endangered,* by the end of the funding improvement period, the plan's funded percentage must increase by 33 percent of the difference between 100 percent and the funded percentage of the plan at the beginning of the first plan year for which the plan is in endangered status.
  - The plan also must not have an accumulated funding deficiency for the last plan year in the funding improvement period.
- For plans that are *seriously endangered,* different percentage improvements and periods may be substituted in certain circumstances, depending upon the plan's funded percentage at the beginning of the funding improvement period and certain other facts.

REHABILITATION PLAN FOR CRITICAL PLANS

- Generally, a rehabilitation plan consists of actions, including options (or a range of options), to be proposed to the bargaining parties by the plan, formulated based on reasonable anticipated experience and reasonable actuarial assumptions to enable the plan to cease to be in critical status by the end of the rehabilitation period.
  - Possible actions include reductions in plan expenditures including plan mergers and consolidations, reductions in future benefit accruals, or increases in contributions.
- The rehabilitation period is generally a 10-year period, determined in the same way as the 10-year period for funding improvement plans—and may end earlier if the plan emerges from critical status.
- Critical plans are generally required to adopt measures to emerge from critical status, but if the plan sponsor (*i.e.,* joint board) determines emergence is not possible, instead reasonable measures must be taken to emerge from critical status at a later time or to forestall insolvency.
- If a critical plan fails to make "scheduled progress" for 3 consecutive years or fails to meet the applicable requirements by the end of the rehabilitation period, then for excise tax purposes (unless the excise tax is waived), the plan is treated as having a funding deficiency equal to (1) the amount of the contributions nec-

essary to leave critical status or make scheduled progress or (2) the plan's actual funding deficiency, if any.

- Certain surcharges (additional contributions) apply to certain critical status plans, with specific rules on amounts and timing—and are generally disregarded in determining an employer's withdrawal liability.

WITHDRAWAL LIABILITY

- Under ERISA, if an employer withdraws from a multiemployer plan, the employer is generally liable to make ongoing payments to fund its share of unfunded vested benefits under the plan, often based on the employer's share of total plan contributions during a preceding period, rather than benefits of the employer's own employees.
- Withdrawal from the plan occurs for this purpose if the employer ceases operations covered by the plan or if the employer's obligation to contribute to the plan ceases or significantly declines.
- Plan sponsor must determine amount of employer's withdrawal liability and notify the employer, with a process for resolving disputes if needed.
- Withdrawal liability amount is generally paid (with interest) in installments, determined in part by reference to the amount of the employer's previous contributions.
- Payment period is limited to 20 years, even if installments during that period will not cover full liability amount.
- Other exceptions and limitations apply.

HISTORY OF MULTIEMPLOYER PLAN FUNDING ISSUES

- The amount of employer contributions are specified in the bargaining agreement (commonly based on hours worked or units of production)—while the specified contribution level generally takes into account benefits to be earned under the plan, it historically has not been explicitly tied to the amount needed to satisfy Code/ERISA funding requirements.
- If the industry has contracted (resulting in fewer active employees), the liabilities for benefits of retirees and other former employees generally have become disproportionately large compared to liabilities for benefits of current employees.
- Also, liabilities under the plan include previously earned benefits for employees of employers that no longer participate in (*i.e.,* contribute to) the plan.
    - Former participating employers may have withdrawal liability, but payments may not be sufficient to cover unfunded amount or former participating employer might no longer exist.
- Underfunding in many cases is too great to realistically cover with future investment income or ongoing contributions.

APPENDIX: BRIEF LEGISLATIVE HISTORY OF SIGNIFICANT CHANGES RELATING TO MULTIEMPLOYER PLANS

- **Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93–406, September 2, 1974.**
    - Established PBGC multiemployer insurance program and provided multiemployer funding rules.
- **Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96–364, September 26, 1980.**
    - Strengthened funding requirements, set new funding and benefit adjustment rules for financially weak plans, revised multiemployer insurance program, and established withdrawal liability.
- **Consolidated Appropriations Act of 2001, Pub. L. No. 106–554, December 21, 2000.**
    - Increased benefit guarantee for multiemployer plans.
- **Deficit Reduction Act of 2005, Pub. L. No. 109–171, February 8, 2006.**

  - Increased the flat-rate per participant premium for multiemployer defined benefit plans from $2.60 to $8.00; for 2007 plan year and later, premium indexed to rate of growth of national average wage.
- **Pension Protection Act of 2006 (PPA), Pub. L. No. 109–280, August 17, 2006.**
  - Established new funding requirements, including creation of additional funding rules for plans in endangered or critical status.
  - Also made revisions to amortization periods, changes to funding waivers, and revisions to reasonableness requirement for actuarial assumptions.
  - Enhanced reporting and disclosure requirements.
- **Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), Pub. L. No. 110–458, December 23, 2008.**
  - Made technical corrections to PPA.
  - Provided funding relief to multiemployer plans in response to economic downturn.
- **Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), Pub. L. No. 111–192, June 25, 2010.**
  - Provided funding relief in form of extended amortization periods for experience gains and losses, and also expanded the asset smoothing period where certain requirements satisfied (solvency test, additional benefit restrictions, and reporting requirements).
- **The Moving Ahead for Progress in the 21st Century Act (MAP–21), Pub. L. No. 112–141, July 6, 2012.**
  - Increased the 2013 PBGC premium for multiemployer defined benefit plans by $2 per participant; after 2013, premium to be indexed for increases in annual rate of growth in national average wage index.
- **Multiemployer Pension Reform Act of 2014 (MPRA), Pub. L. No. 113–235, December 16, 2014.**
  - Repealed the December 31, 2014 sunset of, and made permanent, the PPA multiemployer funding rules.
  - Established a new process for multiemployer pension plans in critical and declining status to propose a temporary or permanent reduction of pension benefits.
  - Provided for PBGC to facilitate mergers between two or more plans (including providing financial assistance).
  - Expanded PBGC partition rules.

Questions Submitted for the Record to Thomas A. Barthold

Question Submitted By Hon. Orrin G. Hatch

Question. Under the funding rules for multiemployer plans, actuarial assumptions used by the plan must be "reasonable." In addition, the funding rules do not specify the interest rate or mortality tables that must be used. Is this same or similar to the funding rules for single-employer plans? If not, how are the funding rules for multiemployer different?

Answer. Generally, assumptions for both single-employer plans and multiemployer plans are subject to "reasonableness standards." That is, actuarial assumptions are required to be reasonable taking into account the experience of the plan and reasonable expectations, and must, in combination, offer the plan's enrolled actuary's best estimate of anticipated experience under the plan based on information determined as of the valuation date. However, unlike multiemployer plans, for single-employer plans the Internal Revenue Code of 1986, as amended (the "code") and applicable regulations set forth prescribed interest rates and mortality tables which must be used to determine the valuation (present value) of plan assets. The code and regulations also prescribe interest rates that must be used for certain funding determinations for the plan year (called "segment rates").

Single-employer plans that are at-risk have additional required actuarial assumptions. For example, all employees who are not otherwise assumed to retire as of the valuation date but who will be eligible to elect benefits during the plan year and the next 10 plan years must be assumed to retire at the earliest retirement date under the plan but not before the end of the plan year for which the “at-risk funding target” and “at-risk normal cost” are being determined. Also, all employees must be assumed to elect the retirement benefit available under the plan at the assumed retirement age (determined as above) that would result in the highest present value of benefits.

The at-risk funding target is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year using the actuarial assumptions described above, with the addition of a loading factor which arises when the plan has been in at-risk status for at least 2 of the 4 preceding plan years. This loading factor is equal to the sum of (1) $700 multiplied by the number of participants in the plan and (2) 4 percent of the funding target (determined without regard to the definition of at-risk funding target).

The at-risk normal cost for a plan year generally represents the excess of the sum of (1) the present value of all benefits which are expected to accrue or to be earned under the plan during the plan year using the at-risk assumptions described above plus (2) the amount of plan related expenses expected to be paid from plan assets during the plan year, over (3) the amount of mandatory employee contributions expected to be made during the plan year. In addition, where the plan has been in at-risk status for at least 2 of the 4 preceding plan years, a loading factor is added, which is equal to 4 percent of the target normal cost (the excess of the sum of (1) the present value of all benefits which are expected to accrue or to be earned under the plan during the plan year plus (2) the amount of plan related expenses expected to be paid from plan assets during. the plan year, over (3) the amount of mandatory employee contributions expected to be made during the plan year). Otherwise, generally assumptions for single-employer at-risk plans are subject to reasonableness standards.

Endangered or critical status multiemployer plans are also generally subject to reasonableness standards. Although the code requires the actuary’s determinations for endangered or critical status plans to be based on the unit credit funding method for purposes of certain determinations (the plan’s normal cost, actuarial accrued liability, and improvements in the plan’s funded percentage), proposed Treasury regulations—which taxpayers may rely upon—modify these rules. The unit credit funding method bases its calculations on the benefits earned (accrued) at the beginning of the year and earned during the year, and as a result, is a more conservative method for determining a plan’s normal cost. Specifically, the proposed regulations permit the plan to determine its accumulated funding deficiency and status (as endangered or critical) based on reasonableness standards and not the unit credit funding method. In addition, the proposed regulations only require the unit funding method for determining the plan’s funded percentage and for purposes of one of the tests to determine critical status (comparing the present value of reasonably anticipated contributions for the current plan year to the sum of the plan’s normal cost and interest on the plan’s unfunded liability).

QUESTIONS SUBMITTED BY HON. ROB PORTMAN

Question. My understanding is that if a multiemployer pension plan is certified as a “critical status” plan under the Pension Protection Act of 2006, and the plan’s trustees adopt and implement a rehabilitation plan, the employer excise tax liability for the accumulated funding deficiency is waived. If the pension fund takes all reasonable measures to avoid insolvency but still becomes insolvent, what happens to the excise tax? Under that scenario, docs the employer become liable for the accumulated funding deficiency excise tax when the plan becomes insolvent?

Answer. Generally, if a multiemployer plan has an accumulated funding deficiency (determined based on assumptions under the reasonableness standards), an excise tax equal to 5 percent of the accumulated funding deficiency as of the end of the plan year applies. In addition, an excise tax of 100 percent of the accumulated funding deficiency applies if the accumulated funding deficiency is not corrected within a certain period. However, these excise taxes are waived for plan years when the plan is in critical status (also determined based on assumptions under the reasonableness standards). It appears that a policy intent behind waiving the excise taxes for plans in critical status is to allow the money that would otherwise be used for payment of the taxes to instead be used to rehabilitate the plan.

An exception to this waiver applies if a critical status plan fails to meet the requirements of its rehabilitation plan by the end of the rehabilitation period, or if it has received a certification for three consecutive years that the plan is not making the specified "scheduled progress" in meeting its rehabilitation plan requirements. The amount of the excise tax will then be the greater of (1) the aunt of the contributions necessary to meet applicable benchmarks or requirements for each plan year until the benchmarks or requirements are met or (2) the accumulated funding deficiency. It is our understanding that, in practice, the excise tax is rarely (if ever) paid in these situations.

If a critical plan changes its status to insolvent, the code does not indicate whether the excise tax would apply, nor has Treasury issued guidance on this issue. As a result, it is unclear what occurs in practice, but a reasonable assumption is that the excise tax is not paid when this change in status occurs.

Question. On page 46 of your report (JCX–30–18), you note that in determining an employer's withdrawal liability, "a portion of the plan's unfunded vested benefits is first allocated to the employer, generally in proportion to the employer's share of plan contributions for a previous period. The amount of unfunded vested benefits allocable to the employer is then subject to various reductions and adjustments." Can you elaborate on the reductions and adjustments that could most significantly change an employer's annual withdrawal liability calculation?

Answer. There are three ways that withdrawal liability can arise: (1) complete withdrawal (generally where an employer permanently ceases operations under the plan or ceases to have an obligation to make contributions to the plan); (2) partial withdrawal (generally if, on the last day of a plan year, there is a 70-percent contribution decline or there is a partial cessation of the employer's contribution obligation); and (3) mass withdrawal (generally where every contributing employer or substantially all employers withdraw from the plan pursuant to an arrangement or agreement).

To determine an employer's withdrawal liability, there are two general steps: (1) determine the employer's withdrawal liability, and then (2) determine the employer's annual installment amount.

1. *Determining withdrawal liability:* to determine a withdrawing employer's share of the plan's unfunded liability (vested benefits minus assets), this first step requires an allocation of unfunded liability to the withdrawing employer as compared to all employers contributing to the plan. This allocation is determined based on the date(s) of the valuation of assets and liabilities, the actuarial assumptions and methods used, and the allocation method chosen by the plan. The basic allocation method generally looks at the change in the unamortized amount of unfunded vested liabilities for each year in which the employer is obligated to contribute to the plan, compares that employer's amount of change to that of all employers contributing to the plan, and then allocates this liability among the employers required to contribute that year—based on what they were obligated to pay over that year and the prior 4 years. This is the average of the employer's contributions over the 5 years, divided by the contributions to the plan by all employers over the 5-year period. Other rules apply.

   However, as noted, there are a number of rules that can reduce and adjust withdrawal liability, described further below.

2. *Determining annual installments:* the annual installment determination is generally determined based on the employer's contributions in the preceding 10 years. It is the highest contribution rate in the 10 preceding years including the year of withdrawal, multiplied by the employer's average contribution base in the three years (of that 10) in which the base was greatest. ("Base" means covered hours or days.)

Here are some of the more significant rule rules that permit reductions and adjustments to an employer's withdrawal liability (this list is not all-inclusive):

20-YEAR CAP

Unless a mass withdrawal occurs, the employer's liability is limited to 20 annual installments. These are the annual installments (in step 2 above) of the employer's total withdrawal liability which are payable in level annual installments amortized over a specified period. If the period exceeds 20 years, the payments are not required after year 20.

INSOLVENT EMPLOYERS

An employer undergoing a "liquidation or dissolution" (not a reorganization) is liable for an amount equal to 50 percent of its normal withdrawal liability (unfunded vested benefits). However, the employer's exposure for the next 50 percent of its normal withdrawal liability is limited to the employer's liquidation or dissolution value. This rule is applied on a controlled group basis.

In addition, if an employer withdraws from more than one plan as part of the same liquidation or dissolution, its liability is allocated to each plan based on the ratio that its liability to each plan bears to its total liability (calculated before applying any applicable limitations).

"FREE LOOK" RULE

This rule is intended to encourage new employers to join the plan despite the risk of withdrawal liability. It permits employers that meet certain conditions to enter the plan and later leave it without incurring withdrawal liability, and only applies if a plan sponsor specifically adopts the rule. This rule requires the employer to leave the plan within the earlier of the plan's vesting period or within 6 years from the employer's date of entry into the plan. In addition; the employer must have made less than 2 percent of the total contributions to the plan in each year of membership and cannot have taken a previous "free look." Other rules apply, including that an employer eligible for free look nonetheless may be allocated liability upon a mass withdrawal.

LABOR DISPUTE

A labor dispute involving an employer's employees, such as a strike or lockout, will not result in a withdrawal if an employer suspends contributions under the plan during the dispute.

INDUSTRY SPECIFIC RULES

Special rules apply to certain industries, including the building and construction industry, the entertainment industry, the retail food industry, the coal industry, and the trucking, moving, and public warehousing industry. The Pension Benefit Guaranty Corporation may also prescribe regulations for plans in industries other than the construction or entertainment industries that are similar to the rules that apply to the construction and entertainment industries.

For the building and construction industry (defined in the Taft-Hartley Act), if certain conditions apply, a complete withdrawal is only deemed to occur if the employer ceases to have an obligation to contribute under the plan and the employer continues to work in the industry in the same geographic area, or resumes such work within 5 years and does not resume contributions to the plan. The conditions for eligibility are generally that substantially all union employees participating in the plan work in the building and construction industry and the plan—primarily covers employees in this industry or is amended to provide that this particular rule applies. Other rules apply for when a partial withdrawal is considered to occur.

For the entertainment industry (generally, motion picture, theatre, radio, television, sound or visual recording, music, and dance), if certain conditions apply, a complete withdrawal is only deemed to occur if the employer ceases to have an obligation to contribute under the plan and the employer continues to work in the plan's jurisdiction, or resumes such work within 5 years and does not resume contributions to the plan. The conditions for eligibility are generally that the plan primarily covers employees in the entertainment industry, there is an obligation to contribute to the plan for work in the industry primarily on a temporary or project-by-project basis, and the plan has not been amended to deny this particular rule to a group or class of employers of which the employer is a member. Other rules apply for when a partial withdrawal is considered to occur.

Sale of All or Substantially All Assets in Arm's Length Transaction Between Unrelated Parties

If this rule applies, the employer's withdrawal liability is limited to the greater of (1) a portion of the employer's liquidation or dissolution value determined without regard to withdrawal liability or (2) the unfunded vested benefits attributable to that employer (if the plan uses the attributable method of allocating withdrawal liability). The first prong is determined on a sliding scale from 30 to 80 percent of the employer's liquidation or dissolution value, based on a value of $5 million to values that exceed $25 million. If the employer withdraws from more than one plan, this limit is apportioned among the plans (so it is the employer's aggregate limit).

MANDATORY *DE MINIMIS* REDUCTION

A mandatory *de minimis* reduction applies to employers that meet thresholds for minor participation in the overall plan, and where the employer's withdrawal liability is less than $150,000. The *de minimis* reduction amount is a maximum of $50,000 (it is less if 0.75 percent of the plan's unfunded vested benefits is less than $50,000). If the employer's withdrawal liability exceeds $100,000, the reduction is adjusted downwards by the excess of the employer's liability over $100,000. However, mandatory *de minimis* reductions are not permitted if a mass withdrawal occurs.

ELECTIVE *DE MINIMIS* REDUCTION

If an employer's withdrawal liability is less than $250,000, the plan sponsor can amend the plan to apply a *de minimis* reduction up to $100,000 (or if less, 0.75 percent of the plan's unfunded vested benefits). If the employer's withdrawal liability exceeds $150,000, the reduction is adjusted downwards by the excess of the employer's liability over $150,000. However, elective *de minimis* reductions are not permitted if a mass withdrawal occurs.

PREPARED STATEMENT OF HON. SHERROD BROWN, A U.S. SENATOR FROM OHIO, CO-CHAIRMAN, JOINT SELECT COMMITTEE ON SOLVENCY OF MULTIEMPLOYER PENSION PLANS

WASHINGTON, DC—U.S. Sen. Sherrod Brown (D–OH)—co-chair of the Joint Select Committee on Solvency of Multiemployer Pension Plans—released the following opening statement at today's hearing.

Thank you, Senator Hatch, and thank you to all my colleagues on the committee.

I'd like to welcome our witnesses, Thomas Barthold of the Joint Committee on Taxation, and Ted Goldman, a senior pension fellow at the American Academy of Actuaries.

We had a productive meeting the last time we met, and it's clear that people of both parties on this committee are ready to work in good faith to find a solution to this crisis.

There are more than 100 multiemployer pension plans on the brink of failure, with members in every single State in the country.

More than 1.5 million workers and retirees across this country are at risk of losing the retirement security they earned over a lifetime of hard work.

Small businesses are at risk of collapsing if they end up on the hook for pension liability they can't afford to pay.

Groups as diverse as the Chamber of Commerce and labor unions and the AARP are all pushing for a solution, because they know what is at stake.

And that's what we will explore here today: how we got here and what's at stake, as we work to solve this crisis for retirees, workers, small businesses, and taxpayers.

These are workers and businesses who did everything right.

By joining with other businesses, companies thought they were guaranteeing their workers a secure retirement, because experienced trustees were supposed to manage the investment.

This year, I talked with a small business owner from the Mahoning Valley in Ohio, whose business participates in the Central States plan. After we met, he wrote me a letter saying, "I have owned my business for 18 years, and the company has been in my family for over 60 years. It has made contributions to this fund to ensure that the hard work and dedication of our employees pay off in the form of a pension."

But he goes on to say that, "Many employers that once contributed to these plans have simply gone out of business, leaving the remaining employers to support the remaining employees and retirees of the companies that have closed. Please, we are asking you to get together with your colleagues, reach across the aisle, and find a solution that will help my employees keep a job."

These are the kind of business-owners we're talking about—honest men and women trying to do right by their workers.

We also need to remember what workers gave up to earn these pensions. Workers in these plans sat at negotiating tables and sacrificed pay and other benefits in the short term, in order to guarantee a pension when they retired.

Too many people in Washington don't really understand what happens during these union negotiations. But we have to be clear—these workers earned their pensions, and they gave up pay to do it. They paid into this system for years.

Now these plans are about to fail, through no fault of these workers or these businesses.

Each plan is different and there are many factors that played a role in getting them to this place. Many of these plans are in the same industries that have been affected by decades of bad trade deals, outsourcing of jobs, and general shifts in the American economy.

There's also no question that the economic collapse of 2008 devastated these plans and the people and businesses who depend on them.

Even the coal miners pension—an industry that has been badly hurt over the past few decades—was nearly 90 percent funded before the financial crisis.

If these plans fail, taking thousands of businesses and jobs with them, the Pension Benefit Guaranty Corporation is supposed to step in. But the PBGC is also on the brink of failure. It's $67 billion in the red, with just $2 billion in assets. If the PBGC fails, it will be up to Congress to step in, or allow the entire multiemployer pension system to fail.

Failure is not an option. Failure would wipe out the retirement of 10.1 million American workers and retirees, and force American businesses to file bankruptcy, lay off workers, and close their doors.

The problem only gets more and more expensive to fix the longer we wait.

That's why our work on this bipartisan committee is so important—we must fix this now, when we can still save these businesses, these jobs, and these pensions.

I'm eager to hear from our witnesses today, from Chairman Hatch, and from my fellow committee members.

Thank you.

Prepared Statement of Ted Goldman, MAAA, FSA, EA, Senior Pension Fellow, American Academy of Actuaries

Distinguished Senators and House members, on behalf of the Pension Practice Council of the American Academy of Actuaries, I am Ted Goldman, senior pension fellow at the Academy. I appreciate this opportunity to provide testimony to the Joint Select Committee on Solvency of Multiemployer Pension Plans. The Academy is a strictly non-partisan, objective professional association representing U.S. actuaries before public policy makers. As a member of the Academy, I am also bound by its Qualification Standards, its Code of Conduct and the Actuarial Standards of Practice. The Academy's Pension Practice Council has diligently been working over the past few years to analyze the financial condition of troubled multiemployer plans and to provide actuarial analysis of the challenges the multiemployer plan system faces and potential ways forward to address them.

In keeping with the subject of today's hearing, I am here to provide you with information regarding the history and current status of U.S. multiemployer plans.

INTRODUCTION

Of the more than 10 million people who participate in about 1,400 multiemployer pension plans,[1] in excess of 1 million are in approximately 100 plans that will be unable to pay the full benefits they have been promised under current projections.[2] The Pension Benefit Guaranty Corporation (PBGC)—the government-sponsored program designed to backstop these troubled plans—is likewise projected to be unable to pay all of the benefits that it guarantees, which are already typically much smaller than the underlying plan benefits. If the PBGC fails, participants in these plans could see their benefits cut by 90 percent or more.

As it stands now, participants in these failing multiemployer plans will not receive the full retirement benefits they expect, nor will they even receive the level of benefits guaranteed by the PBGC. Benefit reductions could significantly affect the livelihoods of the retirees and their families who will rely on this income during their retirement years. In turn, these reductions could have broader implications for our economy and our social safety net programs.

MULTIEMPLOYER PLAN BASICS

A defined benefit (DB) pension plan provides employees with lifetime monthly payments in retirement. A multiemployer DB pension plan is a retirement plan sponsored by at least two employers in the same industry or geographic region, established by collective bargaining agreements, and managed by a board of trustees containing an equal number of members appointed by the union and the employers. Plans can be local, covering employees working in a narrow geographical region, or they can be national and cover employees working in crafts and trades throughout the United States.

Multiemployer pension plans are found in private sector industries that are often characterized by small employers and workers who switch employers frequently. More than half of multiemployer pension plans are rooted in the construction industry where workers tend to move where the work is. Among construction industry workers, the median tenure with an employer in 2016 is 4 years.[3] In addition, about 82 percent of construction establishments employ fewer than 10 workers; less than 1 percent of construction establishments employ 100 workers or more.[4] In addition to construction, other industries that tend to have workers covered by multiemployer pension plans are trucking, garment manufacturing, and grocery stores.[5]

Multiemployer pension plans are distinct from single-employer pension plans that are sponsored by one employer. Multiemployer pension plans are also distinct from multiple employer plans, which involve more than one employer but are not collectively bargained and do not necessarily cover a mobile workforce.

Contributions to multiemployer pension plans are collectively bargained, and workers typically forgo some direct compensation in exchange for contributions to retirement income plans. In turn, employers are required to fund the plans in accordance with their collective bargaining agreements and subject to certain regulations. The contribution rate is usually a specific amount per hour or other unit worked by or paid to the employee. The plans must pay PBGC premiums for underlying financial support of an insured level of benefit in the event of a plan failure. Assets are maintained in a qualified trust, and trustees retain investment professionals to assist with the management of fund assets.

Multiemployer pension plans are governed by a joint board of trustees. As fiduciaries, the trustees must act for the sole and exclusive benefit of the participants and beneficiaries. In general, governance terms for multiemployer plans are defined in a trust agreement, and the benefits provided by the plan are defined in a plan document. Traditionally, the board of trustees has sole authority to determine the plan design and level of benefits that will be supported by the negotiated contributions. However, in some cases, collective bargaining agreements may describe the plan design and benefits. In these situations, the trustees are given the authority to collect sufficient contributions to fund the benefits.

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[1] Pension Benefit Guaranty Corporation (PBGC), "FY 2017 Annual Report," November 15, 2017.
[2] PBGC, "FY 2016 Projections Report," August 3, 2017.
[3] Bureau of Labor Statistics (BLS), "Employee Tenure in 2016," September 22, 2016.
[4] BLS, "Quarterly Census of Employment and Wages," accessed on April 17, 2018.
[5] BLS, "Multiemployer Pension Plans," Spring 1999.

The amount of benefits can vary widely from plan to plan. In addition, different plans use different formulas to define the level of benefits. For example, a plan may define the benefit based on a flat dollar amount for each year a participant works. Alternatively, a plan may define the benefit as a percentage of the employer's contribution. To illustrate, in the first example, a benefit equal to $60 per year of service would result in a monthly benefit starting at retirement of $1,800 ($21,600 per year) for an employee with 30 years of service. In the second approach, a contribution-based formula could provide a benefit equal to 2 percent of the total employer contributions. Thus if the contribution was equal to $2 for each hour worked, an employee who works 1,500 hours in a year would earn a benefit of $60 per year (2 percent times 1,500 hours times $2) and after 30 years be entitled to $1,800 per month payable at retirement.

To help put the financial security of a pension plan into context, it may be helpful to consider the following formula: Benefits + Expenses = Contribution + Investment Earnings. In other words, the benefits paid to plan participants and expenses paid to operate the plan must be covered by employer contributions, accumulated with investment earnings. If employer contributions or investment earnings fall short of expectations, available resources may not support promised benefits and required expenses. This dynamic stands true and will be useful when considering options and understanding the events that led up to the current situation.

Defined benefit plans differ from defined contribution plans, such as 401(k) plans, in that the retirement income is distributed as a lifetime income stream at retirement rather than as an individual account balance that holds the employer contributions. Defined benefit plans pool risks for investment as well as longevity whereas in defined contribution plans risks are primarily borne by each participant.

In a DB plan, all of the money in the plan is available to pay any of the benefits owed by the plan to any participant. In a multiemployer DB plan, this sharing of risks occurs not just from one employee of a company to another, but also across the employee populations of multiple companies.

BENEFITS TO LABOR AND MANAGEMENT

Multiemployer plans incorporate risk sharing and portability to provide retirement security to career union workers.

The pooling of employers provides stability, as the plan does not depend on the financial position of a single company. If an employer goes out of business, the multiemployer plan continues functioning as a separate entity, and contributions from remaining employers continue. Participation by numerous employers leads to more covered participants and greater assets, allowing these plans to achieve economies of scale and reduce operating expenses. Without the economies of scale of a multiemployer plan, the same benefits could not be provided to participants for the same cost, as more resources would be spent on operating expenses.

Another characteristic of multiemployer plans is their portability. With a multiemployer plan, service with all contributing employers is aggregated for benefit calculation purposes, allowing employees uninterrupted pension coverage as they move among companies participating in the plan. Without the aggregation of pension service, an employee changing jobs could lose benefits by not having enough service to have vested rights to a pension. This aggregation feature is especially important in industries such as construction and entertainment, where it is common for employees to work for multiple companies as they move from project to project. Furthermore, multiemployer plans usually have reciprocity agreements with plans in other geographic areas covering employees in the same industry or trade, allowing pension portability with employers that participate in other plans.

The reasons that prompted the adoption of multiemployer plans are largely still relevant today. In particular, portability of benefits and the economies of scale are still valid. As evidence of this relevance, several recent bills introduced in Congress would expand the availability of multiple employer plans to companies with no common collective bargaining connection as a means of improving cost-effective access to retirement plans for employees.

EARLY HISTORY OF MULTIEMPLOYER PLANS—PRE-ERISA

Multiemployer plans have evolved and adapted over time either to strengthen areas of weakness or to respond to changes in the business or economic environment. The following historical context provides a baseline to addressing the current challenges.

The Bureau of Labor Statistics has occasionally done studies of multiemployer pension plans, generally tracking their prevalence and reporting on plan features. Only a few multiemployer pension plans existed before the Taft-Hartley Act was enacted. Plans grew in prominence during the 1950s and 1960s. Such plans covered about 1 million participants in 1950, 3.3 million in 1959, 7.5 million in 1973, and 10.4 million in 1989. Throughout the 1990s and since, the number of workers in such plans has been steady at just over 10 million.[6]

The Beginning—Simplicity

The first employer-funded multiemployer pension plan is thought to be one that was started in 1929 by Local 3 of the Brotherhood of Electrical Workers and the Electrical Contractors Association of New York City.[7] Then in the 1930s and 1940s negotiated plans appeared in industries such as the needle trades and coal mining. The employer's responsibility was typically limited to the amount specified in the collective bargaining agreement. Plans paid out benefits at a level that could be afforded based on the available resources, and if those resources proved inadequate, the employers were not liable for the shortfall. It is of interest to note that in 1935 life expectancy from birth was about 60 years and individuals who reached the age of 65 might expect to live another 12 years, on average,[8] whereas today U.S. life expectancy is over 78 years of age[9] with individuals reaching age 65 expected to live another 20 years on average.[10]

Joint Labor and Management Responsibility

In 1943 the War Labor Board ruled[11] that fringe benefits were not subject to the wage freeze resulting from the Wage and Salary Act of 1942 that attempted to contain wartime inflation. This ruling encouraged employers to offer pension, health, and welfare benefits as an alternative means to attract workers. Then in 1947, the Labor-Management Relations Act (also known as the Taft-Hartley Act) provided, among other matters, for the establishment and operation of pension plans administered jointly by an employer and a union. Multiemployer pensions grew in popularity and continued to operate and provide retirement benefits with relatively few statutory standards.

THE PASSAGE OF ERISA—SHIFT OF EMPLOYER RESPONSIBILITY FROM CONTRIBUTIONS TO BENEFITS

In 1974, the Employee Retirement Income Security Act (ERISA) was passed. ERISA brought a fundamental change to private sector pension plans, including multiemployer plans. ERISA protected benefits that plan participants had already accrued, often referred to as the "anti-cutback" rule. ERISA also shifted the responsibility of the employer from the negotiated contribution amount to an obligation to fund the promised benefit. In other words, employers contributing to multiemployer plans became responsible not only for their negotiated contributions, but also for any funding shortfalls that developed in the plans.

ERISA also introduced a number of provisions aimed at protecting participants including minimum funding standards, expanded participant disclosures, and fiduciary standards. Minimum funding requirements and maximum tax deductible limits were also established. It was important to make sure sufficient contributions were made to secure employer commitments, but at the same time, prevent employers from using the tax deductibility advantages of trusts beyond what was needed to secure the benefits. Minimum funding requirements strengthened the financial position of multiemployer plans.

ERISA also established the PBGC to provide mandatory insurance for DB pension plans. Separate insurance programs were established for single-employer and multiemployer plans. These programs have different premium requirements and benefit guarantees. They are also structured differently. For multiemployer plans, financial assistance is provided to a plan that becomes insolvent, but plan administration remains in effect. In the single-employer program, the PBGC takes over trusteeship for a plan that terminates with insufficient assets.

