Statement of the U.S. Chamber of Commerce

ON: **Employer Perspectives on Multiemployer Pension Plans**

TO: **United States Senate & United States House of Representatives Joint Select Committee on Solvency of Multiemployer Pension Plans**

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The Chamber's mission is to advance human progress through an economic, The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

ALIYA WONG
ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

BEFORE THE UNITED STATES SENATE & UNITED STATES HOUSE OF REPRESENTATIVES JOINT SELECT COMMITTEE ON SOLVENCY OF MULTIEMPLOYER PENSION PLANS

TESTIMONY FOR THE HEARING ON:
EMPLOYER PERSPECTIVES ON MULTIEMPLOYER PENSION PLANS

WEDNESDAY, JUNE 13, 2018

The U.S. Chamber of Commerce would like to thank the Co-Chairs, Sens. Hatch and Brown and all members of the Joint Select Committee on Multiemployer Plans for the opportunity to participate in today's hearing on Employer Perspectives on Multiemployer Pension Plans. I am Aliya Wong, Executive Director of Retirement Policy for the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than ninety-six percent of the Chamber members are small businesses with fewer than 100 employees. With members that include sponsors of multiemployer pension plans, the U.S. Chamber has been concerned about the multiemployer system for several decades and worked with Congress on the Pension Protection Act of 2006, the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, and, most recently, the Multiemployer Pension Reform Act of 2014. Despite the intentions of these pieces of legislation, the multiemployer pension system remains in crisis, and indeed, the crisis is growing worse.

BACKGROUND

At the end of 2017, the Chamber issued a report entitled, *The Multiemployer Pension Plan Crisis: The History, Legislation, and What's Next?,* which provides an overview of the current multiemployer crisis, an in-depth analysis of the events leading up to it, attempts to fix it, and the current reform proposals to address the crisis.

Although many multiemployer plans were fully funded in the 1980s and 1990s, this period of financial stability came to an end in 2000 when the price of technology stocks fell drastically. Many multiemployer plans had ridden the wave of dot-com companies to achieve record high asset levels, but when the market crashed, investment returns fell precipitously. Multiemployer plans were hit twice as hard as other investors because of declines in the contribution base due to demographic issues. Less than a decade later, the 2008 global recession led to further dramatic declines in funding levels. For those plans that had not sufficiently recovered from the bursting of the dot-com bubble, the 2008 recession proved catastrophic. National and global events exacerbated the financial troubles of multiemployer plans that already faced significant demographic and financial pressures.

Shrinking industries and declining union participation further 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. And although the introduction of withdrawal liability was supposed to prevent withdrawing employers from shifting pension obligations to remaining employers, a major problem now is that many employers lack the financial means to satisfy that liability.

While it is important to understand the context leading to the current crisis, the Chamber does not believe that continuing to dwell on the causes of the crisis are helpful. Contributing employers are currently facing enormous burdens—and these burdens will only increase.

THE THREAT TO BUSINESSES AND JOBS

This week, the Chamber is issuing a report entitled, *The Multiemployer Pension Plan Crisis: Businesses and Jobs at Risk*. This report underscores the risk to contributing employers and the economy if a resolution to this crisis is not found.

Withdrawal Liability and High Contribution Rates are a Current Threat to Business.

There is understandable focus on plan insolvencies but even without plans reaching insolvency, there is cause for concern. There are several issues that employers are currently facing that are impacting their ability to remain viable. As multiemployer plan liabilities have expanded, employers are experiencing an ever-increasing threat of withdrawal liability and continual hikes in contribution rates.

Fear of Future Withdrawal Liability Assessment Jeopardizes Current Business Opportunities. Withdrawal liability is not "booked" until there is a termination (or partial termination) of the plan. However, as the depth of the multiemployer pension crisis is increasing, employers are finding that ordinary business activities are being impacted by the potential for withdrawal liability. Employers are starting to see banks and lenders question their creditworthiness, leading to less optimal lending rates, or even denial of credit. Employers have lost the opportunity to expand their business operations through mergers because other companies do not want to be associated with the potential withdrawal liability. Furthermore, small, family businesses are deciding not to pass the business down to heirs for fear of leaving them to pay a future withdrawal liability. Instead of continuing these family businesses, owners are shutting down the businesses and selling the assets—which is a preferable outcome to paying a withdrawal