[6] BLS, "Multiemployer Pension Plans," Spring 1999.
[7] Employee Benefits Research Institute, "Multiemployer Plans," accessed on April 17, 2018.
[8] William J. Wiatrowski, "Changing Retirement Age: Ups and Downs," April 2001.
[9] National Center for Health Statistics, "Life Expectancy," accessed on April 17, 2018.
[10] Social Security Administration, "Life Expectancy," accessed on April 17, 2018.
[11] Georgetown University Law Center, "A Timeline of the Evolution of Retirement in the United States," accessed on April 17, 2018.

Under ERISA, funding requirements for multiemployer plans are primarily based on liabilities calculated using the expected rate of return on plan assets. Under this approach, it is anticipated that there will be periods of both strong and weak investment performance, and over time these will tend to offset each other. ERISA does not contain any provisions requiring that plans maintain the surpluses created by investment gains for use as a buffer against future losses. In fact, until 2002, the maximum deductible contribution rules strongly discouraged multiemployer plans from maintaining funding surpluses, as contractually required employer contributions would not have been deductible unless the plan trustees found a way to eliminate the overfunding.[12]

During the late 1990s, very strong asset returns led many plans to improve benefit levels in order to share the gains with participants and protect the deductibility of the employer contributions. Unfortunately, these years were followed by a period of very poor asset returns that erased much of these investment gains. While the investment gains proved to be temporary, the increased benefit levels that plans adopted were not, as they are protected by ERISA's anti-cutback provisions. This combination of temporary asset gains and permanent benefit improvements is a contributing factor in the challenges facing multiemployer plans today.

INTRODUCTION OF WITHDRAWAL LIABILITY

While ERISA introduced the concept of minimum required contribution levels for multiemployer plans, employers had the ability to circumvent these rules by simply withdrawing from the plans. The Multiemployer Pension Plan Amendments Act (MPPAA) of 1980 was intended to prevent employers from exiting a financially a troubled multiemployer plan without paying a proportional share of the underfunding liability. MPPAA required a withdrawal liability assessment for employers exiting a multiemployer plan that is less than fully funded. At the time, few plans faced severe funding issues, but withdrawals were recognized as a potential problem that threatened the long-term financial health of plans because as employers left, the liability for their employees (termed "orphan liabilities") became the responsibility of the employers remaining in the plan. This could result in significant financial burdens for the remaining employers for employees who never worked for them. In addition, it could deter new employers from joining a plan.

Prior to MPPAA, an employer that withdrew from an underfunded multiemployer plan did not have to pay anything to the plan unless the plan was terminated within 5 years of the employer's withdrawal. In addition, the amount paid was limited to no more than 30 percent of the employer's net worth. Under MPPAA, the employer must pay a withdrawal liability equal to the employer's proportionate share of the unfunded vested liabilities at the time of departure.

While MPPAA took steps to address the problem of employer exits, the new withdrawal liability rules did not fully stem the growth of orphan liabilities that remained in plans. Bankrupt employers often were unable to pay the full withdrawal amounts. Changes to the size of the liability due to economic or demographic factors also remained in the plan. The withdrawal payment requirements include a payment schedule with a 20-year cap that can leave behind unfunded liabilities. And finally, for some industries, such as construction and entertainment, there are no withdrawal liability assessments unless an employer continues to perform the same type of work in the same jurisdiction after withdrawing from the plan.

CONTRIBUTING FACTORS TO THE CURRENT CHALLENGES

Following several decades during which nearly all participants received their full benefit amounts from multiemployer pension plans, weaknesses have been exposed which have demonstrated there are limits to the stability and benefit security intended in the current system. In 1985 and 1986 the first signs of distress were detected in a small number of plans which exposed some of the weaknesses of the withdrawal liability approach laid out in MPPAA. In spite of generally meeting the ERISA funding requirements, serious challenges (described below) emerged as plans matured, and these challenges were exacerbated by the recession of 2007–2009. Today the guaranteed benefits that PBGC expects to pay participants in troubled plans produce a liability of $65.1 billion on PBGC's financial statements.[13]

[12] Economic Growth Tax Relief Reconciliation Act (EGTRRA) of 2001, Pub. L. 107–16.
[13] W. Thomas Reeder, testimony before the House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions, November 29, 2017.

The primary contributors to the current challenges relate to investment performance, past benefit increases, the maturation of plans, the decline of unions and some industries, and weaknesses in the withdrawal liability requirements. Typically a combination of these factors has contributed to a projection that a plan will be unable to pay benefits.

Pension Assets Are Invested in Diversified Portfolios

Plans have invested in diversified portfolios to try to achieve investment returns that can support higher benefit levels and lower contribution requirements than would be possible if the assets earned risk-free rates of return. These investment strategies, however, are not guaranteed, and plans need additional contributions or reduced benefits if the anticipated investment returns are not achieved.

In 2000, the price of technology stocks fell drastically. Like most institutional investors, multiemployer pension plans had dot-com investments, and the low returns reduced pension surpluses, not long after the granting of benefit increases. By the mid-2000s, most plans recovered, but some plans remained financially weakened. The recession in 2007–2009 added further strain to the financial stability of most plans.

Past Surpluses Led to Benefit Increases That Were Not Sustainable

Funding pension plans using diversified portfolios can strengthen a plan's funding status when investment returns are robust. These investment gains may be needed to offset losses when returns are weak. However, following the large asset gains in the late 1990s, many plans became significantly overfunded, and responded by increasing benefit levels or taking contribution holidays. Both dynamics of the collective bargaining process and regulatory policies were not conducive to maintaining overfunded plans and contributed to this trend. These benefit increases ultimately became unaffordable for many plans when their assets declined dramatically in the subsequent decade.

Mature Plans Have Fewer Resources to Recover From Investment Losses, as the Assets Grow Relative to the Contribution Base Supporting the Plan

In young plans, contributions are the primary source of asset growth and investment returns are comparatively small, while the opposite is true in mature plans. As the plan relies more heavily on investment returns, it becomes more difficult to make up for investment losses through additional contributions.

Fewer Workers Are Employed in Industries Sponsoring Multiemployer Plans

Some unionized industries have seen significant transformations over time. In some industries the workforce has shifted to more non-union employees as a result of restructurings or regulatory changes, while others have seen declines in the number of employees needed due to global competition, automation, or general declines in the industry. A decline in the active workforce results in a diminished economic base for collectively bargained employer contributions. While pension assets grew to historical levels, union membership started to see a steady decline. Private-sector union membership in 1983 was 12 million. By 2015 that number had fallen to 7.6 million.[14] While pension assets were increasing due to the stock market, the contribution base was beginning to decline due to fewer workers in the plans.

Employers Have Exited Multiemployer Pension Plans, Either Through Bankruptcy or Withdrawal, Leaving Unfunded Obligations for the Remaining Employers in the Plans

These orphan liabilities add to the maturity of a plan and subject the remaining employers to additional risks related to the funding of the orphan liabilities. Orphan participants make up a significant share (about 15 percent, or 1.6 million) of total multiemployer participants.[15]

The majority of multiemployer plans remain healthy and have endured many of the above challenges. However, these factors have created significant stress and pressure on a number of plans and participants which the Joint Select Committee is seeking to address during its work this year.

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[14] Megan Dunn and James Walker, "Union Membership in the United States," BLS, September 2016.

[15] Alicia H. Munnell et al., "Multiemployer Pension Plans: Current Status and Future Trends," Center for Retirement Research at Boston College, December 2017.

ACTIONS TAKEN TO-DATE TO ADDRESS THESE RECENT CHALLENGES

In recognition of the growing risks associated with multiemployer pension plans, a number of actions have taken place. The Pension Protection Act of 2006 (PPA) amended ERISA and the Internal Revenue Code to make certain changes to multiemployer funding rules. The changes were designed to give plan trustees more flexibility in dealing with funding challenges and require plans to identify and address problems in time to prevent further deterioration of the short- and long-term financial security of the plan.

PPA classifies multiemployer plans into one of three categories based on current and projected funding levels. In short, a plan that is projected to fail to meet its minimum funding requirements in the next 4 or 5 years is in critical status (the “red zone”). A plan that is not in critical status but is currently below 80 percent funded or projected to fail to meet its minimum funding requirements in the next seven years is in endangered status (the “yellow zone”). A plan that is neither in critical status nor in endangered status is considered to be in the “green zone.” Plans that are in critical or endangered status are required to take corrective action to rehabilitate or improve their funding. While PPA’s focus on the projected financial condition and early adoption of corrective measures has helped many plans gain a better understanding of their financial condition, these tools were insufficient to deal with the dramatic asset losses and economic contraction that immediately followed the effective date of the law. Thus, the Multiemployer Pension Reform Act of 2014 (MPRA) was enacted, which provided additional tools and strategies for severely distressed plans.

In addition to the classifications defined under PPA, MPRA added a fourth category of “critical and declining” status to further differentiate those plans projected to become insolvent within the next 20 years. One of the benefits of this categorization has been a better perspective on how many plans may be at risk and the degree of the risk. Of the nearly 1,300 plans across all industries identified in one study, 62 percent are green plans, 12 percent are endangered, 16 percent are critical, and 10 percent are critical and declining. The construction, service, and entertainment industries have the lowest percentage of critical and declining plans (4 percent, 6 percent, and 6 percent respectively). The industries with the highest percentage of declining plans are manufacturing (36 percent), transportation (20 percent), and retail/food (10 percent).[16] Keep in mind, however, that a green plan today is still subject to the same risk factors that caused other plans to enter a red or critical status.

Of particular note, MPRA broke new ground with respect to pensions by allowing plan sponsors, subject to an application process, to voluntarily reduce benefits that have already been earned, including for current retirees (with some exceptions). Only plans that face inevitable insolvency are eligible for this provision, and after the application of the reductions, all participant benefit must remain at least 10 percent above the level guaranteed by the PBGC. These “benefit suspensions” offered a potentially effective way for plans to avoid insolvency, acknowledging the adverse impact to participants. MPRA also increased PBGC premiums from $12 to $26 (to be indexed in the future).

Between PPA and MPRA, the tool box for identifying and addressing multiemployer plans’ financial condition expanded to include:

- Assessment of the level of plan risk through the zone status classifications.
- Plans in endangered status must develop a funding improvement plan.
- Plans in critical status must develop a rehabilitation plan.
- Plans in critical and declining status may apply for a suspension of benefits (benefit reductions) if doing so would enable the plan to avoid insolvency.
- Higher maximum tax-deductible limits to allow the buildup of greater surpluses.
- Partitions that allow plans to move a portion of the liabilities to the PBGC prior to insolvency.
- Mergers facilitated by PBGC to combine troubled and healthy plans to generate economies of scale while saving PBGC resources in the long-term.

[16] Jason Russell, “Keeping Healthy Plans Healthy,” April 12, 2018.

EFFECTIVENESS OF RECENT LEGISLATION

On the positive side, the challenges facing the multiemployer plan system are now out in the open and better data is being accumulated to facilitate helpful analysis. Prompted by recent legislation, distressed multiemployer plans have taken steps to address funding problems and many have improved their financial health, but some have not. Of the first 25 applications for benefit suspensions under MPRA, only four have been approved and six are currently under review. The remaining 15 were either denied (five) or withdrawn (10). One of the largest plans, the Central States Teamsters plan, was denied. Thus, while MPRA remains a viable choice for plans, some plans may be too far down the road to take advantage of it. The U.S. Department of the Treasury and PBGC have taken steps to communicate feedback to those preparing applications to help plans make decisions as to whether or not to apply and how best to prepare applications if they choose to move forward. Treasury and PBGC both now offer pre-application conferences to plan sponsors to further facilitate the process.

Employers that have significantly increased contributions or contribute to plans that have pared back benefit accrual rates and ancillary plan features (such as early retirement or disability benefits) have expressed concerns about their ability to remain competitive. Many of them are in industries that have very thin profit margins or are in competitive global markets.

A recent study [17] indicates that aggregate contributions to multiemployer pension plans from 2009 to 2014 increased by 6.9 percent per year, significantly outpacing the average inflation rate of 2.1 percent over this period. Even though contributions are increasing, for many plans, the amount of contributions is not closing the funding gap. This can be measured on two bases—one that uses a discount rate tied to the long-term expected return of the plan (46 percent of the plans lost ground), and one based on a rate reflecting U.S. Treasury bonds (75 percent of the plans saw an increase to the shortfall). At the same time, roughly 75 percent of the plans had a minimum required contribution of zero due to accumulated contributions being greater than minimum requirements in the past years. According to the study, between 89 percent and 94 percent of plans made contributions in excess of their minimum.

The partition and plan merger options available under MPRA have been used sparingly. To date, there has been only one approved partition.

OVERALL STATUS OF THE CURRENT SYSTEM—HISTORICAL AND FUTURE TRENDS

The applications for benefit suspensions under MPRA are very thorough and detailed. As part of the application, the plan sponsor must describe the key factors that led to the request. A few excerpts from the descriptions provided by some of the plans that have filed under MPRA illustrate the seriousness and state of affairs for these programs.[18]

- Automotive Industries—Decline in automotive industry businesses in the San Francisco Bay Area as a result of both the decline over the last 10 years . . . and economic recessions over the last 15 years. Plan employers engaged in a fragmented, competitive industry and have higher labor costs. Only four of the 149 original employers still exist. In 2000, 16 Ford and 10 Chrysler dealerships contributed to the plans. As of 2015, only three of those 26 dealerships remain in the plan.
- Bricklayers Local 7—Plan provides generous benefits relative to non-union bricklayers. Experiencing increased member attrition to nearby unions, which maintain plans that are better funded. Decline in the number of union members in the area.
- Central States Teamsters—Deregulation of trucking in the 1980s and the economic and financial crisis since 2001 forced many major trucking companies out of business. Of the 50 largest contributing employers that participated in 1980, almost all are out of business and only three contribute today.
- Ironworkers Local 16—Economic decline, loss of qualified workers due to fewer opportunities, stagnant wages. Dramatic drop in employers from 125 to

[17] Lisa A. Schilling and Patrick Wiese, "Multiemployer Pension Plan Contribution Analysis," Society of Actuaries, March 10, 2016.
[18] Alicia H. Munnell et al., "Multiemployer Pension Plans: Current Status and Future Trends," Center for Retirement Research at Boston College, December 2017.

60 over the past 6 years. Large bankruptcy from an employer that generated between 13 and 22 percent of work hours for members of the plan.

- United Furniture Workers—The rapid increase in U.S. furniture imports since the 1970s put increasing pressure on U.S. furniture manufacturers and, thus, the pension plan. From 1981 to 2009, 35 contributing employers filed for bankruptcy. Since 2008, 29 of 53 contributing employers have withdrawn from the plan, and active participants have dropped from about 2,500 to 1,000.

Maintaining the financial health of multiemployer plans is an important factor in stabilizing the multiemployer system. Three of the most important indicators of vulnerable plans are:

- Maturity levels—the ratio of inactive (retirees and vested terminations) to active participants;
- Funded status—commonly expressed as the assets divided by the liabilities; and
- Cash flow situation—a comparison of benefits paid out versus contributions and investment earnings coming into the plan.

Data is available from the required Form 5500 [19] government filings that offer information as to the health status of all plans. Plans that have three or more inactive participants per active participant have significantly more critical and declining plans than those with less than a 3:1 ratio. Plans with funded ratios below 70 percent also tend to be in the critical and declining category. Critical and declining plans have, on average, a negative annual cash flow of 11 percent. By comparison, the average cash flow percentages for yellow and green plans are a negative 1.2 percent and negative 1.6 percent respectively. Plans with two or more of these three characteristics are especially vulnerable.

Pension plans also go through an aging process. In the early years, assets are low and most of the growth in assets comes from the employer contributions. There are very few retirees relative to active employees and as a result contributions, which are generated based on the active workforce significantly exceed benefit payments. As the plan matures, more assets accumulate, and asset returns from investments become a larger and larger source of the plan's income. At the same time, the retiree population grows and in some industries there is a shrinking contribution base. As this situation progresses, investment performance becomes more and more important. Thus when actual investment returns are lower than expected there is a resulting loss to the plan. There are mechanisms to smooth out the impact of this volatility, but for mature plans, these methods can create significant stress. This situation is exacerbated if on top of the normal aging process, there are significant industry downturns and loss of participating employers.

Plan sponsors need to find ways to improve the financial position of the plan, but to do this without placing burdens on participating employers to keep them in the plan as well as make the plan attractive to new employers. One approach that is emerging is to adopt variable benefits for future service to the extent permissible under current law. In plans that utilize this method, benefits move up or down with investment performance and thereby minimize future withdrawal liability. Strategies that can maintain benefit security, but eliminate or significantly reduce the threat of withdrawal liabilities will help avoid adding further burdens to the system. These strategies, however, do not address underfunding for legacy liabilities and create a challenge for allocating new contributions between paying off current unfunded legacy benefits and funding the new benefit accruals.

CONCLUSION

Multiemployer pension plans were created as a way to deliver lifetime income retirement benefits to workers in blue collar industries. Employers tended to be small and it was common for workers to stay in an industry, but work for many employers over the course of their career. The multiemployer approach captures economies of scale and pools risks—an intended "win-win" for the employer and employee.

For decades, these plans worked much as expected, with little threat of insolvency (the PBGC multiemployer plan program has provided periodic financial assistance to only 70 multiemployer plans through 2015). However, a combination of economic, demographic, and regulatory changes have placed a small but material segment of

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[19] Employee Benefits Security Administration, "Form 5500 Series," accessed on April 17, 2018.

these plans at risk. Employees who negotiated for these benefits as part of wage and benefit packages were expecting to benefit from these arrangements at retirement. Now those expectations may not be met.

I hope my testimony provided the Joint Select Committee context and history leading up to the development of the current financial challenges facing the multiemployer pension plan system. Identifying solutions is not part of the scope of today's hearing, but from a conceptual standpoint the options are straight-forward. One of three actions must be taken: Either benefits are reduced (this is the current course if there are no interventions), or contributions to the plans have to increase, or as a third option, more risk can be taken by plans to achieve prospective investment gains. Each option presents pros and cons with very different outcomes to different stakeholders.

Thank you for asking me to speak today. The Pension Practice Council of the American Academy of Actuaries stands ready to help you at each step of the way with objective and non-partisan input.

Appendix

American Academy of Actuaries background information regarding multiemployer pension plans:

Issue Brief: Overview of Multiemployer Pension System Issues, *http://www.actuary.org/files/publications/IB-Multiemployer.06.27.2017.pdf.*

Capitol Hill Briefing: Multiemployer Pension Plans/Potential Paths Forward, *http://www.actuary.org/files/publications/HillBriefing-Multiemployer_June_27_2017.pdf.*

Issue Brief: Honoring the PBGC Guarantee for Multiemployer Plans Requires Difficult Choices, *http://www.actuary.org/files/publications/PBGCissuebrief10.20.16.pdf.*

QUESTIONS SUBMITTED FOR THE RECORD TO TED GOLDMAN

QUESTIONS SUBMITTED BY HON. ORRIN G. HATCH

Question. Please describe what employer's withdrawal liability responsibility is a mass withdrawal event?

WITHDRAWAL LIABILITY IN GENERAL

Answer. When a contributing employer withdraws from an underfunded multiemployer pension plan, it must pay "withdrawal liability," which represents the employer's share of the plan's unfunded vested benefits. The amount of the plan's overall unfunded vested benefits is determined annually by the plan actuary.

Under the Employee Retirement Income Security Act of 1974 (ERISA), when an employer withdraws from a multiemployer pension plan, it is not obligated to pay its withdrawal liability in a lump sum. Rather, the statute requires the employer to pay down its withdrawal liability obligation, with accumulated interest, through periodic payments. The amount of the periodic payment is determined based on the employer's historical contribution rates and contribution base units, such as covered hours or wages.

In general, the statute limits an employer's withdrawal liability payments to 20 years; this is often called the "20-year cap." In other words, if the statutory periodic payments are not sufficient to pay down the employer's allocated withdrawal liability, with accumulated interest, the payments stop after 20 years. Any unpaid withdrawal liability must be reallocated among the remaining employers in the plan.

WITHDRAWAL LIABILITY IN A MASS WITHDRAWAL

A mass withdrawal has occurred for a multiemployer pension plan when every employer—or substantially every employer—has withdrawn from the plan. In a mass withdrawal situation, different rules apply to how employer withdrawal liability is calculated.

- The plan's overall unfunded vested benefits must be calculated based on assumptions prescribed by the Pension Benefit Guaranty Corporation (PBGC) for plan termination situations. These conservative assumptions could substantially increase the amount of unfunded vested benefits allocated to each employer.

- The other notable difference under a mass withdrawal is that the 20-year cap ceases to apply. In many mass withdrawal situations, the removal of the 20-year cap means that employers will be obligated to make their statutory withdrawal liability payments indefinitely.

Question. Where do pension obligations fall in the order of priority in bankruptcy?

Answer. The status of withdrawal liability claims against an employer that has filed for bankruptcy protection is not expressly dealt with in either the U.S. bankruptcy code or ERISA. However, in our observation, courts have generally held that a claim for withdrawal liability is not entitled to priority status as an administrative claim. As a result, withdrawal liability does not have priority status and withdrawal liability is treated as a general unsecured claim.

FUNDING STANDARDS

Question. In our initial review of the issues surrounding the multiemployer pension plans, one of the primary concerns the committee plans to investigate are the funding standards for these plans. The issue is whether the funding standards are adequate, providing the proper level of assets to cover the future liabilities of the plans. As a preliminary, can you describe the funding methods for the multiemployer plans prior to the enactment of the Employee Retirement Income Security Act? What new funding standards were established by ERISA, and what impact did these standards have on the funding of the plans?

Answer. Before discussing statutory funding standards and funding methods, it may be helpful to define certain terms commonly used in pension funding. The "normal cost" is the value of benefits being attributed to the coming plan year, and it often includes an adjustment for expected administrative expenses. The "actuarial liability" is the value of benefits that are attributed to prior plan years, in other words, past service liabilities. To the extent that plan assets are less than the actuarial liability, there is an "unfunded liability."

Prior to the 1976 effective date of ERISA, there were no Federal statutory funding standards. Actuaries would advise plan sponsors as to whether contributions and benefits were in balance. In simplified terms, it was desirable for contributions to cover plan costs, which included the normal cost and some amortization of the unfunded liability. To the extent contributions equaled or exceeded plan costs, the plan would be projected to become 100 percent funded over time.

ERISA imposed new minimum funding requirements on private sector pension plans. The minimum requirements are determined annually based on a notional "funding standard account." Under the funding standard account calculations, employer contributions must cover plan costs, which include the normal cost and amortizations of changes in the unfunded liability over a fixed period. Currently, the amortization period is generally 15 years from inception, though there are legacy layers of liability that have a longer outstanding period. To the extent that accumulated contributions exceed accumulated plan costs, the funding standard account will develop a "credit balance." If, however, contributions fall short of plan costs, there will be an "accumulated funding deficiency," meaning the plan is not meeting its minimum funding requirements. In that case, excise taxes on contributing employers and other penalties may apply until the deficiency is corrected.

Focusing only on multiemployer pension plans, the funding standards under ERISA—as amended by the Pension Protection Act of 2006 (PPA)—have provided a framework to target improving funding levels and work toward restoring a credit balance for plans that are facing a funding deficiency. Overall, funding levels for multiemployer pension plans have improved in recent years, after the damage rendered by the poor investment performance of the early 2000s and the recession of 2008–2009. Today, more than 60 percent of the nearly 1,300 multiemployer plans are in the "green zone" under PPA. However, approximately 100–120 plans approaching insolvency will not be able to pay promised benefits without a legislative solution or enhanced access to regulatory approval of the restructuring remedies provided by the Multiemployer Pension Reform Act of 2014 (MPRA).

DISCOUNT RATES

Question. In your testimony, you note that the majority of multiemployer plans remain healthy. Is this actually the case, when in fact PPA zone status reflects pension liabilities discounted at the plans expected long-term investment return assumption? Given a low return investment environment, is the use of a long-term, higher, discount rate appropriate? Would your assessment of the relative health of the multiemployer plans change if we used investment return assumptions that reflect current market valuations or other more conservative measures?

Answer. Two major concepts are implicit in these questions: (1) the selection of an investment return assumption and (2) how different measurements can inform an assessment of the health of a multiemployer pension plan.

INVESTMENT RETURN ASSUMPTIONS

Under actuarial standards of practice (ASOPs) No. 27, the *purpose of measurement* is an important factor in selecting a reasonable and appropriate interest rate or investment return assumption. For example, an investment return assumption may be used as a discount rate—often referred to as the valuation interest rate—to determine the actuarial present value of benefits under a pension plan. Alternatively, an investment return assumption may apply to the rate of return expected to be earned on plan assets over a period of time. For some purposes, the valuation interest rate and the assumed rate of return on plan assets are the same; for others, they are necessarily different.

The following are three common measurements relevant to multiemployer pension plan funding, each of which uses a different investment return assumption.

- *Actuarial accrued liability.* This is the measurement of the plan's accrued liability for benefits earned to date and is based on a valuation interest rate assumption that represents the expected return on plan assets over the long term. Under ERISA, the assumption is the actuary's best estimate. For most multiemployer plans, the assumption is in the range of 7.0 and 7.5 percent, which is set considering the plan's investment policy, asset class expectations, and other factors. The actuarial accrued liability generally serves as the basis for determining ERISA minimum funding requirements, budgeting for long-term sufficiency of contribution rates, and PPA zone status.
- *Current liability.* This is a measurement of the plan's accrued liability and is based on a discount rate and mortality tables prescribed by statute. Current liability is used for certain disclosures and for determining maximum tax-deductible limitations. It is also similar—but not identical to—an assessment of the value of plan liabilities in a settlement or immunization situation. The current liability interest rate represents a weighted average of 30-year Treasury securities, which is considered to be a proxy for current risk-free interest rates. In other words, the current liability interest rate is set independent of the expected return on plan assets. For 2017, current liability interest rates were slightly above 3.0 percent.
- *Actuarial projections.* When performing projections of future solvency or funding levels, actuaries often use an investment return assumption that is the same as the valuation interest rate. Increasingly, however, actuaries are performing projections under different investment return assumptions. For example, actuaries may perform sensitivity projections reflecting higher or lower expected returns on plan assets over the short term. There is no statutory requirement to perform sensitivity projections, but actuaries may do so to reflect the expectation that investment returns will be lower in the near-term than their historical averages in the current low interest rate environment. Additionally, actuaries may perform sensitivity projections—such as sensitivity analysis, scenario testing, and risk tolerance—for purposes of plan sponsor education and planning.

ASSESSING PLAN HEALTH

When assessing whether a multiemployer pension plan is "healthy," it is often helpful to consider more than one single number or perspective. The following are metrics often considered when evaluating the health of a multiemployer pension plan.

- *Statutory requirements.* Minimum funding requirements and PPA zone status are largely based on a funded percentage (assets divided by the actuarial liability) and the current and projected funding standard account. These measurements are designed to support the determination of a contribution amount that balances considerations of long-term stability and sufficiency.
- *Market-based measurements.* Additional metrics can provide further insight into the health of a plan. For example, valuations can be performed using cur-

rent bond market interest rates rather than expected returns. Such an approach can provide greater comparability across plans that have different investment allocations or capital market expectations. It can also help to illustrate the extent to which expected future investment returns are relied upon to provide for the targeted benefits outlined in the plan. The current liability measure mentioned earlier is an example of a market-based measure calculated and disclosed for multiemployer pension plans.

- *Current and projected funding levels.* Rather than focusing solely on the current funded status of a multiemployer pension plan, an assessment of plan health should also consider what its funding levels are projected to be in the future. For example, consider a plan that is currently 90 percent funded and projected to remain about 90 percent funded in all future years. Next, consider a plan that is currently 80 percent funded and projected to become 105 percent funded within the next 15 years. All other factors being equal, one may argue that the second plan is healthier than the first, in that its upward trajectory makes it more likely to be resilient to future adverse experience.

PLAN EXPERIENCE GAINS AND LOSSES

Question. In examining the financial status of the multiemployer plans, the committee is compiling plan data on experience gains and losses. Is this data gathered by plan administrators or trustees?

Answer. Actuarial gains and losses represent the differences between actual plan experience and the actuarial assumptions. Actuaries review gains and losses each year as part of the annual actuarial valuation process. Historical gains and losses are often summarized in the actuarial valuation reports, which are presented to the plan trustees and retained by plan administrators.

When reviewing data on gains and losses, it is important to distinguish between those arising from demographic sources and those arising from investments. For multiemployer pension plans, investment experience tends to be much more volatile than demographic experience (such as mortality and retirement experience).

Annual gains and losses from demographic sources are usually relatively small when compared to those related to investment returns. It is also important to note that gains and losses related to contribution levels may have a relatively small impact on a plan's *current* funding level, but they can have significant effects on *projected* funding levels. To get a more complete picture of experience gains and losses and their impact on projected funding levels, it is important to understand how contribution levels have changed over time, and how they have compared with assumed levels over the years.

MORTALITY

Question. In general terms, what are the mortality assumptions used by these plans and how have these assumptions changed since 2000? How are these assumptions established, and are they subject to any manner of oversight, or legal or professional standards?

Answer. In general, actuaries who practice in multiemployer pension plans use mortality assumptions that are based on published tables. In rare cases involving very large plans that can demonstrate that experience is fully credible and significantly different from the mortality rates under the published tables, the actuary may develop a table of mortality rates based on plan experience.

When setting a mortality assumption based on published tables, actuaries who work with multiemployer pension plans may make adjustments to rates in the published tables based on industry trends, individual plan experience, and professional judgment. For example, actuaries who practice in multiemployer plans often use the "blue collar" version of the published mortality table, which may be a better representation of anticipated experience for the participant population than the "white collar" or general tables.

The published mortality tables most commonly used by actuaries are developed by the Retirement Plan Experience Committee (RPEC) of the Society of Actuaries (SOA). Since 2000, the RPEC has published the "RP–2000" and "RP–2014" mortality tables, along with a series of different scales to project future improvements in life expectancies. In general, the studies that the RPEC has published have shown improvements in mortality over time—in other words, increasingly longer life expectancies.

When selecting actuarial assumptions to be used in determining minimum funding requirements under ERISA, actuaries must operate in accordance with actuarial standards of practice (ASOPs). ASOP No. 35 deals with the selection of mortality assumptions and was recently updated to provide actuaries with more specific guidance related to selecting the appropriate mortality table, making adjustments to the table as appropriate, and projecting future improvements in life expectancies.

An actuary who is believed to have violated the ASOPs may be reported to the Actuarial Board for Counseling and Discipline (ABCD). After reviewing the situation, the ABCD may recommend disciplinary action if the actuary is found to have violated the ASOPs or the Code of Professional Conduct. Discipline may include reprimand or recommendation of suspension of credentials by the issuing actuarial organizations.

Question. How do mortality assumptions for multiemployer plans compare to the prescribed single-employer/current liability mortality tables? Have these assumptions changed in any manner since 2000?

Answer. In late 2017, the Department of Treasury and Internal Revenue Service issued a new rule regarding mortality tables that must be used in determining minimum funding requirements for single-employer pension plans. The same mortality tables must also be used for determining current liability for multiemployer plans. In general, the new mortality tables must be used for plan years beginning on or after January 1, 2018.

The prescribed current liability mortality tables are based on the RP–2014 mortality tables, adjusted for expected future improvement in life expectancies. Mortality assumptions for determining minimum funding requirements for multiemployer plans will vary plan by plan—again, based on industry trends, plan experience, and reflecting the actuary's professional judgment. For that reason, the extent to which the plan's own assumptions will differ from the prescribed current liability tables will also vary plan by plan. The following are some common differences between the current liability mortality tables and the mortality assumptions developed by actuaries for purposes of multiemployer plan minimum funding:

- *Blue collar adjustments.* Current liability mortality tables are based on the general population, in other words, all pension plan participants regardless of occupation. Many actuaries use a mortality assumption that reflects a "blue collar" adjustment in multiemployer plans to reflect the individual plan's demographic characteristics. Based on the tables published by the RPEC, blue collar populations tend to have shorter life expectancies than the general population.
- *Plan-specific adjustments.* Similarly, currently liability mortality tables include no provision to adjust for actual observed plan experience. If experience for a multiemployer pension plan is credible and differs from the mortality rates in the published tables, the actuary may make appropriate adjustments to those rates when setting the mortality assumption.
- *Projected improvements.* The current liability mortality tables include a full projection of expected future improvement based on the scale published by the RPEC. Many actuaries working with multiemployer plans use a mortality assumption that includes a provision for future improvement, but not all do. It is difficult to predict how much mortality rates will improve in the future. Rising obesity rates and the opioid epidemic are frequently cited as factors that may shorten life expectancies, at least for certain segments of the population. Additionally, recent mortality improvements in the general population have been heavily weighted toward higher-income individuals, with substantially less improvement observed in lower-income groups.

Question. In reviewing the actual mortality experience of these plans, do you have any aggregate or summary data on the mortality gains and losses for these plans since 2000? Is there any information available that you could share or provide us access to that would show to what extent actual deaths that have occurred or didn't occur versus changes to the underlying mortality assumptions?

Answer. The American Academy of Actuaries Pension Practice Council does not track data regarding mortality gains or losses.

Question. What actual mortality developments (whether within a plan or in the wider population) cause plans to change their mortality assumptions?

Answer. As described earlier, actuarial gains and losses represent the differences between actual plan experience and the actuarial assumptions. Actuaries review gains and losses each year as part of the annual actuarial valuation process. If a pattern of consistent gains or losses emerges, the actuary would be compelled to do a closer review of plan experience and update the assumption if appropriate. This review applies to all demographic actuarial assumptions, including mortality. In addition, when new mortality tables are published, many multiemployer plan actuaries will review the new tables to see if they may offer a better representation of anticipated plan experience.

BENEFIT ACCRUALS AND CONTRIBUTIONS

Question. Could you provide information on the benefit accrual rates in the multiemployer plans? Similarly, is there any information available on the contribution levels of these plan for each year since 1974? Do you have information comparing plan contributions to other all other compensation in CBAs that govern these programs?

Answer. Benefit accrual rates vary widely plan by plan, industry by industry, and region by region. Often, the health of a plan can affect the accrual rate. For example, an underfunded plan that must devote more from each contribution dollar to pay down its unfunded liability will likely have less left over to provide for future benefit accruals. How the bargaining parties prioritize pension benefits within the overall wage package is another important factor. Two otherwise identical plans could have significantly different accrual rates due to decisions made by bargaining parties over time.

The Academy's Pension Practice Council does not track historical data on contribution rates and levels for multiemployer plans. Furthermore, most plans themselves do not track this sort of information that many years in the past (going back to 1974). Most analyses of aggregate trends among multiemployer pension plans are based on data from Form 5500 filings. Form 5500 data is available on the Department of Labor (DOL) website, but only from 1999 or 2000 forward. Furthermore, while the Form 5500 data includes the aggregate amounts of contributions made to the plan each year, it is limited in what it can tell us about contribution rates and accrual rates for multiemployer pension plans. It is also important to note that Form 5500 data does not provide information pertaining to the overall wage package.

With those caveats, Form 5500 data[1] does show the following noteworthy trends in employer contributions made to multiemployer pension plans since 2000:

- Aggregate employer contributions to all plans were about $28 billion in 2015. For comparison, aggregate contributions to all plans were about $11 billion in 2001. Note that these aggregate amounts are affected by changes in covered employment levels as well as increases in employer contribution rates. These amounts may also include employer withdrawal liability payments.
- While Form 5500 data does not include robust information on contribution rates, it may be instructive to evaluate contributions per active participant—in other words, the plan's contributions in a given plan year divided by the number of its active participants. Focusing on this measure, median contributions per active participant increased 187 percent from 2000 to 2015, which represents an average compounded increase of 7.3 percent per year over that 15-year period.

Question. In your experience, is it possible for plans to track what benefits are attributable to which service and with which employers? Likewise, is it possible to track the level of contributions each employer has made in each plan in each year?

Answer. The ability to track which benefits are attributable to different employers will vary from plan to plan. Some plans maintain very detailed records to determine which specific portions of each participant's benefits are attributable to service with different employers. Other plans maintain records sufficient to determine the total amount of each participant's benefit, but they may have difficulty attributing portions of the total benefit to service with different employers.

[1] The figures that follow are based on an analysis of historical Form 5500 data performed by Horizon Actuarial Services LLC. This analysis serves as the basis for the *Multiemployer Retirement Landscape* reports published by the International Foundation of Employee Benefit Plans.

As for the level of contributions each employer has made to the plan in each year, multiemployer pension plans do track this information, as it is required for determining employer withdrawal liability. The historical periods for which this data is readily available may vary from plan to plan, due to a number of factors, including the plan's withdrawal liability allocation method. For example, some plans may need to track historical contribution data (including contribution rates and contribution base units) for the past 10 or 11 plan years in order to accurately calculate employer withdrawal liability. Other plans may need to track contribution data for the past 25 years or more.

Question. Workers are protected under ERISA and the tax code to receive the full benefit they are promised. What steps have plans and employers taken to guarantee workers receive the full benefit they are promised? Are liabilities calculated by actuaries in such a way as to guarantee that workers will receive the full benefit they are promised? If not, and it is in fact employees who bear much of the risk under the current multiemployer system, are workers and retirees aware of that risk? How is the risk disclosed to them?

STATUTORY FRAMEWORK

Answer. As its name indicates, the Employee Retirement Income Security Act of 1974 (ERISA) was intended to secure the retirement benefit promises made to workers. It is important to understand, however, that while ERISA provides a framework intended to ensure that participant pension benefits are adequately supported, it does not provide an absolute guarantee of these benefits.

ERISA first established minimum funding standards for private sector pension plans. It also created the "anti-cutback" rule, protecting workers from reductions to benefits they had already accrued. However, ERISA contains provisions to address the possibility that some plans might fail to fulfill their promised benefits. It established the PBGC to assist insolvent plans in paying benefits, up to "guaranteed" levels. ERISA also addresses what happens in the event that PBGC itself might not be able to provide full support to insolvent plans. If this event were to occur, ERISA provides that PBGC will provide support not to the "guaranteed" levels, but only to the extent its available resources will allow.

Both PPA and MPRA provided further exceptions to the concept of an ironclad benefit guarantee for multiemployer pension plans. Most notably, for plans in critical status, PPA provides for reducing "adjustable benefits." PPA also permits plans to target delaying insolvency—rather than emerging from critical status—but only if the plan sponsor has determined that all reasonable corrective measures have been exhausted. Perhaps more significantly and subject to certain restrictions, MPRA enabled sponsors of plans in critical and declining status to reduce already-accrued benefits if doing so would enable the plan to avoid insolvency. (These developments are described in more detail in our responses to other questions from the committee.)

STEPS TAKEN BY PLAN SPONSORS

When evaluating the steps that multiemployer pension plan sponsors have taken over the years to ensure benefit promises were kept—as well as in reviewing how actuaries measure plan liabilities—it is important to also consider how statutory, financial market, and economic conditions have changed over the past few decades.

- ERISA was passed in 1974 and became effective in 1976, first establishing funding standards for private sector pension plans—a comprehensive contribution framework that is intended to ensure that participant benefits are adequately supported. Most multiemployer plan sponsors have taken steps to fulfill the benefit promises made to workers in the form of having contributions exceed ERISA requirements. (By definition, if a plan has a credit balance in its funding standard account, historical contributions have exceeded historical funding requirements.)
- At the time ERISA was passed, most actuaries were using conservative interest rate assumptions, around 5 percent, to determine minimum funding requirements. In about 1980, actuarial interest rate assumptions began to receive scrutiny for being *too* conservative. Market interest rates were in the double digits, and many argued that lower interest rate assumptions were overstating plan liabilities. From a Federal tax perspective, employers were overfunding their pension plans, and were therefore taking greater tax deductions on contributions than was justified. By the mid-1980s, most actuarial interest rate assumptions had been raised to the range of 7 to 8 percent.

- The investment returns of the 1980s and 1990s were strong. Most private sector pension plans were close to full funding, and many were overfunded. The Internal Revenue Code at the time, however, limited the tax-deductibility of employer contributions to plans that were fully funded. This point is important, because as pension plans invest in assets that have volatile returns, they need to be able to build up funding surpluses following investment gains, so they can buffer against investment losses that will inevitably follow. In the case of multiemployer pension plans, many plan sponsors decided to increase benefit levels in order to preserve the tax-deductibility of already-negotiated employer contributions.
- The 2000s brought investment losses, with the "dot-com bubble burst" from 2000 to 2002 and the financial market collapse from 2008 and early 2009. Having entered the decade without much of a cushion, most multiemployer plan sponsors spent the next several years developing strategies to restore funding to its pre-2000 levels. At the same time, many industries faced declining contribution bases, which were worsened by the 2008–2009 Great Recession. These factors made a path to recovery even more challenging.
- While the American Academy of Actuaries Pension Practice Council does not possess comprehensive data, anecdotally, the Pension Practice Council has observed that multiemployer plans that were hit hard by the economic climate of the 2000s have responded with significant corrective measures. It is not unusual to see plans where the contribution rates have more than doubled while the rate of benefit accrual applicable to future service is less than half of what it was previously. For a majority of plans, these measures are expected to be sufficient to ensure that all benefits will be paid. However, some plans that have been hit the hardest by the economic downturn will be unable to recover despite taking draconian measures to protect benefits.

DISCLOSURES

ERISA requires the disclosure of "current liability," which is a proxy for risk-free liability measurements (*i.e.,* current liability). ERISA, however, does not require that plans fund to current liability levels. A risk-free funding approach would make participants' benefits more secure, but it would also dramatically reduce benefit levels, and pension funding often involves striking a balance between security and cost-efficiency.

ERISA also contains various disclosure requirements directed at participants, but these requirements do not contain significant information on benefit security risks.

PLAN RESILIENCE

Question. What are the consequences to the plans if the stock market has a downturn/low returns over 2 or 3 years sometime in the next 5 years?

Answer. If there is another market downturn, multiemployer pension plans will no doubt be put under further stress. Many plans are in a strong enough position to be able withstand another downturn, but others are not. Even some plans currently in the "green zone" have increased employer contribution rates and reduced participant benefit levels as much as they reasonably can. These plans have limited remaining actions they can take to cope with further adverse market events.

Question. Which large plans are vulnerable if a handful of participating employers encounters financial difficulties or withdraws (even paying their full share of withdrawal liability)?

Answer. The Academy's Pension Practice Council has not done an analysis of which specific large plans are most vulnerable to the distressed withdrawal of a small number of employers.

Question. If another economic downturn similar to the 2008–2009 downturn were to occur again within the next 10 years, are plans prepared to survive it? What about plans in the green zone? What steps are plans, and their actuaries, taking to properly assess risk in response to the lessons learned from '08, which you have cited as a major cause of the downfall of certain plans such as Central States?

Answer. If another economic downturn similar to the 2008–2009 recession were to occur, some plans would be able to develop continued strategies to recover. Many other plans would not be able to recover, however, including many plans currently in the "green zone." As described earlier, the reality is that most multiemployer plans have taken significant corrective action in recent years to improve plan funding, including reducing the rate of future benefit accruals and increasing employer contribution rates. While some plans have the ability to take further corrective action if needed, others cannot reasonably make significant changes on top of those they have already made.

Many actuaries working with multiemployer pension plans are actively discussing risk with plan sponsors, quantifying how projected funding levels may be affected by future adverse events. A new actuarial standard of practice (ASOP No. 51[2]) provides guidance on how pension actuaries should be discussing risk with plan sponsors, to the extent they have not already been doing so.

Question. You testified that "[plans take money from actives and pay retiree benefits; the contributions on behalf of actives are not going towards guaranteeing their pension promises]." Is this a structurally sound model moving forward? Are employees fully aware that the contributions coming out of their paycheck each week are not in fact going towards their future retiree benefits? What other investment plans use this model?

Answer. Contributions made to multiemployer pension plans are tied to work performed by active participants. A portion of incoming contributions will go toward paying for benefits being earned by the active participants, and a portion will go toward further securing benefits that have already been earned. (The portion of contributions going toward securing benefits could go either to paying down underfunding or to building up a funding cushion against future adverse experience.) This is how pension plan funding works at a fundamental level.

It is important to note that qualified pension plans under ERISA—including multiemployer pension plans—must be prefunded. In other words, the intent is for contributions, accumulated with investment earnings, to prefund benefits as they are being earned. When experience is worse than anticipated, however, the plan may become underfunded, and a portion of incoming contributions must go toward paying down that unfunded liability. Once the plan is restored to full funding, however, ongoing contributions from active participants will not be needed to pay down the unfunded liability, but rather to further secure the overall funding of the plan or to pay for additional benefits being earned by active participants.

To contrast, other benefit programs—such as Social Security and Medicare—are not prefunded, but rather, largely pay-as-you-go. By their design, these programs rely more heavily on incoming contributions from the current active generation to pay benefits that were earned by prior generations. Additionally all insurance programs pool risk and therefore involve a sharing of program assets across all participants.

WITHDRAWAL LIABILITY

Question. Are you familiar with and would you have access to information on which employers have withdrawn from multiemployer plans in each year since 1974? Is there any aggregate or plan specific information available on the amount of these withdrawal liability payments? (Preferably by employer to each such plan.)

Answer. The Academy's Pension Practice Council does not track data on which employers have withdrawn from multiemployer plans. We are also not aware of any aggregate or plan-specific information on withdrawal liability payments. Focusing on Form 5500 filings, limited information on employer withdrawals and withdrawal liability assessments can be found on the Form 5500 Schedule R. However, this information has only been required since 2009.

Question. In general terms, how do withdrawal liability payments compare to each withdrawing employer's share of the unfunded liabilities on an actuarial basis?

Answer. The amount of an employer's statutory withdrawal liability payments (as defined under section 4219 of ERISA) is not directly related to its assessed withdrawal liability amount, which represents the employer's allocated share of the plan's unfunded vested benefits. In general, the amount of the payment increases as employer contributions increase. (Under MPRA, contribution rate increases required under a rehabilitation plan that take effect after 2014 are excluded from determining withdrawal liability payments.) In the case of a plan with a relatively small unfunded vested liability, the employer's statutory withdrawal liability pay-

[2] *http://www.actuarialstandardsboard.org/asops/estimating-future-costs-prospective-property casualty-risk-transfer-risk-retention/.*

ments will pay down its withdrawal liability assessment, including applicable interest, in less than 20 years.

In general, the statute limits withdrawal liability payments to 20 years, often referred to as the "20-year cap." (The 20-year cap does not apply in a mass withdrawal situation.) Therefore, if a plan is deeply underfunded, 20 years of statutory payments will often not pay down the employer's withdrawal liability assessment. In general, the worse funded the plan, the bigger the unfunded liability that will not be covered by the statutory withdrawal liability payments.

ASSETS

Question. Is there information available on the portion of each ME plan's assets that have a readily ascertainable market value such as publicly traded stock, Treasury bonds, or cash versus items whose value is not readily ascertainable?

Answer. There is limited publicly available data regarding the asset allocations for multiemployer pension plans. Perhaps the best data source is the Form 5500 Schedule R, which was recently updated to require plan sponsors to provide basic information regarding their asset allocations.

The following table provides the average asset allocations for multiemployer pension plans, based on the asset classifications on the Form 5500 Schedule R. Note that the allocations are expressed as percentages of plan assets, and only plans with at least 1,000 participants are included. Results are for Form 5500 filings for plan years ending between June 1, 2016, and May 31, 2017.

Average Asset Allocations for Multiemployer Pension Plans

Stocks	Investment Grade Debt	High-Yield Debt	Real Estate	Other
47.7%	18.9%	5.1%	9.6%	18.7%

LIABILITIES

Question. When valuing plan liabilities, are actuaries routinely given information regarding employers in the plans? If not, would it be helpful for them to have this information to better assess risk of the plans and ability of employers to pay should the plan become insolvent?

Answer. Plan sponsors do not generally have information regarding the financial health of its participating employers, as there is no statutory requirement for employers to provide such information to the plans in which they participate. It is also important to keep in mind that providing financial information could be quite burdensome for small or privately held companies. While detailed financial information on contributing employers could help multiemployer plans assess employer-related risks, the practical aspects of gathering and analyzing this information could make such assessments extremely complex, time-consuming, and expensive.

PLAN ALTERNATIVES

Question. For employees who do not wish to take on the risk that is disclosed to them, would there be a way of providing the employees with different options to bear less risk going forward, such as the choice of having their contributions going either into a separate pool with lower discount rates, or a 401(k) plan in which the employee can make his or her own retirement decisions?

Answer. We are not aware of any examples where employees covered under a multiemployer defined benefit pension plan can opt out of that plan and into an alternative arrangement. There have been a small number of opt-out arrangements in the public plan sector and single-employer plans to allow employees to move into a defined contribution arrangement.

When evaluating alternative plan designs, it is important to consider the risks associated with those designs—to both the plan sponsor and the employee. Specifically:

- *Defined contribution plan.* With a defined contribution plan (such as a 401(k)-type plan), the employee has reduced or eliminated risk associated with the financial health of the participating employers or industry in which they work. In exchange, the employee now bears all the investment risk and longevity risk for the rest of his or her life. Without the pooling of risk inherent in a defined benefit pension plan, the employee is now subject to risk factors such as the ability to invest wisely and his or her own life expectancy.

- *Lower-risk defined benefit plan.* The sponsor of a multiemployer pension plan could elect to move toward a more conservative investment policy, which would provide a lower expected return but also lower volatility. Such a move would lead to a lower discount rate associated with the actuarial funding measurements. This arrangement would increase the likelihood that the plan would be able to deliver the promised benefit amount. However, with a lower expected return on plan assets, either the promised level of plan benefits would be lower, the level of contributions needed from employers would be higher, or both. In other words, under a more conservative defined benefit arrangement, an employee would have a higher degree of certainty in the promised benefit being delivered, but the level of that promised benefit would be lower.

If the Joint Select Committee wishes to consider an "opt out" provision, there are many factors to be considered, including participant education, whether the options provide lifetime income, anti-selection (participants selecting the option most beneficial to them, thus raising costs and diluting the benefits of pooling risks), and the possibility of individuals making decisions that are not in the interest of their long-term financial security. If employees are allowed to opt out to a defined contribution plan, the contribution base available to support the benefits of the remaining active employees in the defined benefit plan will be reduced, which increases the risk to those choosing to remain in the defined benefit plan. The potential administrative complexities related to providing participant choice between different defined benefit and defined contribution options is another important consideration.

QUESTIONS SUBMITTED BY HON. SHERROD BROWN

Question. Please describe the advantages and disadvantages to the various discount rates that could be used for valuing the liabilities of multiemployer pension plans for minimum funding purposes, such as the current rate based on long-term investment return expectations, the rates applicable to single-employer plans based on corporate bond yields, and rates based on Treasury bond yields.

Answer. In addition to the response below, we refer to the response to Question #2 from Senator Hatch, which covers similar topics.

Actuarial methods and assumptions should be appropriate for the purpose of the particular measurement. It is critical to note that the advantages and disadvantages of a discount rate *for minimum funding purposes,* which is what the question asks and this response provides, may be very different in other contexts. The same quality that supports one measurement objective may be contrary to a different objective. Comprehensive understanding of plan dynamics is unlikely to be derived from any single measurement.

Two American Academy of Actuaries pension issue briefs [3]—released in November 2013 and July 2017—compared and contrasted various liability measurements. These papers made use of the following terminology.

Purpose	Discount Rate Assumption
Budget Value	Expected long-term investment return
Immunized Value	Current corporate bond yields
Solvency Value	Current Treasury bond yields

As noted in the November 2013 issue brief, using the expected long-term investment return determines a "Budget Value." The Budget Value is the theoretical asset amount that would be expected to be sufficient to pay all currently earned (and fu-

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[3] "Measuring Pension Obligations: Discount Rates Serve Various Purposes," *http://www.actuary.org/files/IB_Measuring-Pension-Obligations_Nov-21-2013.pdf,* and "Assessing Pension Plan Health, More Than One Right Number Tells the Whole Story," *http://www.actuary.org/files/publications/IB-RightNumber07.17.pdf.*

ture) plan benefits if that amount is invested and earns the anticipated return of the plan's investment portfolio, assuming that the current asset allocation remains in place.

The "Immunized Value" is an amount that is theoretically required to fully immunize benefit payments accrued to date with a dedicated high-quality bond portfolio. This is a common measurement for an employer to use to value the pension obligations from single-employer defined benefit pension plans under Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) Topic 715.

The "Solvency Value" is a current market-based measurement that determines the amount that a pension plan theoretically would need to invest in risk-free securities in order to provide the accrued benefits with certainty to the affected participants, assuming no additional contributions.

Key advantages and disadvantages of these discount rate assumptions for minimum funding purposes follow:

Expected long-term investment return

Advantages:

- Liability provides the asset value necessary to provide promised benefit payments if the expected return is realized in each future year.
- May provide greater stability for minimum required contribution amounts than other approaches.

Disadvantages:

- Presumes that the sponsor can make additional contributions if the assumed return is not achieved.
- May incent a more aggressive asset allocation to decrease the measurement of the liability.
- Not comparable across plans with different investment allocations.
- Return expectations are subjective and can vary widely.

Corporate bond rates

Advantages:

- Liability reflects what would be held on a corporate balance sheet for a similar promise, if considered very low in default risk.
- Greater comparability of liabilities across plans.
- Less incentive for risky investment.

Disadvantages:

- Does not reflect the investment policy of the plan. If the plan is fully funded with this liability measure and a typical investment mix is used, the plan sponsor is likely to have contributed more than is actually necessary to pay benefits.
- Discount rate and resulting liability may be quite volatile, presenting challenges for collective bargaining and other plan management functions.

Treasury bond rates:

- Generally the same advantages and disadvantages as for corporate bond rates, but the liability reflects the value of a promise with no default risk (as opposed to very low default risk), consistent with Treasury bond pricing.

Question. Please describe in detail the role that the trustees of multiemployer pension plans, employers, and unions representing employees have in setting benefit and contributions levels for plan participants and employers. If there is a range of customary practices, please describe the most prevalent practices.

Answer. Contributions to multiemployer pension plans are collectively bargained, and workers typically forgo some direct compensation in exchange for contributions to retirement plans. In turn, employers are required to fund the plans in accordance with their collective bargaining agreements and subject to certain regulations. The contribution rate is usually a specific amount per hour or other unit worked by or paid to the employee. When a plan becomes underfunded, the trustees may establish minimum contribution rates as part of their funding improvement or rehabilitation plans.

Traditionally, plan boards of trustees have sole authority to determine the plan design and level of benefits that will be supported by negotiated contributions. However, in some cases, collective bargaining agreements may describe the plan design and benefits. In these situations, the trustees are given the authority to collect sufficient contributions to fund the benefits.

Question. Please describe the procedures by which trustees are selected to serve as such for a multiemployer pension plan.

Answer. Multiemployer plans' boards of trustees consist of an equal number of employer trustees and union trustees. The employer trustees are selected by the contributing employers, or from associations that represent those employers. The union trustees are selected by the participating union or unions. Multiemployer plans are typically governed by trust agreements that can contain varying levels of detail regarding the process that is followed for appointing trustees.

Question. Please describe what an investment policy is for a multiemployer pension plan, including how it is created and how it is used.

Answer. An investment policy is a vital document for multiemployer pension plan governance. As the trustees of a multiemployer pension plan are fiduciaries to the plan, they must act with care and in the best interest of plan participants and beneficiaries in all matters—including those related to plan investments. For that reason, the investment policy is important in documenting the objectives, duties, policies, procedures related to the plan investments.

A plan's investment policy is typically created by the plan's board of trustees, with guidance from professional advisors such as the investment consultant and legal counsel.

Some of the key features of an investment policy include the following:

- *Objectives:* The general investment-related goals for the plan, which may include the targeted annual return, minimization of volatility, and adequate liquidity to pay benefits and expenses.
- *Duties:* Who is responsible for making certain decisions and taking certain actions related to plan investments? Parties typically include the board of trustees, an investment committee of the board of trustees, the plan administrator, the investment consultant, investment managers, or custodian.
- *Asset allocation:* The targeted percentage allocations to various asset classes (such as stocks, bonds, and alternative investments) designed to meet the goals of the investment policy. Typically, the policy will also define acceptable ranges for the asset allocation, as well as procedures for rebalancing the portfolio.
- *Manager selection:* The policies and procedures for selecting investment managers—the firms responsible for investing a portion of plan assets according to a specified strategy, the manager's approach (for example, active versus passive) and fees, are important considerations.
- *Monitoring and review:* The metrics for regularly evaluating the performance of the overall strategy relative to the stated goals, and the performance of individual investment managers relative to specified benchmarks.

Question. Please explain the risk to the multiemployer system in the aggregate if an employer that participates in numerous multiemployer plans goes bankrupt.

Answer. If a major contributing employer that participates in numerous multiemployer plans goes bankrupt, each of those plans will be left with unfunded "orphan" liabilities, as well as a diminished contribution base. These factors will create additional strain on those plans.

The Academy's Pension Practice Council has not done an analysis of the possible impact to the multiemployer pension system in the aggregate if a single employer that participates in several plans were to go bankrupt. The magnitude of the risk to the multiemployer system depends on the size of the employer, the number of plans in which the employer participates, and the current strength of those plans.

Question. Please describe the characteristics of better-funded plans from those that are facing financial troubles.

Answer. The current funded status of a multiemployer pension plan is likely to have been shaped by many factors, both internal and external. Decisions by the board of trustees with respect to the plan's investments, participant benefit levels, and employer contribution rates all contribute to the current and future health of the plan. There are also significant factors in play that are beyond trustees' control, such as market volatility, plan maturity, overall industry strength and activity, and the financial health of participating employers.

- *Investment performance:* Some multiemployer pension plans have performed better than others with respect to investment returns. That said, the vast majority of plans—which by and large are invested in diversified, balanced asset portfolios—were similarly affected by market volatility in recent decades.
- *Benefit and contribution levels:* Many boards of trustees have taken proactive measures to strengthen plan funding levels in recent years through a combination of increases in employer contribution rates and reductions in participant benefit levels. It is important to note, however, that some plans are so distressed that no reasonable corrective measures available under current law can restore them to good health.
- *Plan maturity:* One measure of plan maturity is the ratio of the number of inactive and retired participants to the number of active participants: this is often called the "support ratio." In other words, more mature plans have more inactive and retired participants supported by fewer active participants. Plan maturity is perhaps the most significant factor in distinguishing healthy plans from those in distress. The mere fact that a plan is mature does not mean that the plan will be distressed, but mature plans tend to be less resilient to adverse experience.
- *Industry activity:* "Industry activity" is a term often used to refer to overall covered employment levels. Declining industry activity can accelerate plan maturity—it causes there to be fewer active participants in the plan and a smaller contribution base, and also increases the support ratio described above. Plans in declining industries tend to be less resilient to investment volatility, due to the diminished impact any changes to future contribution rates or benefit accrual rates will have on the trajectory of the plan.
- *Employer health.* A factor related to industry activity is the financial health of participating employers. If employers are distressed, they will be less able to afford increases in contribution rates to strengthen plan funding levels. They are also less likely to be able to pay their full withdrawal liability obligation in the event of a withdrawal, creating unfunded orphan liabilities that must be absorbed by the remaining employers.

Question. Please explain whether it benefits a multiemployer pension plan to have diversity in the industries represented by its participating employers.

Answer. Multiemployer pension plans cover workers in a variety of industries, such as construction, service, transportation, retail food, manufacturing, and entertainment. In most cases, multiemployer plans cover workers in a specific industry; they are not usually diversified across industries.

Diversification is an important element in reducing risks associated with multiemployer plans—both in pooling of risk among employers, as well as in structuring a balanced asset portfolio. Diversification across industries or trades may have similar benefits for multiemployer plans, in that it would make them more resistant to forces that may adversely affect one industry but not another. That said, structuring multiemployer plans to cover workers in a variety of industries, trades, or unions would represent a major shift in how these plans are created and maintained.

Question. Please describe the current rules that allow multiemployer plans to merge with other pension plans.

Answer. A merger is when two or more multiemployer plans join to create a single ongoing plan. The plans are often in similar industries or geographic regions and often have employers that contribute to both plans. The trustees of both plans have to make a decision on whether a merger is in the best interest of their plan and its participants, and among other things decide on the future benefits and levels of contributions and whether the underfunding, if any, is made up by the individual plans or managed on a combined basis. The PBGC has provided regulations for allocating unfunded vested benefits for merged plans, where the individual liability is phased out over time.

Section 4231 of ERISA lays out several rules for mergers and transfers between multiemployer plans. That is, the plan must notify the PBGC 120 days prior to merger date, accrued benefits cannot be reduced, benefits are not reasonably expected to be subject to suspension under section 4245 (insolvent plans), and an actuarial valuation must be completed for each of the affected plans before the merger date.

PBGC may provide assistance to facilitate a merger if it's in the best interest of the participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. PBGC's facilitation may include financial assistance, training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies.

PBGC may provide financial assistance to facilitate a plan merger if: (1) at least one plan is critical and declining, (2) financial assistance will reduce PBGC's expected long-term losses from the plans involved, (3) financial assistance is needed for the merged plan to become or remain solvent, (4) PBGC confirms the financial assistance will not impair its ability to meet existing obligations, and (5) any financial assistance is paid out of the PBGC multiemployer guarantee fund.

Question. Please describe the steps, if any, that individual workers could have taken to prevent multiemployer plan funding shortfalls. Please describe if it were possible for workers to anticipate or prevent the insolvency of the multiemployer plans in which they participate.

Answer. We are not aware of any actions individual workers could have taken that would have had a significant effect on preventing multiemployer pension funding shortfalls.

QUESTIONS SUBMITTED BY HON. ROB PORTMAN

Question. Mr. Goldman, you noted that it is not uncommon for employers to pay a negotiated withdrawal liability in the form of a lump sum settlement that is often well below the amount of the employer's withdrawal liability that would otherwise be calculated under the statute. You further indicated that in reality, an employer's actual payment is often based on its ability to pay, since as you said, "it is better to get something than nothing."

To further crystalize this point, what is your analysis of the approximate percentage of employers who negotiate a lump sum withdrawal, and how much of their full withdrawal liability is that negotiated amount?

Additionally, among employers that pay their withdrawal liability in annual installments, about what percentage have their withdrawal liability forgiven after 20 years, and among these employers, how much is typically forgiven?

Answer. Specific data on withdrawal liability payments is not readily available. However, we can provide some anecdotal observations.

- In very well-funded plans, there is no withdrawal liability. In moderately well-funded plans, the withdrawal liability is paid off in less than 20 years. In distressed plans, however, withdrawal liability payments are often limited by the 20-year cap.
- The typical lump sum settlement amount is usually some percentage (for example, 80 to 90 percent) of the present value of the future withdrawal liability payments. Any settlement below 100 percent of the present value of future payments would likely reflect the uncertainty of the employer's ability to make its required withdrawal liability payments many years into the future. In evaluating proposed settlements, plan trustees often weigh the amount of the discount against the added certainty of receiving the entire amount upfront.
- A very wide range of settlement terms have been negotiated between withdrawn employers and multiemployer funds, and unfortunately there is no data available that summarizes these agreements.

Question. To follow up regarding the rate of return that multiemployer plans currently assume in discounting their liabilities, how often in the past 30 years have multiemployer pension plans achieved a market rate of return of over 7 percent?

Answer. When reviewing investment returns for multiemployer pension plans (or retirement plans in general, for that matter), it is important to keep in mind that annual returns can be quite volatile, even with a well-diversified portfolio. It is also important to note that historical data on investment returns for multiemployer pension plans is not broadly available.

With that said, we have prepared an analysis of historical median investment returns for multiemployer pension plans. This analysis draws on publicly available Form 5500 data where it is available, specifically for calendar years from 2000 through 2016. For calendar years from 1982 through 1999, and for calendar year 2017.[4] (Note that this data may include multiemployer plans other than defined benefit pension plans.) For calendar years prior to 1982, investment return data for multiemployer plans was not readily available. Therefore, for those years, the analysis uses a 50/50 blend of index returns for the S&P 500 and bond markets.

Based on the above data and indexes:

- Focusing on the 30-year period from 1988 through 2017, median investment returns met or exceeded a 7.0 percent benchmark return in 19 of 30 years. The annualized return for that 30-year period is 7.7 percent. It is important to note that even over a 30-year period, these statistics can be endpoint sensitive. In other words, these stats may change noticeably by simply shifting the period forward or backward by one year.
- Investment returns for multiemployer plans have varied by decade, sometimes significantly. Median annualized returns were: 6.7 percent for the 1970s; 13.1 percent for the 1980s; 11.2 percent for the 1990s; and 2.7 percent for the 2000s. The median annualized return so far this decade (for the 8 years from 2010 through 2017) has been 8.2 percent.

QUESTIONS SUBMITTED BY HON. BOBBY SCOTT

Question. Please describe in detail the funding rules of the single-employer pension plans and the multiemployer pension plans.

Answer. Below is a comparison of the general funding rules for single-employer plans and multiemployer plans:

Comparison of U.S. Single-Employer and Multiemployer Pension Plan Minimum Funding Rules

	Single-Employer	Multiemployer
Relevant Internal Revenue Code Sections	Sections 412, 430, 436.	Sections 412, 431, 432.
Actuarial Assumptions:		
Economic Assumptions	**Selection subject to Actuarial Standard of Practice No. 27[5] (ASOP 27)**	
Assumed Rate of Return on Investments	Generally based on expected return over a long-term investment horizon (typically 20 or more years) for the actual or target investment portfolio held in trust. Actuary selects assumption. Only used in calculation of Actuarial Value of Assets, and limited to third segment rate (*i.e.,* the average yield on high-quality corporate bonds with maturity of 20 years or more).	Generally based on expected return over a long-term investment horizon (typically 20 or more years) for the actual or target investment portfolio held in trust. Actuary selects assumption. Used in the calculation of Actuarial Value of Assets and Actuarial Liability.

[4] The analysis is based on market data for multiemployer benefit plans gathered by Segal Marco Advisors, an investment consulting firm in the industry.

Comparison of U.S. Single-Employer and Multiemployer Pension Plan Minimum Funding Rules—Continued

	Single-Employer	Multiemployer
Discount Rate	Prescribed, based on 24-month average of high-quality corporate bond yields. However, statutory relief measures adopted following the 2008 financial crisis have broken the link with current market rates by extending the averaging period to 25 years.	Selection is subject to ASOP 27, with a "best estimate" standard. The discount rate is based on the expected long-term rate of return on investments that will be used to pay all future benefits (including those not yet accrued). For current liability, a 4-year average of 30-year Treasury bond yields is prescribed.
Other Economic Assumptions Such as Inflation or Assumed Rate of Future Salary Increases	Actuary selects assumptions.	Actuary selects assumptions.
Demographic Assumptions	**Selection subject to Actuarial Standard of Practice No. 35[6] (ASOP 35)**	
Mortality	Prescribed.	In general, actuary selects assumption, however, "Current Liability" measurement uses prescribed assumptions.
Other Demographic Assumptions	Actuary selects assumptions, using a "best estimate" standard.	Actuary selects assumptions, using a "best estimate" standard.
Funding Method	**Selection subject to Actuarial Standard of Practice Nos. 4 and 44 (ASOPs 4 and 44)**	
Actuarial Cost Method	Prescribed, a traditional Unit Credit method that results in a Target Liability and Target Normal Cost.	Selection subject to ASOP 4[7] and pre-PPA rules. Most common methods are Entry Age Normal and traditional Unit Credit.
Asset Valuation Method	Actuarial Value of Assets (AVA) is Fair Market Value or may be calculated under a restricted number of alternative methods outlined in Internal Revenue Service (IRS) Notice 2009–22 which recognize market returns over not more than 24 months, with AVA limited to within 10 percent of Fair Market Value.	Selection subject to ASOP 44[8] and various rules promulgated by the IRS. Reflection of market returns over a period of 5 years is allowed, with AVA limited to within 20 percent of Fair Market Value.
Amortization of Unfunded Liabilities	Generally over 7 years; temporary amortization relief permitted; extended amortization periods of up to 15 years for certain years between 2008 and 2011.	Generally over 15 years; certain pre-PPA amounts amortized over longer periods may continue to be amortized over the remainder of those periods.

Comparison of U.S. Single-Employer and Multiemployer Pension Plan Minimum Funding Rules—Continued

	Single-Employer	Multiemployer
Calculation of Minimum Required Contribution (MRC)	Target Normal Cost (the value of benefits expected to be earned in the year plus plan administrative expenses expected to be paid from plan assets during the year), plus amortization of unfunded Target Liability (referred to as the Funding Shortfall). If the AVA exceeds the Target Liability, any Excess Assets reduce the Target Normal Cost.	Normal Cost plus amortization of unfunded liabilities.
Credit Balances Available to Offset MRC	Plan sponsor may elect to apply contributions in excess of MRC to "Prefunding Balance" (PFB), which may be used to offset future MRC contributions. Plan assets are reduced by PFB and any pre-PPA Carryover Balance (COB) when MRC is calculated, and use of COB/PFB is generally precluded if plan is less than 80 percent funded. Interest is credited annually on unused balances based on the actual return on plan assets.	Accumulated past contributions in excess of MRC can be used automatically (to the extent needed) to offset MRC for current and future years. Plan assets are not reduced by credit balance when determining funded percentage. Interest is credited based on the discount rate.
Annual Certification of Funded Status by Enrolled Actuary	Annual Adjusted Funding Target Attainment Percentage (AFTAP) Certification required.	Annual "Zone Status" Certification required. Satisfactorily funded (generally 80 percent funded with no projected inability to pay MRC in next 7 years) plans in Green Zone. "Endangered" plans (generally less than 80 percent funded or projected unable to pay MRC) in Yellow Zone. Critical plans (generally projected inability to pay MRC in near future) in Red Zone. A critical and declining subset are projected to become insolvent within 20 years (or within 15 years for certain plans).
Consequences of Lower Funding Levels	Plans with AFTAP less than 80 percent funded are subject to restrictions on payment of accelerated benefit distributions (most commonly lump sums), amendments increasing plan benefits, and unpredictable contingent event benefits. Plans less than 60 percent funded must freeze benefit accruals. Additional restrictions apply for plans with an AFTAP less than 100 percent where sponsor is in bankruptcy. Accelerated contributions may also be required if plan deemed "At-Risk" or to remove benefit restrictions in some cases.	Plans not certified as Green by Enrolled Actuary must adopt plan of action to reduce benefits and/or increase employer contributions to improve plan funding and emerge from current zone status. Red Zone plans have benefit improvement restrictions.

Comparison of U.S. Single-Employer and Multiemployer Pension Plan Minimum Funding Rules—Continued

	Single-Employer	Multiemployer
Quarterly Contribution Requirement	Generally, plans less than 100 percent funded must make quarterly payments toward the MRC.	Quarterly contributions not required. Contributions are generally made throughout the year pursuant to collective bargaining agreements.
Failure to contribute MRC	Excise taxes, notification of participants, the DOL, IRS and PBGC, possible lien against plan sponsor's assets if aggregate unpaid amounts exceed $1 million.	Excise taxes and other penalties apply. However, plans in the Red Zone operating under a Rehabilitation Plan generally qualify for waiver of excise tax.

[5] *http://www.actuarialstandardsboard.org/asops/selection-economic-assumptions-measuring-pension-obligations/.*
[6] *http://www.actuarialstandardsboard.org/asops/selection-of-demographic-and-other-noneconomic-assumptions-for-measuring-pension-obligations/.*
[7] *http://www.actuarialstandardsboard.org/asops/measuring-pension-obligations-determining-pension-plan-costs-contributions/.*
[8] *http://www.actuarialstandardsboard.org/asops/selection-use-asset-valuation-methods-pension-valuations/.*

Question. What are the main differences between the two?

Answer. The main differences between the single-employer plan and multiemployer plan funding rules are the following:

Differences Between U.S. Single-Employer and Multiemployer Pension Plan Funding Rules

	Single-Employer	Multiemployer
Discount Rate	Prescribed, based on modified ("stabilized") high-quality corporate bond yields.	Selection is subject to ASOP 27. Typically the discount rate is based on the expected long-term rate of return on investments. Current liability discount rate prescribed based on 30-year Treasury rates.
Mortality	Prescribed.	Selection subject to ASOP 35; however, "Current Liability" measurement uses prescribed assumptions.
Asset Valuation Method	Investment gains/losses smoothed over no more than 24 months; AVA limited to within 10 percent of Fair Market Value.	Investment gains/losses smoothed over no more than 5 years; AVA limited to within 20 percent of Fair Market Value.
Amortization of Unfunded Liabilities	Generally over 7 years.	Generally over 15 years.
Credit Balances	Available only when plan funded at 80 percent or higher in the prior year. Applied based on plan sponsor elections. Existing balanced offset AVA in some cases when determining funded status measures. Unused balances marked to market by crediting interest based on actual return on plan assets.	Automatically applied as needed to meet minimum funding requirements, regardless of plan funded status. Credit balances do not offset plan assets in funded status measures. Unused balances carried at book value by crediting interest based on discount rate (*i.e.,* expected return on plan assets).

Differences Between U.S. Single-Employer and Multiemployer Pension Plan Funding Rules—Continued

	Single-Employer	Multiemployer
Consequences of Lower Funding Levels	Plans less than 80 percent funded are subject to restrictions on accelerated benefit distributions, amendments increasing plan benefits, and payment of unpredictable contingent event benefits. Plans less than 60 percent funded must freeze benefit accruals. Additional restrictions when plan sponsor is in bankruptcy. Accelerated contributions may be also be required if plan deemed "At-Risk" or to remove benefit restrictions in some cases.	Plans not certified as Green by Enrolled Actuary must take actions to reduce benefits and/or increase employer contributions to improve plan funding. Benefit improvements are restricted for Red Zone plans.

Question. What would be the key impacts to plans, employers, and participants if multiemployer pension plans were funded like single-employer plans?

PLANS

Answer. Use of the single-employer plan funding rules would generally result in significantly lower funded status percentages.[9] Many multiemployer pension plans would be subject to accelerated funding requirements and restrictions on benefit payments. Some plans would be required to freeze benefit accruals due to being under 60 percent funded. Plans could see a resulting decline in active participation as bargaining units negotiate out of plans where their members will receive no additional accruals.

EMPLOYERS

Use of the single-employer plan funding rules would generally result in increased and unstable contribution requirements. Increases to the contributions would need to be negotiated, and instability would severely hamper employer viability, especially in construction and other competitive industries. Failure to negotiate contribution increases may result in excise taxes and other penalties owed by the employers. If unfunded vested benefit liability were calculated using the single-employer liability assumptions, the exposure to withdrawal liability in some plans would increase for many employers (depending on the actuarial basis used), and the instability of ongoing funding could lead to a wave of employer withdrawals that would result in additional plans becoming insolvent.

PARTICIPANTS

Future participant benefits would likely be reduced from current levels. Plans less than 60 percent funded under the single-employer rules would be required to freeze benefits. Plans over 60 percent funded may still need to reduce future benefit accruals in order to meet the accelerated amortization of unfunded liability. Members would be pressured to give up more of their wages to help meet higher funding requirements, and be far less likely to support continued plan participation.

Additional Details on the Primary Differences Between the Single-Employer and Multiemployer Plan Funding Rules

DISCOUNT RATE(S)

Single-Employer: The single-employer funding rules require discounting of future expected pension benefit payments using rates based on the yields on high-quality corporate bonds, regardless of the plan's actual investments, in order to develop the

[9] Note that funded status is only one measure of plan funding or financial health. Different measures of funded status may be used for different purposes but are only estimates of the relative values of plan assets and liabilities at a point in time, using a specified set of assumptions to estimate the plan's liabilities. The true cost of a defined benefit plan is based on the actual benefits that come due to participants in the future, the pattern of which will inevitably differ from any estimate developed to measure the cost of those payments.

actuarial present value of accrued benefits as of a valuation date. Under the original PPA 2006 rules, the bond rates could either be based on a full yield curve incorporating a 1-month average of bond yields, or could be based on three "segment rates" derived from a 24-month average of rates. The three segment rates represent the average yields for periods less than 5 years (the first segment rate), 5 to 20 years (the second segment rate), and 20 years and beyond (the third segment rate).

The Pension Relief Act of 2010 (PRA) was the first of several funding relief measures in the wake of the 2008–2009 financial crisis. PRA allowed plan sponsors to extend the amortization period of the funding shortfall for any 2 of the years 2008 through 2011, inclusive. In 2012, the Moving Ahead for Progress in the 21st Century Act (MAP–21) provided for "Segment Rate Stabilization," which limited the segment rates to within a corridor defined by a decreasing percentage (starting at 30 percent and reducing in 5-percentage-point increments to 10 percent) of the 25-year average of the original PPA segment rates for calculation of the MRC and AFTAP used to determine the applicability of the PPA benefit restrictions. Segment Rate Stabilization raised the allowable segment rates, which significantly decreased minimum required contributions and provided relief from benefit restrictions for single-employer plans. The phase-out of the corridor based on 25-year average rates has been extended subsequent to MAP–21 by the Highway and Transportation Funding Act of 2014 and again in the Bipartisan Budget Act of 2015.

Notably, Segment Rate Stabilization did not apply to the funded status measurements required to determine whether reporting to the PBGC under ERISA section 4010 was required by a plan sponsor, and also did not apply to the calculation of the unfunded vested benefits used to compute a plan's PBGC variable premium. Thus, since enactment of the PRA many plan sponsors have been able to satisfy the minimum funding requirements but are faced with PBGC variable premiums sufficiently large that a significant incentive exists for the sponsor to fund at a higher level than the MRC (which may not be affordable for some plan sponsors) or to remove liability from their plans through pension risk transfer transactions (*e.g.,* lump sum windows or annuity purchases).

As of March 31, 2018, the segment rates applicable for various purposes are shown in the table below. For comparison purposes, the "effective interest rate," which is the single discount rate that would produce the same target liability as the segment rates, will typically fall between the second and third segment rates.

Measurement Purpose	Averaging Period	Segment Rate		
		First	Second	Third
Minimum Required Contribution and PPA Benefit Restrictions.	25 years.[10]	3.92%	5.52%	6.29%
PBGC ERISA section 4010 Reporting Applicability.	24 months.	1.94%	3.66%	4.46%
PBGC Variable Rate Premiums.	One month.	2.91%	3.99%	4.43%

[10] The actual 25-year average is made using 24-month averages of the monthly segment interest rates, effectively extending the averaging period beyond 25 years.

Multiemployer: Multiemployer plan actuaries generally use a discount rate to value plan liabilities equal to the expected long term rate of return on plan assets. Selection of this assumption is subject to ASOP No. 27. Since most multiemployer plans invest in a diversified portfolio that includes return-seeking asset classes such as equities, discount rates tend to be higher than the single-employer discount rates, even with Segment Rate Stabilization. The average discount rates reported on the IRS Form 5500s used by multiemployer plans in 2015 was approximately 7.4 percent.

MORTALITY

Single-Employer: The mortality rates (and allowance for improvement over time) to be used to calculate the Funding Target and Target Normal Cost are prescribed. These rates are generally based on studies performed by the SOA, but until a recent update in 2018 were based on a study published in 2000 and had not been revised since PPA was enacted. The mandated assumptions do not vary by industry, geographical area or other plan-specific demographics. Only very large plans may use their own mortality experience to set assumptions, if they can show that their plan experience is statistically significantly different from the mortality rates under the standard prescribed tables.

Multiemployer: The selection of the mortality tables and improvement scales to be used for multiemployer plans is subject to ASOP No. 35. The recent SOA studies published in 2014 (with subsequent updates to the improvement scales in 2015, 2016, and 2017) have included mortality tables that vary by "collar" and many multiemployer plans may use some variation of these "blue collar" tables, although those tables were not based on multiemployer experience. The SOA's RP–2014 blue collar mortality rates may result in slightly lower plan liabilities than the prescribed tables for single-employer plans. There are studies indicating that plans, and many industries in which multiemployer plans are prevalent, experience mortality rates that are significantly higher than the SOA blue collar table would indicate, so actuarial judgment is often used to modify the SOA tables.

ASSET VALUATION METHODS

Both single-employer and multiemployer funding rules allow for an AVA to be used for funding calculations. Generally, this is allowed to smooth out volatility in investment returns so that plan costs are less volatile than what would be calculated if the fair market value of assets was used in the calculations.

Single-Employer: The allowable AVA methods are narrowly defined in IRS Notice 2009–22. Actual investment returns differing from expected investment returns must be fully recognized in the AVA within 24 months. The expected rate of investment returns is limited by the third segment rate as of each valuation date, and the AVA must lie between 90 and 110 percent of fair market value.

Multiemployer: The range of allowable AVA methods is subject to ASOP No. 44 and pre-PPA regulatory guidance. Actual investment returns differing from expected investment returns are typically recognized over a period of 5 years or less. The expected rate of investment return is based on a best estimate of expected returns for the plan's investment portfolio. The AVA must lie between 80 and 120 percent of fair market value.

One of the PRA 2010 funding relief measures allowed for 10-year recognition of 2008–2009 investment losses in the AVA and longer amortization of those losses after they are recognized for multiemployer plans that elected the relief.

AMORTIZATION OF UNFUNDED LIABILITIES

Single-Employer: The single-employer funding rules define the "Funding Shortfall" as the Funding Target minus AVA, where AVA is reduced by any PFB or COB. Each year, the Funding Shortfall in excess of the unamortized balance of prior Funding Shortfall amounts is amortized over 7 years. A single annual amortization base is established, such that changes due to experience gains/losses, plan amendments, and assumption changes are not separately identified.

One of the PRA 2010 funding relief measures allowed for amortization of Funding Shortfall amounts for 1 or 2 of the plan years beginning in 2008, 2009, 2010, and 2011 to be amortized over 15 years or over "2 plus 7" years (where amortization was interest only for the first 2 years).

Multiemployer: Under the multiemployer funding rules, the unfunded actuarial liability (UAL) is defined as Actuarial Liability (AL) minus AVA. The PPA 2006 multiemployer funding rules allowed for the previously established amortizations of past plan amendments and assumption changes to be amortized over the remainder of their original 30-year amortization periods. Pre-PPA 2006 gains or losses continued to be amortized over the remainder of their 15-year amortization periods. All post-PPA 2006 changes in UAL due to experience gains or losses, plan amendments, or assumption changes are amortized over 15 years. Changes in UAL are separately identified and amortized by source, even though the amortization period is the same for each of these sources. Funding method changes are amortized over 10 years.

Another of the PRA 2010 funding relief measures allowed for amortization of 2008–2009 investment losses to be amortized over a 29-year period.

CALCULATION OF THE MRC

Single-Employer: Under the single-employer funding rules, the MRC is generally equal to Target Normal Cost plus Shortfall Amortization, where, as discussed earlier, Target Normal Cost (TNC) is calculated using prescribed discount rates based on corporate bond yields and a prescribed mortality table, Shortfall Amortization is over 7 years, and the Funding Shortfall is calculated based on AVA reduced by PFB and COB. The TNC includes an estimate of the administrative expenses expected to be paid from plan assets during the year, and is reduced by any Excess Assets (defined as the AVA − COB − PFB − TL).

Multiemployer: Under the multiemployer funding rules, the MRC is generally equal to Normal Cost plus amortization of UAL, where, as discussed earlier, Normal Cost is calculated using a discount rate equal to the expected rate of return on plan assets and a best-estimate mortality table, and UAL is amortized generally over 15 years. The expense load for expected plan administration expenses may be defined explicitly by inclusion in the normal cost (as with single-employer plans) or implicitly through a reduction in the discount rate.

CREDIT BALANCES AVAILABLE TO OFFSET MRC

Both the single-employer and multiemployer funding rules allow plan sponsors to offset the MRC by past contributions made in excess of past MRC amounts.

Single-Employer: The use of COB or PFB is restricted in a number of ways under the PPA 2006 single-employer funding rules, to reduce the ability of a plan sponsor with a seriously underfunded plan to rely on a large credit balance to meet minimum funding requirements. PPA 2006 does not allow a plan less than 80 percent funded to use these balances to satisfy minimum funding requirements. PPA 2006 requires the funding shortfall to be calculated deducting PFB and COB from AVA, so maintaining these balances actually increases a plan sponsor's calculated MRC amounts by increasing the shortfall amortization amounts. A plan sponsor may also waive these balances to increase the funded percentage, for example to avoid benefit restrictions or restrictions on plan amendments under IRC section 436 or reporting to the PBGC under ERISA section 4010.

The COB and PFB are credited annually with interest at the actual rate of return on plan assets, to the extent not used to offset the MRC or reduced to improve the funded percentage. This mark-to-market approach precludes a plan sponsor from incurring large losses while still increasing its future funding credits with an assumed rate of return. Plan sponsors must actively elect to use the balances to satisfy the MRC, and must specify the exact amount to be used each year.

Multiemployer: The PPA funding rules for multiemployer plans retained the credit balance concept from the pre-PPA funding rules. Any prior years' contributions in excess of prior MRC amounts are accumulated at the valuation interest rate (*i.e.,* an expected return on assets) and are automatically used to satisfy current minimum funding requirements to the extent not otherwise satisfied with cash contributions. If the credit balance ever becomes negative, this amount is called a "funding deficiency." If a funding deficiency occurs or is projected to occur in the next 4 or 5 years, the plan will be considered to be in critical status (in the Red Zone) and must adopt a rehabilitation plan, which reduces plan benefits and/or increases employer contributions to correct the funding problem, if possible. If a funding deficiency is projected to occur within 7 years, a plan is considered to be endangered (in the Yellow Zone) and must adopt a Funding Improvement Plan, reducing the rate of future benefit accruals and/or increasing employer contributions to correct the funding problem.

CONSEQUENCES OF LOWER FUNDING LEVELS

Single-Employer: Plans less than 80 percent funded are subject to restrictions on (a) payment of accelerated benefit distributions (such as lump sums and other amounts paid more rapidly than in equal installments over a participant's lifetime), (b) amendments increasing plan benefits, and (c) unpredictable contingent event benefits. Special "At-Risk" funding measures accelerate the minimum funding requirements for certain plans that are less than 80 percent funded on the regular funding assumptions and less than 70 percent funded using special "At-Risk" assumptions.[11] Plans less than 60 percent funded must freeze benefit accruals. Additional contributions in excess of the minimum funding requirements may be made to remove these restrictions, and cannot be added to the plan's PFB. A plan sponsor in bankruptcy will be subject to the accelerated benefit restrictions unless the plan's actuary has certified the funded percentage for the current year to be in excess of 100 percent. The only remedial actions available for underfunded single-employer

[11] The special "At-Risk" assumptions reflect accelerated retirement timing and an election of the most valuable form of benefit payment at the assumed retirement date.

plan sponsors are to reduce or eliminate future benefit accruals, waive PFB and COB, or contribute their way out of underfunding.

Multiemployer: Plans not certified as Green by the Enrolled Actuary must take actions to reduce benefits and/or increase employer contributions to improve plan funding. Within 30 days of certification as endangered or critical, the plan must notify all participants and beneficiaries, the bargaining parties, the PBGC, and the Secretary of Labor. Certain improvements are to be made over a funding improvement period or rehabilitation period of about 10 years. Annual certification of "scheduled progress" under the funding improvement plan or rehabilitation plan must be certified by the Enrolled Actuary or further corrective action is required. The guidelines and applicable timelines for establishing the funding remedies were designed to work under the collective bargaining process.

Generally, endangered plans may reduce future benefit accruals and increase employer contributions. Critical plans may reduce optional forms of benefit subsidies, amounts payable at early retirement ages and disability benefits payable prior to normal retirement age, in addition to reducing future benefit accruals. Some severely underfunded critical plans may not be able to restore funding within the rehabilitation period and in that case may conclude that all "reasonable measures" to restore plan funding have been taken.

MPRA allows critical and declining plans to apply for benefit suspensions to reduce all benefits, but not below 110 percent of the PBGC guaranteed level, if this is projected to restore solvency after all reasonable measures have been taken to attempt to restore funding without benefit suspensions. Another MPRA measure allows the PBGC to consider applicants for a "partition," in which the agency provides immediate resources to pay for the benefits of a segment of the participants, in combination with a maximum suspension for all participants, enabling long-term solvency to be projected for the non-partitioned segment.

QUARTERLY CONTRIBUTIONS

Single-Employer: Plans less than 100-percent funded must make quarterly payments toward the MRC to accelerate the payment of minimum required contributions to the plan. Plan sponsors may elect to use PFB or COB to cover the quarterly requirements, in certain circumstances. Failure to make a quarterly contribution or a timely election to use PFB or COB to cover the quarterly requirement is a PBGC-reportable event, and requires participant notification (unless promptly corrected).

Multiemployer: There is no quarterly contribution requirement for multiemployer plans. Employer contributions are generally made throughout the year based on hours or other units worked for which employer contributions are due under the applicable collective bargaining agreements.

FAILURE TO CONTRIBUTE MRC

Single-Employer: There are several consequences of failure to satisfy the minimum funding requirements.

- Additional interest penalties apply when quarterly contributions are paid late. When the full MRC is not paid by the final contribution due date (8½ months after the end of the year), interest on the late amount continues to accrue until paid. For late quarterly payments, an additional 5 percent interest penalty applies in addition to the regular interest accrued.
- An excise tax equal to 10 percent of the unpaid MRC is due for failure to pay the full amount by the final contribution due date. Amounts remaining unpaid continue to accrue additional 10-percent penalties as of each final contribution due date for subsequent years, until corrected. Amounts that remain uncorrected after several years may become subject to a 100-percent excise tax.
- The PBGC must be notified of the failure to pay the MRC in a timely fashion. Special reporting applies when the aggregate unpaid amount of any quarterly and final installments (with interest) exceeds $1 million.
- When aggregate unpaid contributions (with interest) exceed $1 million, the PBGC may place a lien against the plan sponsor's assets.

Plan sponsors experiencing temporary financial hardship may apply for a minimum funding waiver, allowing them to defer and amortize the waived contribution over a period of 5 years, if they can demonstrate an ability to make the amortization payments in addition to their projected funding requirements in future years.

Multiemployer: Excise taxes and other penalties apply. However, plans in the Red Zone operating under a Rehabilitation Plan generally qualify for a waiver of the excise tax.

Question. In the PBGC's multiemployer program, the "insurable event" is plan insolvency. What does that mean in practice? Please describe in detail the corrective action specified under the Pension Protection Act (PPA) and the Multiemployer Pension Reform Act (MPRA) requiring plans to identify and take steps to remedy funding challenges before insolvency is reached.

PLAN INSOLVENCY AND PBGC

Answer. A multiemployer pension plan is insolvent when it will have insufficient liquid assets and revenue to pay next year's benefit payments to retirees and beneficiaries in pay status. When a multiemployer pension plan becomes insolvent, triggering PBGC's insurable event, PBGC will provide the plan with financial assistance to enable the plan to make benefit payments, but only up to the PBGC-guaranteed levels. The amount of the financial assistance considers the plan's available resources—any liquid plan assets and cash inflow such as employer contributions and withdrawal liability payments—that can be used to pay at least a portion of guaranteed benefits.

Technically, the financial assistance provided by PBGC is structured as a loan, but it is highly unlikely the insolvent plan will be able to repay that loan. (To date, only one insolvent plan has repaid the financial assistance provided to it by PBGC.)

CORRECTIVE ACTIONS UNDER PPA

PPA provided multiemployer pension plans a framework and new tools to address their underfunding that did not previously exist under ERISA. Most notably:

- *Required remedial action plans in endangered or critical status:* PPA requires annual actuarial status certifications for multiemployer pension plans. Certifications are based on current and projected funded levels. The sponsor of a plan certified to be in "endangered" status must adopt a "funding improvement plan," and the sponsor of a plan in "critical" status must adopt a "rehabilitation plan."
- *Required contribution increases:* A critical status rehabilitation plan or endangered status funding improvement plan may include schedules of required increases in contribution rates, which must be adopted by the bargaining parties. Prior to PPA, multiemployer plan sponsors could encourage bargaining parties to adopt increases in contribution rates, but there was no specific statutory authority providing for this.
- *Reductions in adjustable benefits:* A rehabilitation plan (but not a funding improvement plan) may include reductions to "adjustable benefits," which include early retirement benefits, ancillary benefits, and other subsidies. These reductions may apply to benefits that have already been accrued, but generally may not apply to participants in payment status. Prior to PPA, accrued benefits were protected under the anti-cutback rule first established under ERISA.[12] With very limited exceptions, accrued normal retirement benefits and benefits already in payment status when a plan enters critical status remain protected under PPA.
- *Exhaustion of all reasonable measures:* Under PPA, the primary goal of a rehabilitation plan is to enable the plan to emerge from critical status by the end of a 10-year rehabilitation period. If, however, a plan sponsor determines that it has exhausted all reasonable measures, it can instead adopt a rehabilitation plan that takes reasonable measure to enable the plan to emerge from critical status at a later date, or to forestall the projected insolvency.

The financial market collapse of 2008 and the Great Recession put significant strain on multiemployer pension plans, but most were able to work within the framework provided by PPA to restore funding levels. Some plan sponsors, however, found their plans were too severely distressed to develop a remedial plan that enabled the plan to emerge in a timely way from critical status or avoid projected insolvency.

[12] Internal Revenue Code section 411(d)(6) prohibits the reduction or elimination of any accrued benefit, early retirement benefit and retirement-type subsidies, and optional forms of benefit.

For these severely distressed plans, even after significant benefit reductions, the contribution rate increases needed to emerge from critical status within the required statutory time frame were so immense that they would cripple or bankrupt the participating employers. Therefore, these plan sponsors relied on the "exhaustion of reasonable measures" clause under PPA and adopted rehabilitation plans that focused instead on emerging from critical status at a later date, or perhaps delaying insolvency for as long as possible. Those plan sponsors acknowledged the reality that unreasonable required contribution increases and unreasonable benefit reductions would be counterproductive. In other words, overly burdensome contribution increases could actually reduce plan revenue by triggering employer withdrawals or the rejection of plan participation by active employees.

CORRECTIVE ACTIONS UNDER MPRA

When MPRA was passed in late 2014, it targeted those plans in critical status that had exhausted all reasonable measures and were still on the path toward insolvency. MPRA intended to provide these severely distressed plans with additional tools to enable them to remain solvent. Specifically:

- *Critical and declining status:* MPRA established a new status for severely distressed plans: critical and declining status. In general, a multiemployer pension plan is in critical and declining status if it is in critical status and also projected to become insolvent (in other words, run out of money) in the next 20 years.
- *Suspension of benefits:* MPRA permits sponsors of plans in critical and declining status to elect to suspend benefits if doing so would enable the plan to be reasonably expected to avoid projected insolvency. For this purpose, a suspension of benefits is a temporary or permanent reduction in benefits that would otherwise be protected under ERISA, including benefits that have already been accrued and benefits already in payment status. Certain classes of participants—for example, those over a certain age or those who are or will be receiving disability benefits under the plan—are fully or partially protected from suspensions. Additionally, suspensions must not reduce benefits below 110 percent of PBGC guarantee levels. Plan sponsors that decide to suspend benefits must submit an application to the Department of Treasury for review and approval.
- *Partitions and facilitated mergers:* MPRA also permits sponsors of plans in critical and declining status to apply to PBGC for special assistance in the form of a partition or a facilitated merger. Under a partition, PBGC would provide financial assistance to cover a portion of plan benefits, but only up to PBGC-guaranteed levels. A precondition of a partition is that the plan must suspend benefits to the maximum extent permitted under law. Under a facilitated merger, PBGC may provide financial assistance to enable a merger between two plans, with the goal of extending plan solvency and reducing PBGC's overall anticipated losses related to the plans involved. PBGC may only approve a partition or facilitated merger if the transaction would not impair PBGC's ability to provide financial assistance to other insolvent plans. Given the financial condition of PBGC's multiemployer program, the impairment requirement significantly limits the level of available financial assistance from PBGC.

Question. In any case where all but one employer withdraws from a multiemployer pension plan, is that one remaining employer's withdrawal liability equal to the entire unfunded liability of the plan? Please describe in detail the "last man standing" rule.

Answer. Many refer to the "last man standing" rule as meaning that the final remaining employer in a multiemployer pension plan is responsible for the entire unfunded liability of the plan. When a multiemployer plan is suffering from a declining employer base, the remaining employers tend to bear a larger proportional share of the plan's underfunding. However, it is also important to understand that there are provisions in the statute that significantly limit the actual exposure to the last remaining employers. Most notably:

- Under ERISA, as amended by PPA, the sponsor of a plan in critical status may determine that it has exhausted all reasonable corrective measures to emerge from critical status within the required number of years. In that case, the plan sponsor may develop a rehabilitation plan that includes reasonable measures that target emergence from critical status at a later date, or forestall possible plan insolvency. This provision provides relief to plans with only a few remaining participating employers, in that it does not force them to provide unreasonable contribution increases to rectify underfunding that may be associated with employers that have previously withdrawn.

- Under ERISA, an employer's withdrawal liability assessment is not required to be paid as a lump sum. Instead, the statute establishes a withdrawal liability payment schedule based on historical contribution rates and contribution base units. Furthermore, under ERISA, withdrawal liability payments are generally subject to the "20-year cap," meaning that they stop after 20 years if the statutory payments have not paid down the employer's withdrawal liability assessment, with accumulated interest. In a mass withdrawal situation, however, the 20-year cap no longer applies, meaning that the statutory payments could continue indefinitely. Even if statutory withdrawal liability payments continue forever, however, an employer's withdrawal liability assessment may not be fully satisfied. In other words, the statute does not require an employer to pay its withdrawal liability assessment, even in a mass withdrawal situation.
- Finally, under ERISA, a mass withdrawal may be triggered if "substantially all" employers have withdrawn from a multiemployer pension plan. Furthermore, mass withdrawal rules may "claw back" certain employers that have withdrawn in the 3 years prior to a mass withdrawal. These provisions may help mitigate the unfunded liability exposure to the final few employers participating in a multiemployer plan.

Question. Please explain why the risk to employers participating in multiemployer pension plans could occur sooner than plan insolvency dates if accounting rules eventually require such employers to record their contingent withdrawal liability on their balance sheets.

Answer. Under current accounting rules, there are required disclosures for employers that participate in multiemployer pension plans, including information regarding the employer's total contributions to all multiemployer plans in which they participate. Withdrawal liability is not a balance sheet liability, nor is it a required financial disclosure. That said, some employers voluntarily disclose contingent withdrawal liability in their financial reporting footnotes.

If employers were required to record contingent withdrawal liability on their balance sheet, it would likely result in lowered valuations for publicly traded companies. Many employers, both public and private may experience increased difficulty in securing financing. In some cases, these factors could add additional financial pressures to companies already facing challenging economic conditions.

Question. In your written testimony, you concluded by saying "[o]ne of three actions must be taken: either benefits are reduced (this is the current course if there are no interventions), or contributions to the plans have to increase, or as a third option, more risk can be taken by plans to achieve prospective investment gains. Each option presents pros and cons with very different outcomes to different stakeholders." Please describe in detail the key considerations of each option.

Answer. All available solutions to avoid the insolvency of plans in critical and declining status, which have not found a means to resolve their funding distress, will involve one or more of three actions, broadly defined. In each of these approaches, equity and fairness to participants, employers, and taxpayers—and the ability to accept and withstand risk—all need to be considered.

OPTION 1: BENEFITS CAN BE REDUCED

There are many ways this could be accomplished on a targeted basis. It would be necessary to decide whose benefit is reduced (*e.g.,* everyone, future retirees, or current retirees, or even current retirees under a specified age), and by how much to reduce benefits. The reductions could vary by group or even by individual. If no action is taken, benefit reductions to the PBGC guarantee limit are the default, upon insolvency. However, if the PBGC is unable to honor its guarantee, then further drastic reductions will take place.

This option relies on sacrifices from plan participants in order to resolve the funding crisis.

OPTION 2: PROVIDE FINANCIAL ASSISTANCE

Financial assistance provided to troubled plans could be in the form of more contributions—from employers, existing participants, or even retirees—or from other sources. There are practical limits on how much employer contributions can be increased and still be affordable (*i.e.,* not contribute to bankruptcy or withdrawal), and limits on how much can be paid from participants; in general, critical and declining plans have determined that they have already reached that limit—they have no recourse in the absence of other sources of assistance.

The PBGC offers financial assistance that, per the statute, is a loan (that is realistically not anticipated to be repaid); however, the PBGC's multiemployer program is itself currently projected to become insolvent by the end of 2025 if another solution is not found to stave off several pending insolvencies from systemically significant plans. An alternative is for financial assistance to come from outside the current multiemployer system. To the extent that this option draws on taxpayer money, it represents a sacrifice from the associated taxpayers.

OPTION 3: TAKE ON MORE RISK

The option of taking on more risk could reduce the amount of benefit reduction or additional financial support needed to avoid projected insolvency. It is important to note, however, that taking on additional risk could still result in plan insolvency. It should also be noted that taking on additional risk must be done in combination with other measures. In other words, plans currently in critical and declining status cannot reasonably expect to alleviate their projected insolvency solely by taking on more investment risk in hopes of achieving higher returns.

An example of taking on additional risk would be to use funds from a government-backed loan at a lower interest rate but then investing the borrowed amount in return-seeking assets (including stocks) with the potential to earn a better return than the fixed rate of the loan, which would shift the risk to whatever entity provides or underwrites the loan.

This option will likely involve a taxpayer cost that is expected to be less than would be required under Option 2, but that cost will not be known in advance, and could be higher than expected or could result in unanticipated benefit losses if future experience is poor.

Question. Is present law sufficient to address the looming failure of several systemically important multiemployer pension plans and the insolvency of the PBGC's multiemployer program? Or are additional legislative tools necessary?

Answer. As described above, the provisions under PPA and MPRA are not sufficient to avoid the looming insolvency for roughly 100 to 120 multiemployer plans. For some plans in critical and declining status, Treasury and PBGC may be able to provide a means of survival via approval of plan applications for benefit suspensions and partitions. For other plans the existing tools are insufficient and additional legislative measures will be needed to avoid the insolvency and to prevent the failure of the PBGC guarantee program. However, it is important to not jeopardize the survival of the 90 percent of plans that are doing well, or are far along the path to recovery from the financial crisis.

PREPARED STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM UTAH, CO-CHAIRMAN, JOINT SELECT COMMITTEE ON SOLVENCY OF MULTIEMPLOYER PENSION PLANS

WASHINGTON—Joint Select Committee on Solvency of Multiemployer Pension Plans Co-Chairman Orrin Hatch (R–Utah) today delivered the following opening statement at a committee hearing examining the history and structure of America's multiemployer pension system.

Today, we will begin our work in developing a deep base of knowledge on the issues surrounding multiemployer pension plans and the Pension Benefit Guarantee Corporation, or PBGC.

We have an ambitious work plan, but like all great endeavors, we need to start with the basics. That means reviewing what these plans are and how they operate; examining why the plans were established; and investigating what economic, demographic, and other forces have shaped and impacted the plans.

Going forward, the committee will bring in experts from government and academia to help us better understand the issues surrounding multiemployer pension plans and the PBGC. This insight will be critical: We need to understand the numbers that shape the plans and the PBGC, because the challenges we will look at fundamentally involve arithmetic—however unpleasant that arithmetic may be.

After getting a sense of those basic numbers, this committee will also examine the major legal and financial issues with the multiemployer plans, how the governing statutes have changed over time, and how finances have evolved for the various plans and for the PBGC.

Certainly, the issues involved here are far broader and go much deeper, but to understand the scope of the problems that we face, we need basic measures of what's going on.

Looking ahead, we will likely have hearings in which we will listen to various stakeholders concerned with the operation of these plans. Those stakeholders include retirees, active employees, businesses that sponsor the plans, actuaries, plan managers, American taxpayers, and the PBGC.

We will also look at how multiemployer plans are designed and how their finances are managed, along with the unique regulatory and workforce environments they operate in.

Following stakeholder input, the committee will examine policy options, and the costs and benefits that come with them.

I do not doubt that the committee has a very heavy workload ahead.

I also do not doubt the sensitivity of the issues we will discuss. The committee is charged with a very difficult task. No matter what direction we take, we are bound to anger some folks.

But it is critical that we understand the core financial features of multiemployer pension plans, as well as the PBGC, to guide the path toward possible solutions.

For today's hearing, we have brought in two experts to provide us with information on the history, structure, operations, and evolution of the multiemployer plans since their inception in the 1940s.

Their perspectives and insight will be critical as we begin this first phase of our process, and I look forward to hearing from them and learning more.

Now, let me close my opening remarks by noting that the staff of the Joint Committee on Taxation has prepared, and posted on its website, a publication titled "Present Law Relating to Multiemployer Defined Benefit Plans," which will serve as one of many valuable resources to this committee. I appreciate the work of the JCT and thank Mr. Barthold and his team for what I am sure will be useful background information.

COMMUNICATIONS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, NW
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April 18, 2018

The Honorable Orrin Hatch
Co-Chair
Joint Select Committee on Solvency of
Multiemployer Pension Plans
U.S. Senate
Washington, DC 20510

The Honorable Sherrod Brown
Co-Chair
Joint Select Committee on Solvency of
Multiemployer Pensions Plans
U.S. Senate
Washington, DC 20510

Dear Co-Chairs Hatch and Brown:

Thank you for your work to address the multiemployer pension plan crisis, which affects retirees, participants, and employers with plans and, potentially, the entire retirement system.

The Chamber has issued a report, "The Multiemployer Pension Plan Crisis: The History, Legislation, and What's Next?", which provides an in-depth analysis of the events leading up to the crisis, and various proposals to fix it. Please include this report in the record of your hearing on the "The History and Structure of the Multiemployer Pension System."

There is no easy solution for this crisis. However, if nothing is done, the consequences will be devastating. We look forward to working with Congress to find a solution that minimizes the negative impact of this crisis. Thank you for your consideration of our comments and this report.

Sincerely,

Glenn Spencer
Senior Vice President
Employment Policy Division

CC: Members of the Joint Select Committee on Solvency of Multiemployer Pension Plans.

The Multiemployer Pension Plan Crisis: The History, Legislation, and What's Next?

U.S. CHAMBER OF COMMERCE

December 2017

EXECUTIVE SUMMARY

There is a looming pension crisis in the U.S. that unless addressed quickly by the federal government could jeopardize the retirement security of hundreds of thousands—if not millions—of Americans. Multiemployer pension plans provide pension benefits to over 10 million Americans in industries as diverse as construction, mining, trucking, and retail and a significant number of these plans find themselves in seriously distressed financial condition. If these funds become insolvent—and the time frame for that insolvency ranges from 2 to 8 years—the results could be devastating for retirees, for current employees, for the companies that contribute to the plans, and for the communities in which companies and beneficiaries reside.

The financial crisis is not limited to one region or industry. It potentially will affect companies, workers, retirees, and communities throughout the U.S. and would include states as diverse as Ohio, Texas, New York, Wisconsin, Kentucky, West Virginia, Kansas, and North Carolina.

The narrative is bleak. A recent report found that 114 multiemployer defined benefit plans (out of approximately 1,400 nationally), covering 1.3 million workers, are underfunded by $36.4 billion. Without a solution, most of these plans will be bankrupt within the next 5 to 20 years. Moreover, the federal agency that backstops pension benefits—the Pension Benefit Guaranty Corporation (PBGC)—is itself in financial distress. It is projected that the PBGC could be insolvent in a mere 5 years and, if that occurs, the retirement security of multiemployer plan beneficiaries could be wiped out entirely. Action is needed now to avert this pending crisis.

This report chronicles how the multiemployer pension plan system arrived at this point. It provides a history of the multiemployer plan system, the demographic issues that have plagued it, and attempts to fix it. Additionally, the report identifies several initiatives to resolve the crisis. Ultimately, however, the report presents a strong case for why Congress and the Administration need to act now.

Although many multiemployer plans were fully funded in the 1980s and 1990s, this euphoria came to an end in 2000, when the price of technology stocks fell drastically. Many multiemployer plans had ridden the wave of these dot-com companies to historic highs in asset levels, but when the market crashed and investment returns were disastrous, plans were hit twice as hard because of their declining contribution bases. Moreover, the 2008 global recession led funding levels in most plans to plummet. For those plans that had not sufficiently recovered from the bursting of the dot-com bubble, 2008 proved catastrophic.

National and global financial events exacerbated the financial troubles of multiemployer plans that already faced significant demographic and financial pressures. Shrinking industries and declining union participation eroded the contribution base of many plans. Between 1983 and 2016, the number of unionized workers dropped by almost half. Moreover, there has been increased competition facing contributing employers and their employees. Due to competition and fewer unionized workers, untenable ratios of inactive-to-active participants were created. Many plans now see ratios of one active worker for every two, three, or even five retirees. As expected, industries with high inactive-to-active retiree ratios experience the lowest average funding levels. Due to all of these factors, certain plans will enter a "death spiral" where there is no realistic chance of recovery.

There have been several attempts to address the multiemployer pension funding problem. In 1980, Congress passed the Multiemployer Pension Plan Amendments Act (MPPAA), which was designed to discourage employers from leaving financially troubled multiemployer plans by implementing a withdrawal liability. Although the introduction of withdrawal liability was supposed to prevent withdrawing employers from shifting pension obligations to remaining employers, the biggest problem is that many withdrawing employers do not have the financial means to satisfy their withdrawal liability.

In 2006, Congress passed the Pension Protection Act (PPA). The purpose of the PPA is to give plan trustees more flexibility in dealing with funding while at the same time forcing them to identify and correct existing and potential funding issues in time to prevent further funding level deterioration and stabilize the plans' finances. While PPA did provide additional tools, it was not enough for those underfunded plans with a declining active population base and severe negative cash-flow problems.

Recognizing that some plans could not avoid insolvency without drastic changes in the law, Congress passed the Multiemployer Pension Reform Act (MPRA) in 2014. MPRA created three new tools to help plans stave off insolvency: plan mergers, plan partitioning, and benefit suspensions. Most notably, for the first time under the Employee Retirement Income Security Act of 1974 (ERISA), Congress allowed plans that were in severe financial distress to reduce benefits that had already accrued, including benefits that were in pay status.

In addition, plan trustees have also implemented strategies to solve plans' funding issues. These strategies include; reductions to future benefit accruals, increased employer contributions, new funding policies, and a "two-pool withdrawal liability method."

While the legislation has provided benefit to some plans and some of these strategies have been helpful, the funding issues for the most underfunded plans remain. If these plans fail, the impact will affect individuals, businesses, the retirement system, and entire communities. If the largest underfunded plans become insolvent, they will bankrupt the PBGC. The subsequent benefit cuts that follow will also have deep impacts on the communities where participants live. Retirees will see their standard of living reduced. In addition, the insolvencies could bankrupt employers, potentially leaving workers without income.

Reduced spending by workers and retirees will be felt by businesses, and less money will be paid to local government in sales and other taxes. While tax revenue decreases, the demand for social programs will increase, because many retirees and workers could lose their homes and/or have difficulty paying for medical costs. This will cause many to become reliant on social programs that have to be funded by taxpayers at a time when tax revenue will decline.

Consequently, new ideas and proposals are being discussed. Some are purely legislative proposals, whereas others deal with new pension plan designs. Solutions will not be easy, but they are necessary to address the looming crisis that will affect us all.

OVERVIEW OF CURRENT MULTIEMPLOYER PENSION PLAN FUNDING PROBLEM

Since the beginning of the last decade, many multiemployer defined benefit pension plans have seen their funding level erode to the point that their ability to pay pension benefits into the future is severely threatened. While the majority of multiemployer plans are sufficiently funded, several distressed plans are facing insolvency within the next 5 to 15 years. Some of the most underfunded plans cover hundreds of thousands of participants. If they fail, the economic impact will be disastrous for the U.S. economy as a whole and for certain industries. In addition to the direct impact to contributing employer companies, many secondary businesses will fail and retirees living on a fixed income will see their benefits significantly reduced, resulting in additional stresses on already strapped social service programs and reduced revenues to state and local governments.

There are several reasons for this pending funding crisis. There have been shifts in U.S. regulatory and trade policies over the years, which have resulted in increased competition for businesses in certain industries. The number of employees covered by collective bargaining agreements (CBA) in these industries has declined precipitously. This has resulted in a change in demographics, where many plans have two or more retired participants receiving pension benefits for every one active participant on whose behalf the plan is receiving contributions.

The increased ratio of retirees to active employees has led to negative cash flow; many plans are paying significantly more in pension benefits than they are receiving in employer contributions. This negative cash flow can only be made up through investment returns. However, not only can market returns not be predicted, but taking an overly aggressive approach in investing pension plan assets in the hope that outsized investment gains will be realized is risky and raises other potential legal concerns.

Severe market downturns at the beginning of this century and in 2008 exacerbated the problem for many plans because they compounded the effect of the already existing negative cash flow. Many plans have seen their contribution base further eroded by contributing employers that left the plan due to bankruptcy with little or no remaining assets to pay their share of the plan's unfunded liability. The employees of these employers are referred to as "orphans," and the cost for funding their benefits was placed on those employers who remained behind.

Historically, there were only three ways for multiemployer pension plans to improve their funding: (1) reduce future benefit accruals, thus saving costs; (2) increase employer contributions; and (3) obtain investment returns above the rate assumed by the plan actuary.

While many plans have reduced future benefit accruals, the savings yielded from doing so have generally not been sufficient to materially improve funding. This is because the liabilities that jeopardize pension plans mostly relate to past service (*i.e.,* benefits that have already accrued and in many cases are already being paid to retirees). Until recently, there has been a blanket prohibition against reducing benefits already accrued, so plans reduced future accruals. Plans have also consistently increased employer contributions. However, plans in some industries have increased employer contribution rates to the point that employers cannot be competitive or are on the brink of bankruptcy. Investment returns cannot be predicted, and historically have not provided the type of returns that would be needed to cure most plans' underfunding.

Despite changes in the law designed to provide multiemployer plans with greater flexibility in dealing with funding problems, there is nothing that exists under current law that will save the multiemployer system's most underfunded plans. The risk is not theoretical; some projections show the Pension Benefit Guaranty Corporation (PBGC), the government entity designed to be a backstop for multiemployer pension plans that need financial assistance, will itself become insolvent by 2025. It has become increasingly clear that additional legislative solutions are necessary if the largest and most underfunded plans are to be saved. If these plans become insolvent, the negative repercussions will be felt throughout the U.S. economy.

Current Statistics

As of 2014, there were a total of 1,403 multiemployer defined benefit plans, covering 10.1 million participants.[1] Approximately 4 million were active participants, while a little over 6 million were retired participants. It is estimated that more than 1 million defined benefit plan participants are in plans that have serious funding issues.[2] The gap between plans with severe funding issues (known as "critical-status plans") and those that are not in critical status continues to widen.[3]

According to an August 2017 analysis conducted by the actuarial firm Cheiron, 114 multiemployer defined benefit plans (out of approximately 1,400 nationally), covering 1.3 million workers, are underfunded by $36.4 billion. Participants covered by plans in the coal, trucking, manufacturing, service, retail, and food industries are, and will continue to be, at the center of the funding crisis. Unless a solution is found, most of these plans will go insolvent during the next 5 to 20 years.[4]

In 2016, 167 multiemployer plans filed notices with the Department of Labor (DOL) advising that they were in "critical status" (critical-status plans are sometimes referred to as being in the "red zone").[5] As of 2012, the funding ratio for plans in critical status was 37.1% based on the market value of assets and 62.5% based on the actuarial value of assets. The aggregate underfunding on a market value basis was $166 billion, and on an actuarial basis $65 billion.[6] The difference between market value and actuarial value is explained in the "Funding Rules" section of this paper.

In 2016, an additional 83 multiemployer plans filed notices with the DOL advising they were in critical and declining status. Critical and declining status plans are plans in critical status, but, which, have been certified as facing impending insolvency. These plans generally have the highest ratios of inactive-to-active participants and the most severe negative cash flow.

As assets decline and money continues to flow out of these plans, investment income is insufficient to offset the negative cash flow. Since the market crash of 2008,

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[1] "Multiemployer Defined Benefit (DB) Pension Plans: A Primer and Analysis of Policy," Congressional Research Service Report prepared for members and committees of Congress, John J. Topoleski, November 3, 2016.

[2] Alicia H. Munnell and Jean-Pierre Aubry, "The Financial Status of Private Sector Multiemployer Pension Plans," Center for Retirement Research at Boston College, September 2014, Number 14–14, 3, *http://crr.bc.edu/briefs/the-financial-status-of-private-sector-multiemployer-pension-plans/*.

[3] Kevin Campe, Rex Barker, Bob Behar, Tim Connor, Nina Lantz, and Ladd Preppernau, Milliman Multiemployer Pension Funding Study, Milliman, Fall 2017, *http://www.milliman.com/uploadedFiles/insight/Periodicals/multiemployer-pfs/multiemployer-pension-funding-fall-2017.pdf*.

[4] "Cheiron Study Finds 114 Multiemployer Pension Plans Projected to Fail Within 20 Years, More Than a Million Participants Could Lose Benefits," August 27, 2017, *https://cheiron.us/articles/Cheiron%20Analysis%20Critical%20and%20Declining%20Plans.pdf*.

[5] "Critical, Critical and Declining, Endangered and WRERA Status Notices," Department of Labor, Public Disclosure, *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/public-disclosure/critical-status-notices*.

[6] Alicia H. Munnell and Jean-Pierre Aubry, "The Financial Status of Private Sector Multiemployer Pension Plans," Center for Retirement Research at Boston College, September 2014, Number 14–14, 3, *http://crr.bc.edu/briefs/the-financial-status-of-private-sector-multiemployer-pension-plans/*.

plans that find themselves in critical and declining status have not only failed to improve their funded percentage, but have seen their funded percentage continue to decline to the point that their only hope of survival is to reduce benefits to retirees who are already receiving benefits (referred to as benefits in "pay status").

For some plans, even reductions in benefits to retirees are not enough to stave off insolvency. Plans such as Central States, Southeast and Southwest Areas Pension Fund (Central States) and the United Mine Workers of America 1974 Pension Plan (UMWA Plan) are nearing the point of no return. Sometimes referred to as the "death spiral," these plans' negative cash flow is so severe that they will have to shift their assets away from investments that can provide long-term growth to investments that preserve cash to pay benefits.

When this happens, insolvency is no longer a matter of "if" but of "when," and by most accounts, "when" is before the end of the next decade. Therefore, without a viable resolution, in less than 10 years there will be significant benefit cuts for current retirees, active participants without retirement benefits, and employers bankrupted because of pension obligations.

The PBGC "Backstop" Is in Danger

The funding crisis for multiemployer plans is exacerbated because the Pension Benefit Guaranty Corporation's multiemployer program is itself in crisis. The PBGC is a federal agency created by Employee Retirement Income Security Act of 1974 (ERISA) to protect the benefits of participants in private-sector defined benefit plans. PBGC insures both single-employer and multiemployer defined benefit plans, but under two separate programs.

The PBGC's multiemployer program is funded from premiums paid by multiemployer pension plans and interest income on U.S. Department of the Treasury (Treasury) debt. There is no taxpayer funding.[7]

ERISA Section 4002 reads, in part, "The U.S. is not liable for any obligation or liability incurred by the corporation [PBGC]." Unlike public-sector plans that are completely financed by American taxpayers, multiemployer plans have always paid their own way, with U.S. businesses bearing the bulk of the cost.[8]

The crisis in the PBGC multiemployer program has been recent and swift. Until 2003, the PBGC multiemployer program operated with a surplus. As of 2017, the multiemployer program has a $65 billion deficit.[9] This drastic increase in liabilities is directly due to the insolvency and projected insolvency of plans in industries that have been adversely affected by regulatory and trade policies. PBGC noted that in 2017 there were 19 plans newly classified as probable claims against the insurance program as they either terminated or are expected to run out of money within the next decade. The liabilities represent the present value of $141 million in financial assistance to 72 insolvent multiemployer plans, up from the previous year's payments of $113 million to 65 plans.[10]

In addition, employers have seen a steady increase in premiums. In the 10 years starting in plan year 2007, premiums have increased $20 per participant and are now set at $28 per participant for plan year 2018. Despite these increases, the PBGC maximum benefit payout has remained relatively low and is currently $1,251 per year.

As contributing employers to these plans failed, funding levels plummeted. Remaining employers see their long-term viability threatened by ever-increasing pension liability brought on by employers that went bankrupt, liquidated, or otherwise went out of business. When employers stop contributing to a pension fund, all remaining

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[7] John J. Topoleski, "Multiemployer Defined Benefit (DB) Pension Plans: A Primer and Analysis of Policy," July 24, 2015, Congressional Research Service, 1, *http://digitalcommons.ilr.cornell.edu/key—workplace/1436/*.

[8] As noted in John J. Topoleski's November 3, 2016, paper, some in Congress have expressed reluctance to even consider providing financial assistance to the PBGC. *See* U.S. Congress, House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions, "Examining the Challenges Facing the PBGC and Defined Benefit Pension Plans," 112th Cong. 2nd sess., February 2, 2012, 112–50 (Washington: GPO, 2012) and U.S. Congress, House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions, "Strengthening the Multiemployer Pension System: What Reforms Should Policymakers Consider?", 113th Cong. 1st sess., June 12, 2013.

[9] Annual Report 2017, Pension Benefit Guaranty Corporation, November 16, 2017, *https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2017.pdf.*

[10] *Id.*

employers are required to pick up the slack and assume proportionate liability for the payments owed to the exited employer's "orphan" employees. As employers leave the pool of contributors, each remaining employer's percentage of the growing funding deficit gets larger. This is known as the "last man standing" rule and was established to protect plan participants from the consequences of employer withdrawals. The "last man standing" rule has rendered multiemployer plans unstable as nobody wants to be the last man standing. This provides incentive for even healthy employers to leave, and puts the PBGC in the role of the ultimate "last man." [11]

Given the deficit between total assets and the present value of liabilities, PBGC projects that there is a greater than 50% chance that the multiemployer plan program will run out of money by 2025, and a greater than 90% chance that it will run out of money by the end of 2035.[12] Absent a dramatic increase in premiums that multiemployer plans pay (which would further undermine many plans' funding levels and is thus likely not feasible), or a change in how the PBGC is funded, pension plans facing impending insolvency (or even those that are already insolvent and receiving PBGC financial assistance) cannot rely on assistance from PBGC beyond the next 10 years.

The pressure the projected plan insolvencies will place on the PBGC will be catastrophic, absent congressional action. In 2014, the Center for Retirement Research in Boston College delivered an ominous assessment of the situation:

> The actuarial model projects that it is more likely than not that the program [PBGC] will be insolvent by 2022, with a 90-percent chance of insolvency by 2025. Once the fund is exhausted, the PBGC would have to rely on annual premium receipts and would be forced to pay only a fraction of its paltry guaranteed benefit. One estimate is that a retiree who once received a monthly benefit of $2,000 and whose benefit was reduced to $1,251 under the PBGC guarantee would see the monthly benefit decline to $125. The exhaustion of the multiemployer insurance fund could also undermine confidence in the entire system.[13]

MULTIEMPLOYER DEFINED BENEFIT PENSION PLAN BASICS

Private-sector multiemployer defined benefit pension plans are plans jointly sponsored by a labor union(s) and a group of employers. Such plans usually cover employees working in a common industry such as, for example, coal, construction, food, maritime, textile, trucking, etc. Many multiemployer plans cover employees working at a particular craft within an industry, such as electricians, bricklayers, and truck drivers. While most plans are "local plans" and cover employees working in a specific geographical area, there are also "national plans," which cover employees working in crafts or trades throughout the U.S. Many of the industries in which multiemployer plans prevail have high worker mobility and/or seasonal employment.

Due to the migratory nature of the work, employees frequently work for more than one employer during their careers. Oftentimes, employees would not work long enough for one employer to vest in a benefit under that specific employer's pension plan; however, multiemployer plans allow employees to move from employer to employer and still earn service credit under the multiemployer plan, provided the employers for which the employee works participate in the multiemployer plan.

Multiemployer plans are established via collective bargaining between a union and two or more employers. Ordinarily, the union and the employers will enter into a collective bargaining agreement which is negotiated between local, regional, or national unions and individual employers or an association of employers bargaining as a group. The collective bargaining agreement establishes the employer's obligation to contribute to the plan, identifies the bargaining unit to which the collective bargaining agreement applies, and sets the rate and basis on which employers pay contributions to the plan. The contribution rate is usually a specific sum per hour or unit of time worked by or paid to the employee.

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[11] Carl Horowitz, "New Report Shows Severe Shortfalls in Multiemployer Union Pensions," National Legal and Policy Center, July 3, 2013, *http://nlpc.org/2013/07/03/new-reports-show-severe-shortfalls-multiemployer-union-pensions/*.

[12] PBGC FY 2016 Annual Report, 61.

[13] Alicia H. Munnell and Jean-Pierre Aubry, "Can PBGC Save Multiemployer Plans?," Center for Retirement Research at Boston College, September 2014, Number 14–16, 5, *http://crr.bc.edu/uncategorized/can-pbgc-save-multiemployer-plans/*.

Negotiations over pension contribution rates are not done in a vacuum. The union and employers also must negotiate contribution rates to other multiemployer benefit plans (health and welfare, vacation, defined contribution pension, etc.) as well as wages. The combination of wages and benefit plan contributions is commonly referred to as the "wage and benefit package" or the "total package." Thus while pension plan funding is a factor that bargaining parties must take into account during negotiations, they also must be cognizant of ever-increasing medical inflation and its impact on medical costs as well as employees' desire to receive increases in their hourly wage. As many employers operate on thin profit margins, addressing these competing factors can be complex. Compounding the complexity is that, once negotiated, the pension contribution rate is often subject to review and approval by the plan's trustees.

STATUTES GOVERNING MULTIEMPLOYER PENSION PLANS

Labor Management Relations Act

The Labor Management Relations Act (LMRA), commonly known as the Taft-Hartley Act, requires employers to pay contributions into a trust fund that must be jointly administered by an equal number of union and employer representatives. The obligation to contribute must be set forth in a written document (usually a collective bargaining agreement), and the contributions must be used for the sole purpose of providing benefits to employees.[14]

Employee Retirement Income Security Act

The union and employer representatives who manage the pension plan and administer the trust are called trustees. As trustees of the monies deposited into the trust, the trustees are fiduciaries to the participants (both active employees and retirees) covered by the pension plan. The fiduciary duties to which the trustees must adhere are established under the Employee Retirement Income Security Act of 1974[15] and are enforced by the U.S. Department of Labor's Employee Benefits Security Administration. ERISA requires the trustees to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with a like aim."[16] This is known as the "prudent expert" rule and is the standard to which all fiduciary decisions are held.

Internal Revenue Code

While a plan's trustees generally have the discretion to determine the amount of benefits a plan will provide, there are other plan features that must comply with the requirements of the Internal Revenue Code of 1986 (Code).[17] One such requirement is that, in general, a plan cannot be amended to reduce accrued benefits, optional forms of payment, early retirement benefits, and retirement-type subsidies.[18] This is known as the anti-cutback rule, which until recently was the lynchpin of the federal pension system. Amendments are generally allowed to reduce future benefit accruals, as well as optional forms of payment, early retirement benefits, and retirement-type subsidies that accrue after the date of the amendment.[19]

The anti-cutback rule, which has been a backbone of federal pension law since ERISA's inception in 1976, has been considerably weakened by passage of the Pension Protection Act of 2006 (PPA) and the Multiemployer Pension Reform Act of 2014 (MPRA). The weakening of the anti-cutback rule has been in direct response to the pending funding crisis of certain multiemployer plans and has been helpful to many plans trying to avoid insolvency. However, MPRA has not been entirely successful, as there are many severely underfunded plans that are going to need additional help from Congress to survive.

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[14] LMRA Section 302 (c)(5).
[15] ERISA Section 1001, *et seq.*
[16] ERISA Section 404(a)(1)(B).
[17] Some Code requirements are also found in ERISA.
[18] Code Section 411(d)(6) and ERISA Section 204(g).
[19] "Present Law, Data, and Selected Proposals Relating to Multiemployer Defined Benefit Plans," The Joint Committee on Taxation, February 26, 2016, *https://www.jct.gov/publications.html?func=startdown&id=4872.*

Funding Rules

ERISA's and the Code's minimum funding rules require multiemployer plans to maintain a funding standard account. The funding standard account gets debited for charges related to benefit accruals, investment losses, and other negative plan experience. Credits are given for employer contributions, investment gains, and other positive plan experience. The minimum required contribution to a multiemployer plan is the amount needed, if any, to balance the accumulated credits and accumulated debits to the funding standard account. If the debits exceed the credits, there is a negative balance, and contributing employers must pay the amount necessary to balance the account. The liability is allocated to all of the plan's contributing employers.

If participating employers do not make the contribution necessary to balance the funding standard account, the plan has a minimum funding deficiency and contributing employers can be assessed excise taxes on top of having to make up the deficiency. On the other hand, if the plan was overfunded, it would have to increase benefits in order to prevent paying an excise tax on the overfunding.

The calculations related to determining the amount in a multiemployer plan's funding standard account are performed by an actuary. The plan must use a specific funding method to determine the elements included in its funding standard account for a given year. Such elements include the plan's normal cost and the supplemental cost. Normal cost is the cost of future benefits allocated to the year under the plan's funding method. Supplemental cost is generally the costs attributable to past service liability or to investment returns that were less than those assumed by the actuary. The supplemental costs are amortized over a specified period of years by debiting the funding standard account over that period. If experience is good, there can also be actuarial gains that result in credits being made to the funding standard account.[20] When calculating debits and credits to the funding standard account, the plan actuary must use reasonable actuarial assumptions.

Actuaries calculate plan funding using both actuarial values and market values. Actuarial values are computed by the plan's actuary to predict how much money a plan needs to set aside to pay future retirees. Actuaries cannot use market values for this prediction, because market values fluctuate from day to day as the stock market rises and falls. An actuary predicts the long-term performance of the plan's investments by using mathematics to smooth out year-to-year market variations. This means that when investment performance is bad for a given year, the actuary will not recognize the entire loss in the year it occurs, but rather will "smooth" the loss by recognizing a portion each year for a period of years. Investment gains are treated similarly.

The actuary uses this smoothing method to create an actuarial value of the plan's assets, which is the likely value of the investments based on typical long-term investment results. Market value is the actual value of the plan's assets on any given day without regard to any smoothing and provides a more realistic view of a plan's financial condition.

As of 2012, the funding ratio for plans in critical status was 62.5% based on the actuarial value of plan assets. Under normal circumstances, such a ratio would not be disastrous; if the plan's investment earnings matched or exceeded its actuarial assumed rate of return and if the trustees made changes to benefits, a plan in critical status could be expected to right itself. The actuarial assumed rate of return is the rate the actuary assumes the plan's investment will earn annually, and generally ranges from 7% to 8%. Unfortunately, many plans have seen their contribution bases erode to the point where their cash flow is so negative they cannot earn their way out of critical status. As of June 30, 2017, the aggregate funding percentage of plans in critical status fell to 60%, whereas the funded percentage of non-critical status plans was almost 90%.[21]

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[20] *Id.*

[21] Kevin Campe, Rex Barker, Bob Behar, Tim Connor, Nina Lantz, and Ladd Preppernau, "Milliman Multiemployer Pension Funding Study," Milliman, Fall 2017, *http://www.milliman.com/uploadedFiles/insight/Periodicals/multiemployer-pfs/multiemployer-pension-funding-fall-2017.pdf.*

THE CURRENT FUNDING CRISIS IS BEING DRIVEN BY A SMALL PERCENTAGE OF PLANS WITH COMMON CHARACTERISTICS

Multiemployer defined benefit pension plans are not a monolith. The most recent surveys illustrate that, as of today, many plans are structurally stable and well managed. In fact, a Milliman study recently reported that "in the first 6 months of 2017, the aggregate funding percentage for all multiemployer pensions climbed from 77% to 81%, reducing the system's shortfall by $21 billion—an improvement driven largely by favorable investment returns." [22] According to the study, the estimated investment returns have outpaced actuarial assumptions, reflecting the strong performance of the U.S. stock market.

During the 1980s and 1990s, many plans were fully funded.[23] This was primarily due to a soaring stock market. While most multiemployer plans' actuaries assume that annual investment returns will be in the 7% to 8% range, investment returns were well above those percentages for many plans in the 1990s. The surging stock market seemed like a blessing at the time. However, the outsized investment returns masked a significant problem.

While pension assets increased at historical rates, union membership nationally was in a steady decline. Private-sector union membership in 1983 was 12 million. By 2015, that number had fallen to 7.6 million.[24] Thus, while pension plans assets were increasing thanks to the stock market, many plans' contribution bases were declining. With fewer contributions coming in, plans relied more heavily on investment returns to keep assets growing.

Today, almost half of all union members are between 45 and 64 years old.[25] As these workers age into retirement, there are not enough younger union workers to replace them. This exacerbates negative cash flow and essentially requires some plans to earn annual investment returns that are likely unrealistic based on the investment markets' cyclical nature. Moreover, as mentioned above, funds were not able to "bank" these extra returns because they would be subject to an excise tax.

The euphoria of the 1990s came to an end in 2000, when the price of technology stocks fell drastically. Many multiemployer plans had ridden the wave of these dot-com companies to historic highs in asset levels, but when the market crashed and investment returns were disastrous, plans were hit twice as hard because of their declining contribution bases. By the mid-2000s, most plans had recovered, but several plans remained in dire straits. While very few industries were immune from funding issues, certain plans in industries that had seen a significant decline in active participants, such as trucking, or in industries with cyclical work, like construction, did not recover. In 2008, a global recession rocked the investment markets, causing funding levels in most plans to plummet. For those plans that had not sufficiently recovered from the dot-com bubble burst a few years earlier, 2008 was catastrophic.

Although the investment markets have had favorable returns in recent years, many plans' funding levels have continued to deteriorate. Since passage of MPRA in December 2014, 15 multiemployer defined benefit plans have filed applications with the Treasury Department to reduce benefits to avoid insolvency. As of December 2017, Treasury has approved only 4 of the 15 applications. These 15 applicants currently account for only 1.35% of multiemployer defined benefits plans, but cover roughly 5% of all multiemployer defined benefits plan participants. These plans represent a segment of multiemployer pension plans that are failing and that, although in the minority, could cause the entire multiemployer pension system to crumble if additional legislative action is not taken.

What does a plan facing impending solvency look like? By looking broadly at the plans and industries they are in we can identify many of the conditions and events that lead a plan down the path to critical and declining status, and eventual insolvency.

[22] *Id.*

[23] Alicia H. Munnell and Jean-Pierre Aubry, "Private Sector Multiemployer Pension Plans—A Primer," Center for Retirement Research at Boston College, August 2014, No. 14–13, *http://crr.bc.edu/briefs/private-sector-multiemployer-pension-plans-a-primer/*.

[24] Megan Dunn and James Walker, "Union Membership in the United States," Bureau of Labor Statistics, September 2016, *https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/home.htm.*

[25] *Id.*

Shrinking Industries and Declining Union Roles

The Bureau of Labor Statistics (BLS) reports that in 1983, there were approximately 12 million American workers covered by a collective bargaining agreement, which represented 16.8% of the American workforce. By 2016, the number had fallen to about 7.6 million, or 6.4% of the workforce.[26]

From 2000 to 2015, union membership in the transportation sector, alone, declined by 6.7 percentage points. Union membership rates in construction, manufacturing, and wholesale and retail trade also declined over that period.[27]

Unionized workers on average are older than nonunion workers. In 2015, nearly half of union members were between 45 and 64 years old, but only about one-third of nonunion members belonged in this age group. Workers aged 45 to 64 were heavily represented in the manufacturing and transportation industries, which also had relatively high unionization rates. Furthermore, the lowest union membership rate is among workers aged 16 to 24 (4.4%), which makes the systemic replacement of older union members with younger members impracticable.[28]

Competition and Economic Factors Impacting Contributing Employers

Increased competition facing contributing employers and their employees is another factor leading to declining pension plan funding levels. There has been an onslaught of new competition in the last half century caused in part by changes in U.S. regulatory and trade policy. These policy changes have contributed to the hollowing out of entire industries and their associated retirement plans.

For example, the United Furniture Workers Pension Fund A (Furniture Workers Fund) was crippled by an influx of imported goods. In 1999, the furniture and related products industry had 537,000 workers. By 2010, the industry had only 251,000 workers.[29] Some of this attrition was caused by the 2008 financial crisis, but not all of it. Between 1981 and 2009, a period that coincides with significant increases in importation by foreign manufacturers, 35 contributing employers to the Furniture Workers Fund filed for bankruptcy protection and withdrew from the plan.

In the trucking industry, the competition was domestic in origin, but similarly dramatic. In 1980, Congress deregulated the trucking industry, allowing companies to compete in a free and open market. While the deregulation of the trucking industry has been beneficial for economy and the American consumer, deregulation has significantly impacted trucking companies that participate in multiemployer plans.

Researchers at the Center of Retirement Research at Boston College summarized the effects, noting “of the 50 largest employers that participated in the Central States Fund in 1980, only four remain in business today. More than 600 trucking companies have gone bankrupt and thousands have gone out of business without filing for bankruptcy. As a result, roughly 50 cents of every benefit dollar goes to pay benefits to ‘orphaned’ participants, those left behind when employers exit.”[30] Even though an employer leaves, the fund—meaning the remaining employers—is still responsible for paying the benefits due to all participants in the plan. The orphan participants constitute a significant share of total multiemployer participants and are much likelier to participate in severely underfunded plans.

Plan Demographics—The Inactive-to-Active Participant Ratio

As competition and demographic shifts reduced the participant populations in plans, untenable ratios of inactive-to-active participants were created. New York State Teamsters Conference Pension and Retirement Fund (New York State Fund) provides a vivid illustration.

In 1990, the New York State Fund had 23,883 active participants and 10,150 retired participants, for a ratio of more than two active participants for every one retired participant. By 2000, the ratio was reduced to almost one to one, as the number

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] United Furniture Workers Pension Fund A—Second Application for Approval of Suspension of Benefits (File 1), 12.
[30] Alicia H. Munnell, Jean-Pierre Aubry, Wenliang Hou, and Anthony Webb, “Multiemployer Plans—A Proposal to Spread the Pain,” Center for Retirement Research at Boston College, October 2014, 8, *http://crr.bc.edu/wp-content/uploads/2014/10/IB_14-17.pdf.*

of active participants declined to 16,827, and the number of retired participants increased to 14,198. As of January 1, 2016, there were 11,576 active participants, compared to 15,936 retired participants, reversing the ratio of active to retired participants in a single career span.[31]

According to a survey of multiemployer plans, 87% of beneficiaries in critical and declining plans were inactive (either already retired or entitled to a benefit at some time in the future but are no longer working), compared with 63% in non-critical and declining plans.[32]

The survey also found some correlation between average plan funding levels by industry and inactive-to-active retiree ratios. Plans from the manufacturing sector had the lowest average funding levels at 79% and the highest inactive-to-active ratio at 5.8 retirees per active employee. Transportation sector plans fared a little better with funding levels averaging 81% but with a much more manageable inactive to retiree ratio of 2.9:1. Compared to those plans, construction sector plans are 89% funded on average and have an average ratio of 1.6:1.[33] As ratios worsen, and the rate of negative cash flow grows, employer contribution rate increases have little overall effect on plan funding. Instead plans must rely more heavily on investment returns.

Financial Pressure

Plans with negative cash flow can survive only if the investment return outpaces the benefit payments. During the 1980s and 1990s many multiemployer pension plans rode the bull market gains, thereby masking ominous trends in the growing retiree population. When the tech bubble burst in 2000, many plans, which had been relying on investment returns to cover negative cash flows, had to pay benefits directly from plan assets. As they did so, plan funding levels dropped, and plans had a lower asset base with which to invest. Since the negative cash flow problems for many plans did not improve, they were forced to seek higher investment returns to bridge the gap between the amount of money coming into the plan and the amount going out.

As a plan's assets dwindle, however, trustees are forced to shift investments out of equities and into more conservative investment vehicles to preserve cash to pay benefits for as long as possible. Such investments generally provide for little growth, so there is no opportunity for the asset base to grow. If the trustees were to continue to leave assets invested in equities, a sharp downturn in equity markets could cause a plan to go insolvent much sooner than anticipated and to provide trustees with little time for corrective action or to request the PBGC's assistance. In such circumstances, trustees are at risk of a fiduciary breach claim for imprudently investing the assets of the plan. Accordingly, trustees will almost always err on the side of making assets last longer to avoid potential legal liability. This approach generally leads a plan to enter the death spiral where there is no realistic chance of recovery.

The 2008 financial crisis was a disaster for multiemployer plans. Just prior to 2008, 80% of plans had funding levels in excess of 80% (referred to as the "green zone"), whereas only 9% of plans were in critical status, or the "red zone." By 2009, in the wake of the market collapse, the percentage of green zone plans plummeted to 38%, while the percentage of plans in the red zone increased to 30%. Over time, as the investment markets rebounded, many plans were able to claw their way back into the green zone. While some plans are just now returning to their pre-2008 funding levels, virtually all funding improvements have come exclusively from positive investment performance. This suggests that nothing has changed demographically, and that these plans will remain vulnerable to investment market conditions, which are unpredictable.

ATTEMPTS TO FIX THE MULTIEMPLOYER PENSION PLAN FUNDING PROBLEM

Given the negative cash flow and diminishing contribution bases of plans that are facing impending insolvency and the PBGC's precarious financial condition, finding a solution to the funding woes of many plans will not be easy. Congress and trustees of pension plans have attempted to address multiemployer funding issues in the

[31] New York State Teamsters Conference Pension and Retirement Fund Treasury Application, 24.
[32] "Summer 2017 Survey of Plans' Zone Status," Segal Consulting, Summer 2017, 4.
[33] *Id.,* 6.

past, especially within the last several years. These attempts have helped some plans, but additional measures will be needed to save some of the most underfunded plans.

Multiemployer Pension Plan Amendment Act

In 1980, Congress passed the Multiemployer Pension Plan Amendments Act (MPPAA).[34] MPPAA amended ERISA and was designed to discourage employers from exiting financially troubled multiemployer plans. Congress recognized that when a contributing employer stopped contributing to an underfunded multiemployer plan, the unfunded liability related to the departing employer was absorbed by the plan's remaining contributing employers. Although in 1980 most multiemployer pension plans were not facing funding issues as severe as those today, withdrawing employers increased pension costs for employers that remained, and in many cases threatened their financial viability. Withdrawing employers also caused multiemployer plans' contribution bases to erode.

Prior to MPPAA, an employer that withdrew from a multiemployer plan did not have to pay anything to the plan unless the plan was terminated within 5 years of the employer's withdrawal. Even then, the employer's liability was limited to no more than 30% of the employer's net worth. Under MPPAA, an employer that totally or partially withdraws from a multiemployer pension plan must pay "withdrawal liability."[35] An employer's withdrawal liability is the amount of the employer's proportionate share of the plan's unfunded vested benefits or liabilities, or UVBs (*i.e.,* the withdrawing employer's proportionate share of the deficit between the amount of the plan's vested benefits and the plan's assets).

When an employer withdraws from an underfunded multiemployer plan, MPPAA requires the plan's trustees to (1) determine the amount of withdrawal liability, (2) notify the employer of the amount of that liability, and (3) collect that liability. Generally, in order to determine an employer's withdrawal liability, a portion of the plan's UVBs is first allocated to the employer, generally in proportion to the employer's share of plan contributions for a previous period. The amount of UVBs allocable to the employer is then subject to various reductions and adjustments.

ERISA sets forth the amount of annual withdrawal liability payments the employer must make directly to the plan. Generally speaking, ERISA calls for annual payments to continue until the employer pays the liability in full, but caps the annual payments at 20 years. Thus, it is possible for an employer that does pay withdrawal liability for 20 years to still not pay off all of its unfunded liability. When this happens, other employers must make up the difference.

An employer's annual withdrawal liability payment amount is generally structured to approximate the employer's annual contributions to the plan. The amount is equal to the employer's highest recent average number of contribution base units, or CBUs (essentially, the amount of contribution paid to the plan) multiplied by the employer's highest contribution rate in the past 10 years. An employer can prepay its liability or attempt to negotiate the amount with the plan. There are additional withdrawal liability rules applicable to certain industries, exemptions for certain sales of assets, employer and plan disputes, and plan terminations following mass employer withdrawals.

Although the introduction of withdrawal liability was supposed to prevent withdrawing employers from shifting pension obligations to the remaining employers, MPPAA has not always worked as intended. The biggest problem is that many withdrawing employers do not have the financial means to satisfy their withdrawal liability. Employers often withdraw when they are going out of business or when they file for bankruptcy. When this happens, it is difficult, if not impossible, for the plan to collect the employer's withdrawal liability. As a result, some plan participants with vested benefits may have worked for an employer that no longer participates in the plan. The liability for these "orphaned" participants has devastating effects on plan funding and is a major contributor to the funding issues that many plans face today.

[34] *See* ERISA Sections 4201–4225.

[35] Not only is the contributing employer to the plan responsible for paying withdrawal liability, but also MPPAA provides that all trades or businesses under common control (as defined in Section 414 of the Code) are jointly and severally liable for a withdrawing employer's withdrawal liability. *See* ERISA Section 4001(b)(1).

Pension Protection Act of 2006

In 2006, Congress passed the Pension Protection Act. The PPA amended ERISA and the Code to make certain changes to multiemployer funding rules. These changes were designed to give plan trustees more flexibility in dealing with funding while at the same time forcing them to identify and correct existing and potential funding issues in time to prevent further funding level deterioration and stabilize the plans' finances.[36] The PPA requires a multiemployer plan's actuary to provide an annual certification to the Internal Revenue Service of the plan's funded status. The certification specifies that the plan falls into one of three categories: endangered status, critical status, or neither.

Endangered-Status Plans

A plan is generally in endangered status, also known as the "yellow zone," if the plan's funded percentage is less than 80%, or the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years. A plan's funded percentage for purposes of the PPA certification is determined by dividing the value of plan assets by the accrued liability of the plan. The trustees of a plan in endangered status are required to adopt a funding improvement plan.

A funding improvement plan consists of a list of options, or range of options, for the trustees to propose to the union and the employers (the bargaining parties). The funding improvement plan is formulated to provide, based on anticipated experience and reasonable actuarial assumptions, for the plan to attain "applicable benchmarks" by the end of the funding improvement period. The range of options generally is a combination of contribution rate increases or reductions in future benefit accruals that would allow the plan to obtain a statutorily specified increase in the funded percentage and not have an accumulated funded percentage by the end of the funding improvement period, which is generally 10 years.

Many plans certified as endangered in the early years of the PPA were able to fix their funding problems and now are in neither endangered nor critical status (known as the "green zone"). Other plans were not so fortunate, and their status deteriorated from endangered to critical. It should be noted that the PPA did not allow plans in endangered status to make any changes to benefits that were not already allowed under pre-PPA rules. In other words, trustees of endangered plans are not allowed to violate the anti-cutback rule of ERISA and the Code, and can only reduce future accruals and eliminate other protected benefits on a prospective basis. This led some trustees to take the counterintuitive action of allowing their plans to fall into critical status, because there was more statutory flexibility under the critical status rules to address funding problems.

Critical-Status Plans

A plan is in critical status if the plan:

(1) is less than 65% funded and will either have a minimum funding deficiency in 5 years or be insolvent in 7 years; or

(2) will have a funding deficiency in 4 years; or

(3) will be insolvent within 5 years; or

(4) the liability for inactive participants is greater than the liability for active participants, and contributions are less than the plan's normal cost, and there is an expected funding deficiency in 5 years.

Trustees of plans in critical status are required to adopt a rehabilitation plan. Unlike endangered plans, critical-status plans whose trustees adopt and follow a rehabilitation plan generally do not have to meet the minimum funding rules of ERISA and the Code.

A rehabilitation plan is a plan that consists of a range of options for the trustees to propose to the bargaining parties, formulated to provide (based on anticipated experience and reasonable actuarial assumptions) for the plan to cease to be in critical status by the end of the rehabilitation period, which is generally 10 years. Options include reductions in plan expenditures, reductions in future benefit accruals, increases in contributions, or any combination of such actions. The rehabilitation plan must be updated annually, and the plan must show that it is making scheduled progress toward emerging from critical status.

[36] Segal Consulting, Segal Bulletin, August 2006.

If the trustees determine that, based on reasonable actuarial assumptions, the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period, the plan must include reasonable measures to emerge from critical status at a later time or to forestall possible insolvency. If a multiemployer plan fails to make scheduled progress under the rehabilitation plan for three consecutive plan years or fails to meet the requirements applicable to plans in critical status by the end of the rehabilitation period, for excise tax purposes the plan is treated as having a funding deficiency equal either to the amount of the contributions necessary to leave critical status or make scheduled progress or to the plan's actual funding deficiency, if any. Plans may apply for a funding waiver if the case failure is due to reasonable cause and not willful neglect.

The PPA allows trustees of critical-status plans to make changes to benefits that endangered-plan trustees cannot. They are allowed to reduce or eliminate benefits that were previously protected by the anti-cutback rule. Critical-status plans can be amended to reduce or eliminate certain adjustable benefits, including post-retirement benefits, subsidized optional forms of payment, disability benefits not yet in pay status, early retirement benefits or retirement subsidies and benefit increases adopted less than 60 months before the plan entered critical status. In addition, critical-status plans that provide for payment of benefits in the form of a lump sum are required to cease paying lump-sum benefits on the date they enter critical status.

The ability to eliminate or reduce previously protected benefits was heretofore unprecedented, and many plans in critical status have taken advantage of these new rules and are projected to emerge from critical status or to forestall possible insolvency because of them. However, for those underfunded plans with a declining active population base and severe negative cash-flow problems, the savings generated by eliminating these adjustable benefits were not great enough to improve the plans' funded percentages.

Compounding the problem is that after cutting benefits to the maximum extent possible, there was little else that could be done to reduce costs. That left employer contribution rate increases as the only viable option to improve funding. Over the years, however, many plans have found that annual increases in employer contribution rates are not so viable because employers cannot absorb the costs. Out-of-control pension costs threaten employers' very survival.

Multiemployer Pension Reform Act of 2014

Although the investment markets have had favorable returns in recent years, many plans' funding levels continue to deteriorate. Under the PPA, a prohibition against reducing accrued benefits on a retroactive basis remained. Recognizing that some plans could not avoid insolvency without drastic changes in the law, Congress passed the Multiemployer Pension Reform Act in 2014.[37] MPRA changed the multiemployer defined benefit plan landscape.

The law created three new tools to help plans stave off insolvency. Most notably, for the first time under ERISA, Congress allowed plans that were in severe financial distress to reduce benefits that had already accrued, including benefits that were in pay status (these reductions are referred to as "benefit suspensions" under MPRA). This was a landmark change and a radical departure from what was previously allowed. MPRA also revised ERISA's existing merger and partition rules.

Critical and Declining Status

MPRA created a new funding status called "critical and declining" for those plans that were the most deeply troubled. A "critical and declining" plan is one that meets one of the statutory requirements for critical status *and* is actuarially projected to become insolvent within 14 years (or within 19 years if more than two-thirds of its participants are inactive or retired). A plan that is in "critical and declining" status can file an application with Treasury to reduce or suspend benefits that have already accrued and that are in pay status (*i.e.,* are already being paid to retirees and beneficiaries). MPRA provides for the following three mechanisms to help critical and declining plans avoid insolvency:

PBGC-Facilitated Plan Mergers

Mergers can improve a financially troubled plan's funding issues. By transferring its assets to a more financially stable plan, the weaker plan can lessen or eliminate

[37] The Multiemployer Pension Reform Act of 2014, Pub. L. No. 113–235, Division O (2014).

the effect of negative cash flow while gaining a larger asset base with which to invest. Generally, however, a trustee's decision to merge is subject to the fiduciary duty provisions of ERISA.[38] These fiduciary duties are applied to the trustees of both plans involved in a contemplated merger. The trustees of both plans have to determine that a merger would be in the best interest of their respective participants. Both plans' trustees have to examine the financial condition of their respective plans before and after the merger, as well as the viability of the surviving plan post-merger.

Because generally one of the plans in the proposed merger is in worse financial condition than the other, finding a good merger partner was and is sometimes difficult. For example, the trustees of a financially sound plan will likely not want to merge with a plan that is projected to become insolvent because of the affect the poorly funded plan would have on the funded level of the financially sound plan. Traditionally, a merger between a stronger plan and a weaker plan—but not one facing insolvency—would have the benefit of a larger asset base in which to obtain investment gains.

Under MPRA, the PBGC can facilitate mergers between two or more plans, including providing financial assistance. By providing financial assistance, the PBGC can alleviate the healthier plan's financial/fiduciary concerns, which might make the healthier plans more willing to merge. Upon a plan's request, the PBGC may facilitate a merger if PBGC determines the merger is in the interests of the participants and beneficiaries of at least one of the plans, and the merger is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. The PBGC may provide assistance to a plan such as training, technical assistance, mediation, communication with stakeholders, and support with related requests to other governmental agencies. MPRA allows trustees of plans in "critical and declining" status to apply for both a facilitated merger and a benefit suspension.

The PBGC may also provide financial assistance to facilitate a merger if one or more of the plans in the merger is in "critical and declining status"; the PBGC reasonably expects that financial assistance will reduce it's expected long-term loss with respect to the plans involved and, the PBGC reasonably expects that the financial assistance is necessary for the merged plan to become or remain solvent; the PBGC certifies its ability to meet existing financial obligations will not be impaired by providing the financial assistance; and the assistance is paid from the PBGC's fund for basic benefits guaranteed for multiemployer plans.

PBGC Plan Partitions

MPRA also expanded ERISA's partition rules, which previously allowed only the PBGC to partition plans that suffered significant contribution losses as a result of employer bankruptcies. In a partition, PBGC gives approval to divide a severely underfunded plan into two plans. Generally, the liability for orphaned participants is transferred to a new plan, which is technically insolvent from inception. The PBGC pays the orphan benefits up to the PBGC guaranteed amount. The original plan remains as is, and the goal is to restore its financial health.

A plan in critical and declining status may submit coordinated applications to the PBGC for a partition and to Treasury for a benefit suspension.

The PBGC may order a partition if the following conditions are satisfied:

(1) the plan is in critical and declining status;

(2) the PBGC determines that the plan has taken all reasonable measures to avoid insolvency, including the maximum benefit suspensions as discussed above;

(3) the PBGC reasonably expects that the partition will reduce its expected long-term loss with respect to the plan and partition is necessary for the plan to remain solvent;

(4) the PBGC certifies to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by such partition; and

[38] Merging a plan is arguably a settlor function that would not be subject to ERISA's fiduciary rules. The DOL has offered the opinion that certain actions taken by trustees of multiemployer plans that would ordinarily be settlor functions will be treated as fiduciary functions if the plan's trust agreement provides that the trustees act as fiduciaries when engaging in what otherwise would be settlor functions. If the governing plan documents are silent, activities generally considered settlor functions in a non-multiemployer setting will be considered as settlor functions with respect to the multiemployer plan. DOL Field Assistance Bulletin 2002–2.

(5) the cost arising from such partition is paid exclusively from the PBGC's fund for basic benefits guaranteed for multiemployer plans.

Suspension of Benefits

MPRA allows trustees of plans in critical and declining status to apply to Treasury to suspend (temporarily or permanently) participants' accrued pension benefits, including those already in pay status. MPRA defines "suspension of benefits" as the "the temporary or permanent reduction of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not in pay status at the time of the suspension of benefits."

A plan may suspend benefits only if the plan's actuary certifies that the plan is projected to avoid insolvency if the benefit suspensions are implemented.

Benefit suspensions are subject to the following limitations:

(1) a participant or beneficiary's monthly benefit cannot be reduced below 110% of the PBGC-guaranteed amount;

(2) participants and beneficiaries aged 75 and older at the date of suspension have limitations on the suspension;

(3) participants and beneficiaries aged 80 and older at the date of suspension are exempt from suspensions;

(4) disability pensions are exempt from suspensions; and

(5) benefit suspensions must be reasonably implemented to avoid plan insolvency.

MPRA also includes a list of factors the plan may consider to ensure the benefit suspensions are equitably distributed among the participants and beneficiaries, including age, number of years to retirement, and the participants' benefit history.

MPRA requires plans with 10,000 or more participants to select a retiree representative to act as an advocate for the interests of the retirees and inactive participants during the suspension application process. The plan must pay for all reasonable legal, actuarial, and other costs the representative incurs.

Benefit Suspension Application Rules

In order to suspend benefits, the trustees must submit a detailed application to Treasury and demonstrate that the plan meets the statutory requirements. Once Treasury accepts the application for review, it has 225 days to render a decision or the application is automatically deemed approved. Treasury will generally request additional information and pose questions to the plan's attorneys and actuaries regarding the application.

If Treasury rejects a plan's application, the plan may challenge the denial in court. If Treasury approves a plan's application, the suspension is subject to a participant and beneficiary vote within 30 days of the approval. If a majority of all participants and beneficiaries (not simply a majority of those who vote) do not actively vote to reject the suspensions, the suspensions are approved. Suspensions may not take effect until after the vote, and Treasury issues final authorization. If the participants and beneficiaries vote to reject the suspensions, Treasury, in consultation with the DOL and PBGC, must determine whether the plan is "systemically important." A plan is "systemically important" if the plan's insolvency will result in $1 billion or more in projected PBGC liabilities. If a plan is deemed systemically important and suspensions were not approved by the participants, Treasury has the discretion either to accept the terms of the proposal or to modify the benefit suspensions in some other manner projected to avoid plan insolvency.

Since the passage of MPRA, 15 multiemployer defined benefit plans have filed applications with the Treasury Department to reduce benefits to avoid insolvency. As of December 2017, Treasury has approved only 4 of the 15 applications. These 15 applicants currently account for only 1.35% of multiemployer defined benefits plans, but cover roughly 5% of all multiemployer defined benefits plan participants. These plans represent a segment of failing multiemployer pension plans that, although in the minority, could cause the entire multiemployer pension system to crumble if additional legislative action is not taken. Details on these applications are provided in "MPRA Suspension Applications to Date" in this paper.

Individual Plan Initiatives

Over the past 15 years, trustees of financially troubled plans have employed numerous strategies to solve plans' funding issues. While some of these strategies have been helpful, most of these plans' funding issues remain.

Reductions to Future Benefit Accruals and Increased Employer Contributions

The PPA requires trustees to take an active and forward-looking approach in managing their plans. Plans in critical and endangered status have to take corrective action. As part of that corrective action, plans can continue to reduce future benefit accruals and increase contributions. Critical-status plans can also reduce and eliminate adjustable benefits for those participants that have not retired.

Prior to the PPA, trustees had limited options to combat underfunding issues. Most plans had to solve funding problems by: (1) reducing the future benefit accruals of the active participants; and/or (2) requiring employers to increase their contributions.[39] While these strategies were sometimes successful, for employers in industries like coal, trucking, manufacturing, and bakery, continued contribution increases became unsustainable.

Many trustees now recognize that they can no longer feasibly cut benefits for active employees and raise employer contributions. Employers and bargaining unit groups have left plans at alarming rates over the last decade as contribution rates have steadily increased and plans have repeatedly reduced benefits for active participants. Additional contribution increases are not sustainable in many industries, and threaten the employers' competitiveness, and in some cases, their existence. Losing employers would further erode the stream of contribution revenue on which a plan relies and exacerbate the negative cash flow problem for severely underfunded plans.

For example, in 1980 the Central States Pension Fund had approximately 12,000 employers; by July 2015 the number was down to 1,800.[40] Between 2010 and 2014, Central States experienced approximately 260 involuntary employer withdrawals as a result of employer bankruptcies. During this same period, the New York State Fund also had a significant number of employers leave, negatively affecting its funding level.[41] In December 2013, the New England Teamsters and Trucking Industry Pension Fund (New England Teamsters Fund) reported that in order to avoid filing bankruptcy, one of its 10 largest employers negotiated an agreement with the International Brotherhood of Teamsters to temporarily cease pension contributions, with a subsequent resumption at a significantly reduced level. Another large employer emerged from bankruptcy and notified the Fund that it was unable to pay its current contributions.[42]

Funding Policies

Some trustees have adopted policies with strict rules on the acceptance of employer contributions to ensure that the bargaining parties, *i.e.,* the union and the employer, do not negotiate a CBA containing pension provisions that would adversely affect plan funding. These trustees have drafted policies or included rules in the plans' governing documents explicitly reserving sole discretion to reject a particular CBA if it is not in compliance with the policy or if it is deemed economically bad for the plan. While some plans have had such policies for many years, others are now just implementing them.

For example, the Board of Trustees of the Western Conference of Teamsters Pension Trust Fund does not allow CBAs that permit or require pension contributions for non-bargaining unit members or CBAs that limit the employees on whose behalf contributions are to be made.

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[39] In general terms, a participant's accrued benefit represents the benefit that the participant has earned or "accrued" under the plan as of a given time. For example, if a participant terminated covered employment before reaching normal retirement age under a plan's rules, the benefit to which the participant is entitled to receive on reaching normal retirement age is the accrued benefit. The plan usually specifies the accrual method used to determine a participant's accrued benefit.

[40] Central States, Southeast and Southwest Areas Pension Fund's MPRA Suspension of Benefits Application, dated September 25, 2015, Section 19.8.4.

[41] New York State Teamsters Conference Pension and Retirement Fund's MPRA suspension of benefits application, dated May 15, 2017, Section 5.

[42] New England Teamsters and Trucking Industry Pension Fund 2013 Review of the Rehabilitation Plan.

The Trustees of the Central States Pension Fund have taken a similar but more aggressive position. They reserved discretion in the Fund's trust agreement to reject any CBA it determines to be unlawful or would "threaten to cause economic harm to, and/or impairment of the actuarial soundness of, the Fund, and/or that continued participation by the Employer is not in the best interest of the Fund." [43]

Two-Pool Withdrawal Liability Method

Some trustees have requested approval from the PBGC to adopt an alternative method to calculate withdrawal liability called the "two-pool withdrawal liability method" (the two-pool method). Under the two-pool method, the plan maintains two withdrawal liability pools for contributing employers: one new pool for new employers and current employers that elect to pay off their existing withdrawal liability and transition over; and a second old pool for existing employers who, for a variety of reasons, decide not to trigger a withdrawal and remain in the plan.

Usually, an employer that is not contributing or does not owe withdrawal liability to the plan can qualify to be in the new pool. If a new employer enters the plan, it would automatically enter the new pool. When an already contributing employer moves from the old pool to the new pool, it generally agrees to withdraw from the existing withdrawal liability pool, to adhere to a withdrawal liability payment schedule, and to reenter the plan through the new pool for contributions made and benefits earned after that date.

Over the past few years, PBGC has received a number of requests from plans looking to implement the two-pool method.[44] The Central States Pension Fund, the New England Teamsters Fund, the New York State Fund, and the Bakery and Confectionery Union and Industry International Pension Fund have received PBGC approval to use the two-pool method. In order to encourage employer participation in the new pool, the trustees offer favorable settlement terms to satisfy withdrawal liability, but the extent of the relief is related to the employer's sustained commitment and continued contributions to the Fund.

The two-pool method has the potential to provide significant benefits to some plans. Trustees that have implemented the two-pool method believe it helps retain contributing employers that might otherwise withdraw.[45] A plan's long-term funding is affected by the strength of its base of contributing employers. Often times, a plan's more financially stable employers become frustrated as other employers withdraw from the plan. These withdrawals transfer costs and liability to the remaining employers over time in the form of higher contributions and increased reallocated withdrawal liability. This trend encourages healthy employers to withdraw before additional financial responsibility shifts to them, which ultimately places financial stress on the plan. The two-pool method offers an opportunity for healthy employers to remain in a plan while insulating them from the less financially stable employers.[46]

Despite its potential benefits, to date the two-pool method has not attracted new employers. It is a relatively new concept, however, and may be helpful in conjunction with other strategies, such as mergers and partitions.

DEVELOPMENTS UNDER THE MULTIEMPLOYER PENSION REFORM ACT OF 2014

Since its passage almost 3 years ago, MPRA has been criticized in part because of the manner in which it was enacted but more substantively because of the law's allowance for reductions to accrued benefits, including benefits already in pay status. Additionally, critics claim that implementation of MPRA failed to provide relief to

[43] "Trust Agreement of the Central States, Southeast and Southwest Areas Pension Fund as Amended through April 1, 2016," 9, *https://mycentralstatespension.org/-/media/Pension/PDFs/Legal/pension_fund_trust_agreement_as_amended_april_2016.pdf?la=en&hash=1A796461E51C6BB84ED3111B62C59A326D881686.*

[44] "Retirement Matters, Request for Information: Two Pool Withdrawal Liability," PBGC Blog, January 4, 2017, *https://www.pbgc.gov/about-pbgc/who-we-are/retirement-matters/request-information-two-pool-withdrawal-liability.*

The Western Pennsylvania Teamsters and Employers Pension Fund has implemented the two-pool method but is still waiting for the PBGC's official approval. *See* Plan Document of the Western Pennsylvania Teamsters and Employers Pension Fund.

[45] "Response to Request for Information on Alternative Two-Pool Withdrawal Liability Methods," American Academy of Actuaries, February 21, 2017; *see also* PBGC Letter to the Bakery Confectionery Union and Industry International Pension Fund, January 19, 2017.

[46] "Response to Request for Information on Alternative Two-Pool Withdrawal Liability Methods," American Academy of Actuaries, February 21, 2017.

the one plan that arguably was the primary focus of Congressional concern: the Central States Fund. Supporters assert, however, that absent benefit reductions, there are some plans that cannot avoid insolvency and thus will result in benefit reductions for most participants far greater than proposed under the rescue plan, since participants' benefits will be reduced to the PBGC guarantees. That the PBGC itself is projected to become insolvent only complicates things.

MPRA Suspension Applications to Date

As of December 2017, 15 plans covering a variety of industries, including transportation, furniture, machinery, and bricklaying, have applied to Treasury to suspend benefits, while four of those same plans submitted coordinating partition applications to the PBGC.[47]

Treasury has denied the following MPRA applications:

- Automotive Industries Pension Plan;
- Central States, Southeast and Southwest Areas Pension Fund (Central States);
- Iron Workers Local Union 16 Pension Fund;
- Road Carriers Local 707 Pension Fund (Local 707 Pension Fund); and
- Teamsters Local 469 Pension Plan.

The following plans withdrew their applications prior to Treasury's issuance of a ruling:

- Alaska Ironworkers Pension Plan;
- Bricklayers and Allied Craftsmen Local No. 7 Pension Plan;
- Bricklayers and Allied Craftsmen Local No. 5 Pension Plan (Bricklayers Local 5 Pension Plan);
- Local 805 Pension and Retirement Plan (Local 805 Pension Fund); and
- Southwest Ohio Regional Council of Carpenters Pension Plan.

The following application is under review:

- Western States Office and Professional Employees Pension Fund.

Treasury has approved the following applications:

- Iron Workers Local 17 Pension Fund;
- United Furniture Workers Pension Fund A (Furniture Workers Fund);
- New York State Teamsters Conference Pension and Retirement Fund (New York State Fund); and
- International Association of Machinists Motor City Pension Fund (Motor City Fund).

MPRA Application Denials

Central States Pension Fund

Treasury denied Central States Pension Fund's suspension application in May 2016. The Central States Pension Fund's application was the first application submitted under MPRA. Central States, the largest multiemployer pension plan in the country with close to 400,000 total participants, roughly half of whom currently receive annual benefits totaling close to $3 billion,[48] has been reeling from investment losses stemming from the 2008 financial crisis. When Central States submitted its MPRA application, it had $16.8 billion in assets against $35 billion in liabilities. In 2015, the Fund was certified to be in critical and declining status, at 47.7% funded and projected to go insolvent by 2026.

Decades ago, the Fund had four active workers for every retiree or inactive member. But, like many other Teamster plans, that ratio reversed to approximately five re-

[47] Applications for Benefit Suspension, U.S. Department of the Treasury, October 26, 2017, *https://www.treasury.gov/services/Pages/Plan-Applications.aspx.*
See also Partition Requests, Pension Benefit Guaranty Corporation, October 26, 2017, *https://www.pbgc.gov/prac/pg/mpra/multiemployer-plans-and-partition.*

[48] Central States, Southeast and Southwest Areas Pension Fund's MPRA suspension of benefits application, September 25, 2015, Section 5.1.9, *https://www.treasury.gov/services/AppsExtended/(Checklist%205)%20Critical%20and%20Declining%20Status%20Certification.pdf.*

tirees for every one active worker, as a decline in membership due to the deregulation of the trucking industry and two economic catastrophes in the 2000s resulted in far fewer active workers paying into the plan than receiving benefits. The Fund's retirees currently earn $1,128 per month on average, although that total includes workers with tenures of all different lengths. The longest-tenured workers receive about $2,400 a month.

Treasury rejected the Central States Pension Fund's application because it failed to satisfy several MPRA technical requirements.[49]

According to Treasury, the Fund did not meet the following statutory requirements:

(1) to use reasonable investment return assumptions;

(2) to use a reasonable entry age assumption;

(3) to equitably distribute the suspensions; or

(4) to draft its suspension notices to be understandable by the average plan participant.

Many commentators were shocked that Treasury denied the Central States application, because it is one of the largest and most financially troubled plans in the multiemployer system. Many believe MPRA was passed specifically to save Central States, on the grounds that if the plan went insolvent it would effectively bankrupt the PBGC's multiemployer plan insurance program. On the same day that Treasury rejected Central States' application, Treasury Secretary Jacob J. Lew sent a letter to Congress wherein he advised that the larger funding issues facing Central States and other multiemployer plans remain unsolved, especially as the PBGC is simultaneously heading toward insolvency. Secretary Lew's letter explained that Treasury's rejection of the application may have provided participants with some short-term relief but pointed out that even larger cuts may be required in the future for the Fund to meet MPRA's requirements.[50]

Central States' executive director, Thomas Nyhan, said the decision was disappointing because the trustees believed "the rescue plan provided the only realistic solution to avoiding insolvency." Nyhan said the Fund's retirees would have been better off with the cuts than they would be if the plan became insolvent. Given PBGC's looming insolvency, Nyhan noted that without the PBGC safety net, the Fund's participants could see their pension benefits reduced to "virtually nothing."[51]

As of this writing, the Fund has posted the following sobering message on its website:

> Although the decision to request approval of a pension rescue plan was very difficult for the Fund's Trustees, we are disappointed in Treasury's decision and strongly disagree with the reasons expressed by Treasury for denying our rescue plan application. Central States' proposed rescue plan was a proposal of last resort, and clearly not an option that the Trustees preferred. It was, however, based on a realistic assessment that benefit reductions under a rescue plan were the only available, practical way to avoid the hardship and countless personal tragedies that will result if the Pension Fund runs out of money.

Since the Central States Pension Fund submitted its application, its funding percentage has decreased to approximately 42.1%, with an estimated insolvency date of 2025. Its liabilities have increased to approximately $39 billion, and its assets have decreased to $16.1 billion.[52]

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[49] Kenneth R. Feinberg, U.S. Department of the Treasury's MPRA suspension application denial letter to the Board of Trustees of the Central States, Southeast and Southwest Areas Pension Plan, May 6, 2016, *https://www.treasury.gov/services/Responses2/Central%20States%20Notification%20Letter.pdf.*

[50] Jacob J. Lew, Secretary of the U.S. Department of the Treasury, Letter to Congress, May 6, 2016, *https://www.treasury.gov/services/Documents/MPRA%20SecLew%20Letter%20to%20Congress%20050616.pdf.*

[51] Thomas Nyhan, Executive Director and General Counsel of the Central States, Southeast and Southwest Area Pension Plan Letter to Participants, May 20, 2016, *https://mycentralstatespension.org/-/media/Pension/PDFs/cspf-letter-to-participants-05-20-16.pdf?la=en&hash=5A9F9CCFF4AD8A48781D30CDD684B02092531264.*

[52] 2017 Notice of Critical and Declining Status of the Central States, Southeast and Southwest Area Pension Plan, *https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/public-disclosure/status-notices/declining/2017/central-states-southeast-and-southwest-areas-pension-plan.pdf.*

Road Carriers Local 707 Pension Fund

Treasury and the PBGC denied the Road Carriers Local 707 Pension Fund's coordinated partition and suspension applications in June 2016.[53] The Fund, a Teamster plan based in Hempstead, New York, is currently insolvent and receives financial support from the PBGC in the amount of $1.7 million per month to pay benefits.[54]

At the time the Fund submitted its applications in February and March 2016, it was less than 5% funded and had only $24.5 million in assets, a 2:1 retiree-to-active participant ratio, and only nine remaining contributing employers.[55]

The trustees had already reduced benefit levels for those in pay status and filed the Fund's notice of insolvency with the PBGC, informing the Corporation that it would become insolvent and require financial support beginning in February 2017. Like many other Teamster plans, this Fund has never been able to recover from a combination of trucking deregulation, little to no growth in the trucking industry, an increasing retiree population, bankrupt employers failing to pay their withdrawal liability, and the two financial crises in the 2000s.

In its denial of the partition request, PBGC concluded that the Fund failed to demonstrate that it would remain solvent following a partition, and that its application was based on unreasonably optimistic assumptions related to active participants and future contribution levels, including those of the Fund's dominant employer, YRC Worldwide.[56] Treasury also denied the Fund's suspension application, mainly because the projection of solvency in the application was based on the implementation of a partition, which the PBGC denied.[57]

Other MPRA Application Denials and Withdrawals

The applications of the Automotive Industries Pension Plan, the Ironworkers Local Union 16 Pension Fund, and the Teamsters Local 469 Pension Plan were all rejected, because they did not meet MPRA's technical requirements. According to Treasury's denial letters, these plans' applications were denied because the proposed suspensions were not reasonably estimated to avoid insolvency, the actuarial assumptions and methods (*i.e.,* assumptions about mortality rates, hours of service, and spousal survivor benefits) were unreasonable, and/or assumptions about the return on investment were unreasonable.[58]

On the other hand, a few plans, such as the Alaska Ironworkers Pension Plan and the Bricklayers and Allied Craftsmen Local No. 5 and No. 7 Pension Plans, made the strategic decision to withdraw their applications from Treasury consideration before the Department could issue its decision.[59] These plans likely withdrew their applications based on discussions with Treasury. To date, three of the four plans that received Treasury's approval withdrew their initial applications and resubmitted revised applications after consultation with Treasury.[60] The recent approvals may give these plans hope that Treasury will approve a refiled application.

Central States, Southeast and Southwest Area Pension Plan 2016 Annual Form 5500, Schedule MB, October 6, 2017.

[53] Kenneth R. Feinberg, U.S. Department of the Treasury's MPRA suspension application denial letter to the Board of Trustees of the Road Carriers Local 707 Pension Fund, June 24, 2016, *https://www.treasury.gov/services/Responses2/Local%20707%20Notification%20Letter.pdf.* *See also* PBGC Letter to the Board of Trustees of the Road Carriers Local 707 Pension Fund, June 2016, *https://www.pbgc.gov/documents/PBGC-Letter-June-2016.pdf.*

[54] Notice of Insolvency Benefit Level of the Road Carriers Local 707 Pension Fund, dated December 2016, *https://www.pbgc.gov/news/other/res/road-carriers-local-707-faqs,* (October 29, 2017).

[55] Road Carriers Local 707 Pension Fund Coordinated Application for Approval of Suspension of Benefits under MPRA, Exhibits 2–3, March 15, 2016, *https://www.treasury.gov/services/KlineMillerApplications/Redacted%20Files%20Local%20707%20application_001.pdf.*

[56] PBGC Letter to Board of Trustees of the Road Carriers Local 707 Pension Fund, June 10, 2016, *https://www.pbgc.gov/documents/PBGC-Letter-June-2016.pdf.*

[57] Kenneth R. Feinberg, U.S. Department of the Treasury's MPRA suspension application denial letter to the Board of Trustees of the Road Carriers Local 707 Pension Fund, June 24, 2016, *https://www.treasury.gov/services/Responses2/Local%20707%20Notification%20Letter.pdf.*

[58] *See* U.S. Department of the Treasury Letter to Board of Trustees of the Automotive Industries Pension Plan, May 9, 2017; U.S. Department of the Treasury Letter to Board of Trustees of the Ironworkers Local 16 Pension Fund, November 3, 2016; U.S. Department of the Treasury Letter to Board of Trustees of the Teamsters Local 469 Pension Fund.

[59] *See* Applications for Benefit Suspensions, U.S. Department of the Treasury, October 31, 2017, *https://www.treasury.gov/services/Pages/Plan-Applications.aspx.*

[60] *Id.*

MPRA Application Approvals

Treasury has now approved four plans' applications to suspend benefits under MPRA. Three of these approvals have occurred under President Donald Trump's administration and may indicate a changing trend in the review and approval process at Treasury.

Iron Workers Local 17 Pension Fund

On December 16, 2016, Treasury issued its first MPRA suspension application approval to the Iron Workers Local 17 Pension Fund based in Cleveland, Ohio.[61] At the time the Fund submitted its application, it was 44.3% funded with approximately $84 million in assets and $263 million in liabilities and was projected to become insolvent in 2024.[62] This Fund was one of the smaller plans to submit an application, with a little fewer than 2,000 participants and a 1:2 active-to-retired-worker population ratio.

The Fund's proposed suspensions generally involved reducing accrued benefits and eliminating early retirement subsidies and extra benefit credits indefinitely. Benefits were generally estimated to be reduced between 20% and 60%. Under the proposed suspensions, 52%, or 1,029 of the plan's 1,995 participants, will not have their retirement benefits cut. More than 30% of participants will see benefits cut by at least 20%. Specifically, 30 participants will see extreme cuts between 50% and 60%; 115 participants will see cuts between 40% and 50%; 191 will see cuts between 30% and 40%; and 265 will see cuts between 20% and 30%. Another 168 participants will see benefits cut by 10% or less. The suspension will reduce the average monthly benefit for all participants by 20%, from $1,401 to $1,120. With these proposed suspensions, the Fund's actuaries estimated that the Fund will remain solvent through April 2055.

United Furniture Workers Pension Fund A

In July 2017, the Furniture Workers Pension Fund A, based in Nashville, Tennessee, became the second plan to receive Treasury's approval to suspend benefits.[63] The Fund has approximately 10,000 participants and also received approval for a partition from the PBGC effective in September 2017.[64] At the time the Fund submitted its suspension plan, it had assets of approximately $55 million and almost $200 million in liabilities, was approximately 30.6% funded, and was projected to become insolvent by 2021.[65] As with other plans facing insolvency, the plan's funding had slowly deteriorated over the years due to its inability to recover from the market downturns in 2000 and 2008 and to competitive pressures caused by increased furniture imports from overseas, the loss of some of its larger contributing employers, the further decline of its active participant base, and its inability to attract new contributing employers in the industry.

In the Fund's application, its trustees estimated that 2,800 participants would receive on average a reduction of 12.7%, and 7,100 participants would receive no reductions because they were protected under MPRA (*i.e.,* they were over age 80, disabled, etc.).[66] The reductions were estimated to range from 0% to 62%.[67]

In the Fund's partition application, the trustees proposed to partition to the successor plan 100% of the liability associated with the terminated vested participants and 56% of the liability associated with those in paid status (retirees, beneficiaries,

[61] Letter to the Board of Trustees of the Ironworkers Local 17 Pension Fund, U.S. Department of the Treasury, December 16, 2016.
[62] Iron Workers Local 17 Pension Fund's Application to Suspend Benefits, July 29, 2016.
[63] Letter to Board of Trustees of the United Furniture Workers Pension Fund A, U.S. Department of the Treasury, August 31, 2017, *https://www.treasury.gov/services/Responses2/UFW_Final_Approval_Letter.pdf.*
[64] Letter to Board of Trustees of the United Furniture Workers Pension Fund A, U.S. Department of the Treasury, August 31, 2017, *https://www.treasury.gov/services/Responses2/UFW_Final_Approval_Letter.pdf.*
See also PBGC FAQs on the United Furniture Workers Pension Fund, *https://www.pbgc.gov/about/faq/ufw-partition-faqs.*
[65] United Furniture Workers Pension Fund A's Second Application to Suspend Benefits Under MPRA, Exhibit 3, U.S. Department of the Treasury, March 15, 2017, *https://www.treasury.gov/services/KlineMillerApplications/United%20Furniture%20Workers%20Pension%20Fund%20A%20-%20Second%20Application%20for%20Approval%20of%20Suspension%20of%20Benefits%20-%20File%202a%20of%203_Redacted.pdf.*
[66] Letter from the United Furniture Workers Pension Fund A to Participants, March 15, 2017.
[67] *Id.*

and disabled participants).[68] The PBGC generally would become responsible for paying the partitioned liabilities in the successor plan. The trustees estimated that this would be the minimum amount of liability necessary to transfer to the PBGC to relieve some of the financial burden and to remain solvent for the 30-year period required under MPRA.

New York State Teamsters Conference Pension and Retirement Fund

The New York State Teamsters Conference Pension and Retirement Fund was the third and largest plan to receive Treasury approval.[69] Like the other two successful plans before it, this plan withdrew its original application and submitted a new one.

Over the past 35 years, this Fund faced a significant deterioration in its contribution base. In 1990, the Fund had 37,953 total participants, with an active population of approximately 23,883 workers and a retiree and terminated vested population of 14,070.[70] The Fund had almost 500 contributing employers and received $60 million in annual contributions, while paying about $46.9 million in annual benefits.

At the time the Fund submitted its revised application to Treasury in May 2017, it had almost the same number of participants (34,459); however, it now had two retirees for every active worker, and only 184 contributing employers. The Fund was receiving $118.7 million in annual contributions but paying approximately $280.1 million in annual retiree benefits. While almost fully funded in 2000, as of January 1, 2017, the plan was 37.8% funded, with $1.28 billion in assets and $3.39 billion in liabilities.

In its application, the trustees proposed a 19% reduction for all active participants and a 29% benefit reduction for all inactive participants. It was estimated that nearly 28% of participants would not see any cuts due to MPRA's protections.

International Association of Machinists Motor City Pension Fund

On November 6, 2017, the Troy, Michigan-based International Association of Machinists Motor City Pension Fund (Motor City Fund) became the fourth plan to receive Treasury's approval to suspend benefits.[71] This Fund became the first one to receive Treasury's approval without undergoing a resubmission process.

Over the last 15-plus years, the Motor City Fund's finances have been affected by the same factors plaguing other plans seeking MPRA relief—loss of contributing employers, a decrease in active participants, and an inability to recover from the economic catastrophes of the 2000s.[72] In 2006, the Fund was 74% funded with a market value of assets of approximately $84 million and about $111 million in liabilities.

Since then, the Fund's demographics and asset base have declined. The Fund has experienced numerous employer withdrawals over the years. The Fund had 20 contributing employers in 2012, 16 in 2015, and 11 in 2016, and is currently down to five. As of June 30, 2016, the Fund was about 58% funded with only $51 million in assets and about $101 million in liabilities. It pays out $8.69 million in benefits to its retirees annually, while receiving only $1.6 million in employer contributions. Unbelievably, it has almost eight inactive participants receiving benefits per every one active worker. Without the benefit suspensions, the Fund is projected to be insolvent by the end of the 2026 plan year.

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[68] United Furniture Workers Pension Fund A's Second Application to Suspend Benefits Under MPRA, U.S. Department of the Treasury, March 15, 2017, *https://www.treasury.gov/services/KlineMillerApplications/United%20Furniture%20Workers%20Pension%20Fund%20A%20-%20Second%20Application%20for%20Approval%20of%20Suspension%20of%20Benefits%20-%20File%201%20of%203_Redacted.pdf.*

[69] Letter to Board of Trustees of the New York State Teamsters Conference Pension and Retirement Fund, U.S. Department of the Treasury, September 13, 2017, *https://www.treasury.gov/services/Documents/NYST%20final%20approval%20letter.pdf.*

[70] New York State Teamsters Conference Pension and Retirement Fund Second Application to Suspend Benefits, U.S. Department of the Treasury, May 15, 2017, *https://www.treasury.gov/services/KlineMillerApplications/01a%20NYSTPF%20MPRA%20App%20C%20Exhibits%2001%20to%2016_Redacted.pdf.*

[71] Letter to the Board of Trustees of the International Association of Machinists Motor City Pension Plan, U.S. Department of the Treasury, November 6, 2017, *https://www.treasury.gov/services/Pages/Benefit-Suspensions.aspx.*

[72] Board of Trustees of the International Association of Machinists Motor City Pension Plan Application to Suspend Benefits, U.S. Department of the Treasury, March 29, 2017, *https://www.treasury.gov/services/Pages/International-Association-of-Machinists-Motor-City-Pension-Fund.aspx.*

Under the Fund's suspension plan, monthly benefits payable to participants in pay status as of January 1, 2018, would be reduced to 110% of the PBGC-guaranteed amount, which is the maximum reduction allowed under MPRA. The reduction applies to benefits earned up to January 1, 2018. Accruals after January 1, 2018, will return to 0.5% of credited contributions. As of December 2017, the Fund was in the process of submitting its proposal to its 1,134 members for voting.

IS MPRA WORKING?

MPRA has been neither an unmitigated disaster nor a panacea for multiemployer pension plans. Many commentators and, without a doubt, most plan participants are unhappy with MPRA because it allows plan trustees to violate the most basic tenet of ERISA: that once a benefit is earned, it cannot be taken away. There is little doubt, however, that prior to MPRA there was nothing some plans could do to avoid insolvency given the anti-cutback rule and the unsustainability of employer contribution increases. For plans that have recently reduced benefits, there is now hope that they will provide benefits for at least the next 30 years and perhaps in perpetuity. For other plans like Central States and the UMWA Pension Plan to survive, additional legislative action will need to be taken.

Yes

MPRA now allows plans to reduce accrued benefits, which are by far the highest expense most plans have. It is virtually impossible for a plan with severe funding issues to reduce costs sufficiently when reductions are limited to future accruals. While there is a cost to providing future service credit, it is the past liabilities, many of which are unfunded but still owed, that normally sink a pension plan. With limited cost-cutting measures available pre-MPRA, plan trustees looked to employers to pay more and more every year. Now that well has run dry and the ability to cut accrued benefits is the last tool available for some plans to avoid insolvency.

The MPRA application process also appears to be getting more streamlined. The first several MPRA applications were denied because Treasury was not comfortable with the actuarial and investment assumptions that plans were making in proposing their benefit suspensions. Treasury has since issued new regulations governing suspension applications and has demonstrated a willingness to engage plan advisors during Treasury's review process. This allows for the exchange of information and the tweaking of certain assumptions that make it easier for the plan to demonstrate that suspensions will avoid insolvency for at least 30 years, which is what is required for Treasury to approve an application.

Treasury has now approved four MPRA applications, with the Motor City Pension Fund being the first plan to obtain an approval on its initial application. This could possibly bode well for future applications.

No

Although Treasury seems to have implemented a process that may ultimately result in more suspension application approvals, the process is still lengthy and expensive. This is partly attributable to Treasury's use of its own actuarial and investment assumptions when reviewing and evaluating a plan's suspension application. By substituting its own assumptions for those of the plans' actuaries, Treasury adds a layer of complexity that slows the process and makes it more expensive.

MPRA's statutory text does not require (or authorize) Treasury to make such a detailed review of suspension applications. The statute authorizes Treasury to review applications to determine if the plan is eligible for the suspension and has satisfied the requirements of MPRA. In fact, the statute specifically says that when evaluating an application, Treasury must accept the trustees' determinations unless the plan's determinations are clearly erroneous.

While MPRA allows plans to make drastic reductions in costs by reducing accrued benefits, nothing in MPRA helps to infuse new money into the plans. Ultimately, some of the larger and most underfunded plans will need a new income stream in addition to benefit cuts to avoid insolvency. A combination of new money and benefit reductions could stop the bleeding from negative cash flow and allow a plan to earn its way out of critical and declining status. There is nothing in MPRA that helps on the income side of the equation.

Benefit cuts alone do not appear to be sufficient to address the payment of the orphan liability some plans have. MPRA has been unable to save two of the largest and most underfunded plans: Central States and the UMWA Plan. Central States' application was denied, and the UMWA Plan's benefit levels do not seem to make it a candidate for benefit suspensions under MPRA because it is already paying out benefits in many cases that are below the minimum amount allowed under MPRA. PBGC's projected insolvency is in part based on the liabilities it sees coming from these two plans. Although other legislative proposals have been made to provide relief to the UMWA Plan, nothing has been passed to date.

MPRA has been helpful to some plans and may prove helpful to others. But MPRA will not save Central States, the UMWA Pension Plan, and the other most severely underfunded plans because it provides no additional funding mechanism, which these plans will require. For these plans, and the more than 1 million participants in them, additional legislation is needed in short order.

WHAT HAPPENS IF NOTHING HAPPENS?

Central States, the UMWA Plan, and other plans approaching insolvency are not in a position to impose additional benefit cuts or employer contribution increases. These plans generally have no realistic expectation that any new employers will enter the plan. As assets dwindle, the trustees' fiduciary duty limits their ability to diversify the plan's investments.[73] Now begins the death spiral, the inexorable slow march that will see the assets depleted while benefits are still due and owing.

If insolvency occurs, participants will receive significant cuts in payments, because PBGC insurance covers only a fraction of the promised pension benefit payment. For example, a Local 707 Pension Fund participant with 30 years of service once received approximately $48,000 a year from the plan. Since the plan's insolvency, that participant receives only $12,870 per year from the PBGC, which is the maximum guaranteed amount. This reduction obviously puts participants in a difficult position.

Many cannot return to work because of age and health issues, not to mention potential skill and certification gaps. As a result, they will have to find other ways to make up for the reduction, including liquidating their assets, relying on family members, and looking to the government, and by extension the taxpayer, through the use of Medicare, Medicaid, Social Security, Supplemental Nutrition Assistance Program benefits, and other social safety net programs.

The failure of the largest and most underfunded plans will ultimately bankrupt the PBGC. In its FY 2016 Projections report, the PBGC stated that the multiemployer insurance program is likely to run out of money by the end of 2025. The PBGC Multiemployer Program's 2016 deficit of $59 billion increased to $65.1 billion in 2017 and is expected to explode to $80 billion by 2026.[74] Once the multiemployer program is bankrupt, participant payments will be cut even further and may even cease. As such, the scenario described above will become even direr.

A failure of this magnitude in the multiemployer system will damage the entire economy—not just employers in the multiemployer plan system. Insolvencies and the subsequent benefit cuts that follow also have deep impacts on the communities where participants live. Retirees will see their standard of living reduced. At a minimum, they will have less income to spend in local economies. The reduced spending will be felt by businesses, especially in small communities. Less money spent by retirees also means less paid to local government in sales and other taxes. When tax revenue decreases, the demand for social programs will increase, because many retirees will likely lose their homes and/or have difficulty paying for medical expenses. This will cause many to become reliant on social programs that have to be funded by taxpayers at a time when tax revenue will be declining. Simply put, pension plan insolvencies and a PBGC collapse will have a cumulative negative effect on entire communities. Individuals, government, and businesses will all suffer unless a solution is found.

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[73] As mentioned earlier, as a plan's assets dwindle, trustees are obligated by their fiduciary duties to shift a plan's investments out of equities and into more conservative investment vehicles to preserve cash to pay benefits for as long as possible. Such investments generally provide for little growth, so there is no opportunity for the asset base to grow. If the trustees continued to leave assets invested in equities, a sharp downtown in equity markets could cause a plan to go insolvent much sooner than otherwise anticipated.

[74] "PBGC Projections: Multiemployer Program Likely Insolvent by the End of 2025; Single-Employer Program Likely to Eliminate Deficit by 2022," Press Release, Pension Benefit Guaranty Corporation, August 3, 2017, *https://www.pbgc.gov/news/press/releases/pr17-04.*

POTENTIAL SOLUTIONS

Several proposals have been designed to address the multiemployer pension plan funding problem. Some are purely legislative proposals, whereas others deal with new pension plan designs. The most widely considered of the proposals are discussed below.

PBGC Takeover of Critical and Declining Status Plans

The prospect of the PBGC taking over all plans that are classified as critical and declining has some appeal. After all, the PBGC was established in 1974 to provide insurance to private pension plans, including multiemployer plans. If the PBGC's mission is to provide assistance to financially troubled multiemployer plans, the plans in the worse shape should look to PBGC to not only help pay benefits if necessary, but to operate the plan as well.

Proponents of a complete PBGC takeover of critical and declining plans cite these primary reasons for their position—PBGC-operated plans will save money by reducing administrative expenses; or the threat of a PBGC takeover will provide an incentive for trustees to ensure adequate funding, because their jobs will be at risk otherwise.[75]

When a single-employer defined benefit pension plan goes insolvent, the PBGC takes over the operation of the plan. When a multiemployer plan goes insolvent, the PBGC offers financial assistance in the form of a loan. Not only are these loans almost never repaid, but the plan continues to operate under the pre-insolvency structure. This means that there remains a board of trustees comprised of an equal number of union and employer representatives who are charged with administering the plan in accordance with the fiduciary requirements of ERISA and the tax-qualification requirements of the Code. The trustees hire actuaries, attorneys, accountants, investment consultants, and investment managers to help comply with the various legal requirements. These professional advisors cost money, and therefore even an insolvent plan receiving financial assistance from PBGC has continuing administrative costs.

A PBGC takeover of critical and declining multiemployer plans would likely reduce administrative costs. The costs would not be eliminated, because the PBGC would still need the same actuarial, legal, accounting, and investment advisory services that the plan's trustees use. Nevertheless, many of the advisors would either already be on staff at PBGC, or the services could be provided in a less costly manner due to economies of scale.

However, the PBGC is not currently funded well enough itself to offer any meaningful long-term financial relief to multiemployer plans under its current structure of offering only loans. If the PBGC were to take over the administration of critical and declining plans, PBGC's costs would increase, even if only slightly. More important, plans that are in critical and declining status are not in that condition because of their administrative expenses; rather, they are in critical and declining status primarily because of massive negative cash flow issues brought on by having to pay millions more in benefits to retirees than they receive in contributions for active employees. While a PBGC takeover would most assuredly reduce administrative expenses, a reduction in administrative expenses alone, without shoring up the PBGC's financial condition, would not provide a long-term solution.

Another reason frequently cited by those advocating for PBGC takeovers is that the threat of a takeover will incentivize plan officials to more closely monitor a plan's funding level. This line of thinking assumes that once a plan becomes critical and declining, the PBGC takeover of the plan will cost people their jobs, and therefore, for self-preservation purposes, plan officials will do everything possible to prevent a plan from becoming critical and declining. While it is true that a plan's professional advisors and in-house administration (if any) would not be needed after a PBGC takeover, professional advisors and administrative staff do not have the authority to make decisions for the plan that affect funding.

Those decisions are made by the plan's trustees, who generally are not full-time plan employees. Being a trustee of a multiemployer plan is often one of the duties of a union official or employer-appointed trustee, but it is not a job in and of itself. Therefore, it is doubtful that very many plan trustees will lose their jobs if the

[75] Rachel Grezler, "Congress Needs to Address the PBGC's Multiemployer Program Deficit Now," The Heritage Foundation Issue Brief, September 13, 2016, 2.

PBGC were to take over a plan; the professional advisors whose jobs would be at risk are already incentivized to help keep a plan out of critical and declining status, because if their advice is shoddy, the trustees will terminate them. Finally, the PBGC "takeover as incentive/threat" position assumes that critical and declining plans are in that condition because plan officials were not diligent or were asleep at the wheel. This is rarely the case, as changing demographics and stock market returns have been more influenced by government policy and market forces than by trustees' decisions.

PBGC Funding

There are limited tools available to improve the PBGC's funded status. Historically, the PBGC multiemployer program has been funded solely through annual premiums that multiemployer plans are required to pay, and not by individual tax payers. Broadening the PBGC's funding mechanisms to include taxpayer dollars from the general treasury is appealing to some but anathema to others.[76] Some pundits believe that the federal government has been complicit in the downfall of some multiemployer plans by imposing strict funding rules and deregulating certain industries.[77] These pundits believe that the government should help fund the PBGC to make up for prior policies that have put the plans at risk. Others believe that American taxpayers, the majority of whom do not participate in multiemployer pension plans, should not be asked to sacrifice for others when they have their own retirements to fund.[78]

Another way to improve PBGC funding is to increase the annual premiums that multiemployer plans pay. This has already been done in recent years, but increases have not been large enough to solve the PBGC's funding deficit. In 2014, multiemployer plans paid an annual flat rate premium of $12 per participant. In 2018, multiemployer premiums will be $28 per participant. Despite more than doubling the premium, the PBGC still projects that there is a 90% chance it will be insolvent by 2035. Even more disturbing is that the PBGC estimates that if premiums were increased to $120 per participant, its deficit in 2022 would still increase by $15 billion.[79]

According to the Congressional Budget Office, PBGC premiums would have to be increased to $232 per participant to achieve a 90% probability of covering its deficit by 2036.[80] Based on the fair-value estimated deficit of $101 billion, a $232 premium increase would cover only 36% of the PBGC's deficit.[81] Furthermore, raising premiums eightfold would require increasing employer contributions. As many plans are in critical and declining status because employers could not afford the contribution increases required under their rehabilitation plans, it seems unlikely that employers would be able to pay the increases necessary to increase PBGC premiums to a level that would cure the PBGC's deficit.

Partitioning of Orphans

Orphan participants constitute a significant portion of total multiemployer participants. Approximately 1.6 million of the 10.7 million multiemployer plan participants are orphans.[82] To relieve severely underfunded plans of the burden of unfunded orphan liability, many practitioners suggest that the liability be transferred to the PBGC via a partition. Once a partition is approved, and the original plan transfers liabilities to the PBGC, the PBGC becomes responsible for paying benefits to the partitioned participants at the PBGC guaranteed level.

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[76] *Id.,* 2.

[77] Mary Sanchez, "The Federal Government's Little Known Pension Heist," *Baltimore Sun,* February 17, 2015.

[78] Rachel Grezler, "Congress Needs to Address the PBGC's Multiemployer Program Deficit Now," The Heritage Foundation Issue Brief, September 13, 2016.

[79] Alicia H. Munnell and Jean-Pierre Aubry, "Can PBGC Save Multiemployer Plans?", Center for Retirement Research at Boston College, September 2014, Number 14–16, 5, *http://crr.bc.edu/uncategorized/can-pbgc-save-multiemployer-plans/*.

[80] Rachel Grezler, "Congress Needs to Address the PBGC's Multiemployer Program Deficit Now," The Heritage Foundation Issue Brief, September 13, 2016, 2.

[81] Alicia H. Munnell and Jean-Pierre Aubry, "Can PBGC Save Multiemployer Plans?," Center for Retirement Research at Boston College, September 2014, Number 14–16, 5, *http://crr.bc.edu/uncategorized/can-pbgc-save-multiemployer-plans/*.

[82] Alicia H. Munnell, Jean-Pierre Aubry, and Caroline V. Crawford, "Multiemployer Pension Plans: Current Status and Future Trends," Center for Retirement Research at Boston College, November 2017, 170.

Since MPRA's enactment, only the Furniture Workers Fund has successfully applied for a partition.

While partitions can help reduce a plan's underfunding, they are far from a panacea because they rely on the PBGC to pay the partitioned participants' benefits. PBGC is simply not funded well enough to pay all orphaned liabilities for all critical and declining plans. The PBGC funding issue is actually exacerbated in a partition, because PBGC starts paying the partitioned benefits immediately, unlike when the plan as a whole goes insolvent. Absent additional funding, this move would likely accelerate PBGC's projected insolvency.[83] Assuming the funding issue could be resolved, the value of partitioning would be to help plans to focus on maximizing contributions to pay for current costs.

Plan Mergers

As discussed previously, MPRA provides the PBGC with the authority to facilitate mergers. Some commentators believe that, with PBGC-assisted mergers or partitions, many plans will be able to recover using contributions from the remaining active employers and employees, which might help preserve plans covering some 800,000 people.[84] However, it does not appear that many plans have sought PBGC assistance in effectuating mergers under MPRA. This could be because trustees of critical and declining plans have been focused on determining whether a benefit suspension and/or partition application would solve their plans' solvency issues rather than on investigating potential mergers.

The MPRA application process is labor intensive, time consuming, and expensive and requires only the involvement of one board of trustees. It would thus be difficult and time consuming to explore potential mergers or perform a merger study and to prepare a MPRA application at the same time. It is possible that those plans that have had their MPRA applications rejected, or who have withdrawn their applications, may investigate whether a PBGC-facilitated merger with another plan is feasible. However, any solution that requires PBGC funding is not necessarily going to permanently resolve a plan's funding issues because of PBGC's own precarious financial condition. To make plan mergers a viable tool for critical and declining plans, more guidance is needed from Treasury/PBGC and/or Congress.

Benefit Modifications

While the PPA has allowed many plans to make benefit modifications to future accruals and other adjustable benefits, and MPRA now authorizes reductions to benefits in pay status, some are calling for even more flexibility to allow financially troubled plans to make benefit modifications. It is possible that for some deeply troubled plans that are nearing the death spiral, benefit reductions that go beyond those allowed by MPRA may be necessary.

The more time that elapses without a workable solution, the bigger the cuts will have to be. These plans' plights are exacerbated by PBGC's underfunded status. It is estimated that if the PBGC becomes insolvent, ongoing premiums that multiemployer plans pay would cover only about 10% of the benefits for which Central State is responsible. This would require participants to take a 90% reduction in their benefits.[85]

In an article for the Heritage Foundation, Rachel Grezler proposed several ideas to improve multiemployer plan funding. First, she suggested creating special rules for critical and declining plans that "have no hope of becoming solvent." Under the proposal, critical and declining plans would not be allowed to continue adding new liabilities. Instead, they would be required to freeze new benefits and reduce existing benefits, including to those in pay status, similar to MPRA.[86] The paper also advocates for rules making it easier for plans to reduce benefits prior to becoming insolvent as doing so would prevent older workers in underfunded plans from continuing to receive full benefits, while younger worker accrue very little. The authors suggest that plans looking to make MPRA reductions be able to do so without demonstrating

[83] Alicia H. Munnell and Jean-Pierre Aubry, "Can PBGC Save Multiemployer Plans?", 5.

[84] "What Can Congress Do to Help People in Multiemployer Pension Plans?": testimony by Hon. Joshua Gotbaum before the Senate Committee on Finance, March 1, 2016, *https://www.finance.senate.gov/imo/media/doc/03012016%20Gotbaum%20SFC%20Gotbaum%20Multiemployer%20Pensions%20Testimony.pdf.*

[85] *Id.*

[86] Rachel Grezler, "Congress Needs to Address the PBGC's Multiemployer Program Deficit Now," The Heritage Foundation, September 13, 2016, 3.

that the reductions will result in the plan's long-term solvency.[87] Another concept is to allow the PBGC, on its initiative, to reduce benefits within a plan prior to the plan going insolvent, or to reduce the PBGC guaranty after insolvency. The Heritage Foundation recognizes however, that reductions in the PBGC guaranty alone would not be enough to prevent PBGC insolvency, and that other changes are necessary.

Variable Defined Benefit Plans

While technically a defined benefit plan, a variable defined benefit plan has characteristics of both defined benefit and defined contribution plans. Interestingly, the variable defined benefit plan has been used by multiemployer defined benefit plans with severe funding issues (like the Sheet Metal Workers' National Pension Fund) to allocate part of the investment risk to employees, as well as by multiemployer 401(k) plans (like the UNITE HERE Local 26 Pension Plan) to shift some investment risk to employers.

Variable defined benefit plans can be designed to be 100% funded.[88] They are similar to traditional defined benefit plans in that the contributing employers bear the financial obligation and the plan's assets are invested in a pooled account. They are unlike defined benefit plans in that they spread investment risk among contributing employers and participants and rely on less risky investment assumptions.[89] The benefit the plan pays is "variable," because the amount varies depending on actual investment performance.

Basically, the variable defined benefit plan pays the greater of a floor defined benefit and a variable benefit. After taking into account contribution levels, the plan actuary will determine the floor benefit based on plan demographics and a conservative interest assumption (for example 4% to 5%). The floor benefit would also be converted into investment units in the plan's collective assets, which would be professionally managed. These investment units fluctuate in value annually, increasing in value if the plan's investment return exceeded the conservative interest assumption (plus a reserve factor) and decline in value if the plan's investment return falls below the assumption.

At retirement, the employee would receive the greater of the sum of his or her floor benefits or the sum of his or her investment units.[90] The floor benefit is thus designed to be the minimum that a participant might receive at retirement, but the variable component allows the benefit to increase (within certain specified limits) when investment returns are higher. Extraordinarily high investment returns above those specified in the plan are placed into reserve to protect against the inevitable negative investment return years.

Proponents of the variable defined benefit plan laud the design's ability to pay an adequate benefit in the form of a life annuity, while at the same time allocating the investment risk among contributing employers and participants. The conservative investment assumption is lower than the traditional 7% to 8% that most defined benefit plans assume, which provides a higher probability that the promised floor benefit will never have to be adjusted because the lower return is more likely to be achieved.[91]

Variable defined benefit plans are of recent vintage in the multiemployer arena. While there appear to be benefits to all stakeholders, these plans might be more helpful for younger workers and could possibly become the defined benefit plan of the future. The variable defined benefit plan does not do anything to solve the funding issues of plans that face insolvency today and that jeopardize the retirement security of those near or in retirement.

Composite Plans

Another plan design that has gained traction among multiemployer plan stakeholders and practitioners is the composite plan. The concept of the composite plan

[87] *Id.*

[88] David B. Brandolph, "Hotel Industry Trust That Left 401(k) for Pension Gets IRS OK," August 2017, *Bloomberg BNA, https://www.bna.com/hotel-industry-trust-n73014462612/.*

[89] Gene Kalwarski, "The Variable Defined Benefit Plan," Cheiron, accessed December 13, 2017, *https://www.cheiron.us/cheironHome/doc/Retirement_USAv1.pdf.*

[90] Gene Kalwarski, "Re-Envisioning Retirement Security: Variable Defined Benefit Plan," Retirement USA, October 21, 2009, *http://www.retirement-usa.org/re-envisioning-retirement-security-variable-defined-benefit-plan.*

[91] David B. Brandolph, "Hotel Industry Trust That Left 401(k) for Pension Gets IRS OK," August 2017, *Bloomberg BNA, https://www.bna.com/hotel-industry-trust-n73014462612/.*

was first introduced in 2013 by the National Coordinating Committee for Multiemployer Plans (NCCMP).[92] Draft legislation language was released by the House Education and Workforce Committee in September 2016, but to date no legislation has been enacted.

Like variable defined benefit plans, composite plans are designed to allocate investment risk to both employers and participants. A composite plan is neither a defined benefit nor a defined contribution plan, but has characteristics of each. Like multiemployer defined benefit plans, the trustees would determine the rate at which benefits accrue and benefits would be paid in the form of an annuity. However, unlike defined benefit plans, the ultimate benefit paid would be variable and depend on the market value of assets.[93] Benefit amounts would be adjusted on an annual basis to mitigate the frequency and impact of market fluctuations, projected for a 15-year period.[94] Composite plans would not have any withdrawal liability and would not be subject to PBGC guarantees. The employers' contribution obligation would be limited to the rates negotiated with the union.[95]

Those advocating for composite plans note that composite plans no longer place the risk of ensuring performance of the investment markets solely on employers, while at the same time providing a mechanism for union workers to receive retirement income for life.[96] The composite plan design also has its critics. International Brotherhood of Teamsters President James Hoffa believes the composite plans would not be adequately funded under the proposed legislation and the net result would be two underfunded plans.[97] The Pension Rights Center describes the proposed legislation as a bill that would allow "relatively healthy multiemployer plans with secure adequate benefit structure to transition to two inferior plans."[98]

Loan Program Proposals

In recent months, stakeholders representing both union and management have put forth potential legislative solutions they believe could solve even the most severely underfunded plans' funding problems. Recognizing the uphill political battle procuring a pure tax payer bailout of multiemployer plans would entail, these proposals involve providing loans to pension plans that would be paid back to the U.S. government over time.

Butch Lewis Act

In November 2017, Senator Sherrod Brown (D–OH) and Representative Richard Neal (D–MA) introduced the Butch Lewis Act (S. 2147 and H.R. 4444, respectively), which would allow struggling multiemployer pension plans to borrow money from Treasury to remain solvent.

The bill would create a new office within Treasury, known as the Pension Rehabilitation Administration (PRA). The PRA would allow financially troubled plans to borrow money for up to 30 years at low interest rates. The PRA would raise money for the loan program through the sale of Treasury-issued bonds to financial institutions. The 30-year period is supposed to give the borrowing plans ample time to repay the loan, while simultaneously incentivizing it to make smart long-term investments. The legislation would also prohibit the plans from making certain "risky" investments during the loan period. Every 3 years, the plans will have to report back to the PRA and demonstrate they are rehabilitating themselves and avoiding insolvency. The PBGC would also share some responsibility in financing the loan program by providing a plan the funds it requires beyond the loan program to pay benefits.[99]

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[92] *See* NCCMP 2013 Retirement Security Review Commission Report, "Solutions Not Bailouts."

[93] The United States House of Representatives Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions, "Examining Reforms to Modernize the Multiemployer Pension System," testimony of Randy G. DeFrehn, April 29, 2015.

[94] *Id.*

[95] *Id.*

[96] "Examining Reforms to Modernize the Multiemployer Pension System," testimony of Randy G. DeFrehn, April 29, 2015.

[97] "Teamsters Strongly Oppose New House 'Composite' Pension Legislation," Teamsters, September 22, 2016, *https://teamster.org/news/2016/09/teamsters-strongly-oppose-new-house-composite-pension-legislation.*

[98] "Composite Bill Legislative Summary," Pension Rights Center, November 10, 2016, *http://www.pensionrights.org/issues/legislation/composite-bill-legislative-summary.*

[99] "Brown Announces Plan to Protect Ohio Pensions, Keep Promises to Ohio Workers," Press Release, Sherrod Brown, Senator for Ohio, November 12, 2017, *https://www.brown.senate.gov/*

Curing Troubled Multiemployer Pension Plans: Proposal

A stakeholder group made up of employers and unions has been proactive in formulating its own legislative proposal, and has been actively marketing the proposal to multiemployer plans, the NCCMP, and members of Congress. The proposal is titled "Curing Troubled Multiemployer Pension Plans" and the theme is that saving multiemployer plans will require shared sacrifices. Under this proposal, multiemployer plans will be saved from impending insolvency through a combination of federal loans, benefit reductions, and surcharges to plan participants.

Under the proposal, any plan that is in critical and declining status would be eligible for a federal loan. The plan would submit an application to the Department of Treasury, together with an actuarial certification that the plan is critical and declining and that the loan proceeds would be sufficient to cure the plan's funding issues and that the plan could repay the loan. The loan proceeds would cover the plan's negative cash flow (*i.e.,* the difference between the amount the plan pays in benefits each month, plus administrative expenses and the amount the plan receives in employer contributions).

A plan would be able to take up to three loans. The total amount of the loan would be calculated by the plan's actuary, and would be sufficient to pay five times the projected contribution income and earnings minus benefit payments and administrative expenses. The proposal refers to this amount as the "shortfall." The interest rate on the loan would be 1% and would be paid over 30 years, with interest-only payments during the first 5 years (or 10 years if two loans are necessary, and 15 years if three are needed).

The proposal also requires plans to reduce all benefit payments by 20% within 60 days after the loan application is approved. These benefit reductions would apply to all participants and there would be no protected classes. The reductions would apply even if they resulted in a participant receiving less than the PBGC guarantee. The 20% reduction would also apply to those participants who are not yet receiving benefits. Proponents of the proposal assert that because the loan will cover the shortfall, and the shortfall is calculated using the unreduced benefit amounts, plans will have an opportunity to improve its funded status through investment performance.

After the initial 5-year loan period, the plan's actuary will determine whether the plan is still in critical and declining status. If the plan is still critical and declining, the shortfall is recalculated (again without including benefit reductions) and a new loan amount is calculated and paid in monthly installments. If the plan is no longer in critical and declining status, repayment of the loan principal begins. Benefit reductions would remain in place until the plan is neither in critical or endangered as defined in the PPA.

The Curing Troubled Multiemployer Pension Plans proposal estimates that approximately $30 billion in loans might be necessary to save underfunded multiemployer plans. In order to reduce the risk of default on the loans (the plans will be paying interest only for 5 to 15 years), a multiemployer plan risk reserve pool (MRRP) would be established. The MRRP would be funded by imposing monthly surcharges on participants and employers, and by increasing PBGC premiums that multiemployer plans pay. PBGC would administer the MRRP and would invest the money in a trust separate from PBGC's other assets.

Draft Federal Credit Proposal

The NCCMP has put forth its own proposal. The NCCMP was instrumental in designing and lobbying for the passage of MPRA and firmly believes that Central States' funding issues would have been resolved if Treasury had approved Central States MPRA application.[100]

The NCCMP proposal is similar to the shared sacrifices proposal. The NCCMP's Draft Credit Proposal (DCP) also contemplates federally subsidized 30-year loans at a 1% interest rate. According to NCCMP, it has modeled its program using data from five plans and that each plan demonstrated that it would maintain solvency and be able to repay the loan. The DCP provides for three alternatives to be presented to Congress.

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newsroom/press/release/brown-announces-plan-to-protect-ohio-pensions-keep-promises-to-ohio-workers.

[100] Michael D. Scott, "Multiemployer Pension Facts and the Draft Emergency Multiemployer Pension Loan Proposal," September 20, 2017, 8.

Alternative 1 would require no benefit reductions and the federal government would pay all credit subsidy costs. The credit subsidy cost is the estimated long-term cost to the government of a direct loan or loan guarantee, calculated on a net present value basis and excluding administrative costs. The NCCMP concedes that there is no precedent for any federal credit program that did not require the recipients to restructure their obligations and governance.[101] It is thus hard to imagine that Alternative 1 would be adopted given the current political climate.

Alternative 2 requires the same 20% across the board reduction in benefits that the shared sacrifices proposal calls for. Unlike the 20% UPS reductions, which would be used to provide plans with the ability to earn their way back to solvency, the reductions under the DCP would be paid to the government to reduce the cost of the government subsidy. The government would pay any remaining subsidy costs. The NCCMP is on record that it will not support any tax or other payment on the multiemployer plan system to pay for or credit-enhance the loan program because the structure is consistent with the Federal Credit Reform Act.[102]

Alternative 3 also requires a 20% across-the-board benefit reduction, and then requires any additional amounts needed to achieve a zero credit subsidy to the government.[103]

The NCCMP recognizes that for plans like Central States and the UMWA Plan, time is of the essence in passing a solution. Each day that goes by brings both plans closer to the death spiral from which there would likely be no return. The NCCMP believes that its proposal maximizes the probability of success and would be palatable to the government, which makes implementation more likely.

CONCLUSION

Although most multiemployer pension plans are not in endangered or critical status, a significant crisis is looming in the multiemployer system. Most plans have survived last decade's two financial crises and absorbed the impact of a dwindling ratio of active participants to retirees. These plans survived primarily due to a combination of benefit reductions and contribution increases allowed by the Pension Protection Act of 2006, as well as an improving economy. Some plans might be able to survive if they make significant Multiemployer Pension Reform Act of 2014 reductions to benefits in pay status. Those appear to be the fortunate plans.

Unfortunately, some plans are nearing the death spiral, where even maximum reductions under the Multiemployer Pension Reform Act of 2014 will not be sufficient to stave off insolvency. At the same time, the gap between those critical and declining plans and healthier funds continues to widen, while the Pension Benefit Guaranty Corporation's insolvency is quickly approaching. If these plans fail, the negative effects will be felt by the participants and their families, local economies, and U.S. taxpayers as a whole.

ILLOWA Committee to Protect Pensions
Illinois/Iowa Quad Cities
1815 37th Street Place,
Moline, IL 61265
(309–797–9578)

Judith Weeks—Chairperson
Ruth M. Puck—Recording Secretary
Diane Roth—Treasurer

May 12, 2018

Joint Select Committee on Solvency of Multiemployer Pension Plans
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Committee Members:

Please support the Butch Lewis Act (S. 2147 and H.R. 4444). We believe it will relieve the taxpayer of the burden of funding the Pension Benefit Guarantee Corpora-

[101] *Id.,* 11.
[102] *Id.*
[103] *Id.*

tion (PBGC) and of taxpayers supporting over 10 million retirees in their declining years.

This letter pertains to the plight of nursing homes across America that will be harmed if multiemployer pension funds are allowed to become insolvent. Many retirees are in those nursing homes because they have a pension that they (or their spouse) earned while working. Most of them may not even be aware of the possibility of losing the pension check that pays for their care. They need you to speak for them and make sure that those nursing homes receive those pension checks so seniors won't be moved onto Medicaid and state or county homes **at taxpayer expense.**

This is also about the future of retirees who aren't currently in nursing homes. One day, many of us may need nursing home care and we want to make sure that we have pension checks to pay for that possibility. We don't want to be dependent upon the state or federal government to care for us in our declining years.

The loss of those pensions could devastate the economy as well. Please refer to the newly released Economic Impact Study for the entire multiemployer pension system. The data on the Economic Impact Study is from the National Institute on Retirement Security (NIRS) which used DOL Form 5000 data.

Many of these retirees are veterans who are currently paying for Medicare and a secondary health insurance because they can afford to with their pensions. If they lose those pensions, they will end up getting services at the Veterans Administration, again **at taxpayer expense.** And many of those who lose pensions will quality for subsidized housing and even food stamps, again **at taxpayer expense.**

Our committee, ILLOWA Committee to Protect Pensions, is mostly Teamster retirees and spouses from Central States but we represent over 10 million retirees in multiemployer pension plans. We are a part of a group of over 60 committees across America that is working with congress to solve this funding problem.

Thank you for your work with the Joint Select Committee on Solvency of the Multiemployer Pension Plans. We need your support in our efforts to stay in our homes, provide for ourselves, meet our obligations, and feel secure in our futures. Again, please support S. 2147 or H.R. 4444.

Sincerely,

Members of ILLOWA Committee to Protect Pensions
Ruth M. Puck (Contact Person)

Letter Submitted by Henry B. Jefferson III

May 20, 2018

U.S. Senate
Committee on Finance
219 Dirksen Senate Office Bldg.
Washington, DC 20510–6200

RE: Central States Pension Fund

Dear Senate Committee,

My name is Henry B. Jefferson III. I was employed by The Kroger Company for 36 years. I am now 78 years old and have had multiple sclerosis for 23 years. A cut in my pension plan would put a hardship on my wife and me. The pension plan was part of my wages and it is not my fault that the money was mismanaged. Thank you for your assistance in this matter.

Sincerely,

Henry B. Jefferson III

LETTER SUBMITTED BY BILL R. REED

May 3, 2018

U.S. Senate
U.S. House of Representatives
Joint Select Committee on Solvency of Multiemployer Pension Plans
219 Dirksen Senate Office Building
Washington, DC 20510

Honorable Committee Members:

I am writing you to ask for your support in saving the Central States Pension Fund from insolvency.

I worked for 47 years as a truck driver in St. Louis and was a member of Teamsters Local 600. When it was time for my pension my wife and I decided to take the option of spousal survival and set aside a portion of my pension for her if she survives me.

Now I understand that unless the pension plan receives funding from the government, it will be insolvent in 2025 and there will be no more pension payout from Central States for either the retiree or the surviving spouse. The impact upon my wife and me will be severe. Without the pension income we will have to sell our house because we will no longer be able to set aside money for real estate taxes and home owners insurance. We have worked hard to improve our house and surroundings and will not be able to enjoy living in the house as we get older.

Please add your voice to help those of us who are retired after working hard for so many years and genuinely need our pension to lead our lives. This is our number one priority and we hope that the members of the Committee will support us.

Thank you for listening and for fighting for all our hard-earned pensions.

Sincerely,

Bill R. Reed

LETTER SUBMITTED BY THOMAS J. SPOTT

April 18, 2018

U.S. Congress
Joint Select Committee on Solvency of Multiemployer Pension Plans
Dirksen Senate Office Bldg.
Washington, DC 20510–6200

Comments for:

Mr. Thomas A. Barthold
Chief of Staff
Joint Committee on Taxation
Washington, DC

And

Mr. Ted Goldman, MAAA, FSA, EA
Senior Pension Fellow
American Academy of Actuaries
Washington, DC

Regarding the April 18, 2018 hearing of the Joint Select Committee on Solvency of Multiemployer Pension Plans on "The History and Structure of the Multiemployer Pension System"

Wages are paid now—called "salary" and paid later called "pension." If your employer funds a "noncontributory" "defined benefit plan" then your employer computes when you are going to retire and how long you are going to live. With that information they put away some money that is expected to grow over that time period and get paid to the retiree. NO MEDICARE OR SOCIAL SECURITY TAXES ARE PAID ON IT. Upon retirement that retiree gets a check. They pay income taxes on it but NO OTHER TAXES LIKE MEDICARE or SOCIAL SECURITY. They get the same Medicare coverage as everyone else and all they paid for it was the tax taken from their salary. Their Social Security check is a tad smaller than it would be if the pension funding were part of the computation.

If an employer has a "contributory" or commonly called "401(k)" plan, the rules are different. From the "salary" of their employee, the employer withholds MEDICARE and SOCIAL SECURITY TAX first. Then from what is left over, the employee can contribute to the 401(k). When this money is paid out to them in retirement they pay income taxes on it the same as the defined benefit plan retiree. They get the same Medicare coverage as the defined benefit retiree. But they paid more for it as a function of total "salary."

We are told Medicare is going broke. We are told that Social Security is going broke.

It wouldn't be if EVERYONE paid their fair share on the same rules. Literally trillions of dollars are put into defined benefit plans by employers and ALL of it escapes Social Security and Medicare Taxes.

Please stop this unfair lunacy. What you can do is start by taxing the retirees that are currently getting defined benefit payments—MEDICARE and SOCIAL SECURITY (tax the employer, too). And going forward have the employers pay tax on their contributions.

The IRS Publication 15 says defined benefit plan contributions are not subject to Medicare or Social Security Tax. Also you can call any pension specialist if you want a citation.

Let me know if you have any questions.

Yours truly

Thomas J. Spott

UAW
1757 N Street, NW
Washington, DC 20036
Telephone: (202) 828–8500

April 25, 2018

U.S. Congress
Joint Select Committee on Solvency of Multiemployer Pension Plans
Dirksen Senate Office Bldg.
Washington, DC 20510–6200

Statement of Josh Nassar, UAW Legislative Director

On behalf of the more than 1 million active and retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, I am writing to encourage the Joint Select Committee on Solvency of Multiemployer Pension Plans to include the provisions of the Butch Lewis Act (S. 2147/H.R. 4444) and to avoid making benefit cuts.

Butch Lewis rightfully honors our nation's commitment to millions of retirees, including thousands of UAW members and retirees, to help them receive their earned and promised benefits in the multi-employer pension system. It does so by enabling the Treasury to provide bond-backed loans for plans that are in critical and declining status. Thousands of UAW members in multi-employer plans are at risk of not receiving benefits through no fault of their own if Congress continues to fail to act to address our retirement security crisis.

Nearly two-thirds of retirees rely on Social Security for half or more of their retirement income, as nearly one third of workers have no savings at all. No senior citizen should have to choose between paying household expenses and affording their medicine. Sadly, millions upon millions are faced with these choices every day. Congress's response is long overdue, and this commission has an important opportunity to begin the process by ensuring that people in multiemployer pension plans continue to receive the benefits they have earned. We stand ready to work with you to ensure all Americans can live with dignity and economic security in their golden years.

Thank you for considering our views.

LETTER SUBMITTED BY JAMES WAGGONER

April 19, 2018

U.S. Congress
Joint Select Committee on Solvency of Multiemployer Pension Plans
Dirksen Senate Office Bldg.
Washington, DC 20510–6200

Members of this committee,

My name is James Waggoner, and I live in Lebanon, TN. I am a retiree from The Kroger Company, where I was employed for 31 years. I have been retired since January 2001, and I am 74 years old, married, and have 8 grandchildren. My wife is also retired. We are, by no means, wealthy. I would guess our earnings status could be put at lower middle class. To lose a portion of our pension would be a huge setback in our finances. I can only think of electronics as the only thing that has gone down in price since I have been retired. Grocery stores increased their costs because (it was reported) the price of oil increased the costs of transportation. However, when the cost of oil went down, the price of groceries stayed the same or even went higher in some instances. The automobile that I drive is 11 years old, and my wife's is 14 years old. We will be needing an automobile in the not too distant future but the price of a new car has gone completely out of question for our budget. We can only afford a used car, and even a late model is very questionable. This doesn't take into account that I still have a long-term mortgage.

It was my understanding that one of our (employee) benefits was our pension program and it was for life. This pension was a negotiated benefit for which we gave up other benefits such as hourly wages, vacation, holidays, etc. We paid a price back then in order to get this pension when we retired. We were only offered a 401(k) for approximately the last 3 years (1999) of my employment. Kroger furnished financial counselors for its employees when they offered this benefit, and I was counseled that the 401(k) would not be beneficial assuming the short time I would be employed. With my retirement, I felt that I could have used most all my wages for family needs, instead of a savings plan. In hindsight, I would have saved as much money as I could.

To add insult to injury, so to speak, we (retirees) were very limited to what employment we could do after retirement. Basically, I could not have any employment in the "craft" that I worked. Being employed for 31 years in a warehouse, I had no other experience that I could draw upon for supplemental income. It seemed insane that I could not use the only experience I had to get other jobs. I was told by the pension representative that I could not even take a warehouse supervisor's position because it was "in the craft."

I have referenced a portion of our "Pension Plan"[1] for your convenience to read. You can plainly see that the only "permissible employment" was primarily government jobs or be over 65 years of age. An office job was an option but I had no experience in that field. After working in a warehouse for 30 years, I was not physically able to do any work that I had experience in.

As you can see, if our pension is cut, I can't make up that difference by finding other employment. Who wants to hire a 74 year-old man with diabetes, hypertension, COPD and peripheral neuropathy with only warehouse experience? Being 74 years old, mine and my wife's health is only going to get worse. That means higher medical/prescription bills. My wife has already experienced the "donut hole" in her medicines. So, retirement is very nice but it is not exactly a financial windfall.

I ask that you, the Committee members, see the tragic situation we are in through no fault of our own. The pension crisis will affect millions more going forward. Personally, I think, the Brown act is a solution that would put Multiemployer Pensions on sound footing that would work for all its members. We worked very hard for what little we earned. We had no part in the failure of this retirement plan and I don't feel that we should have to pay a price to make it solvent.

The Federal Government appointed someone to be a "watchdog'" of the pension plan, to make sure the investments were handled correctly. The pension investors, from what I am informed, were careless at best with our pensions. Supposedly they made

[1] *Summary Plan Description Benefit Classes 15 and Higher, see* p. 19–21, *https://mycentralstatespension.org/-/media/Pension/PDFs/pl_pen_spd_15plus.pdf.*

investment decisions based on the highest commissions instead of the safest returns. Why was this allowed to happen?

In closing, I am hoping the members of this committee make this decision based solely on what is best for several millions of people. Please don't turn this into a partisan issue.

Respectfully,

James Waggoner

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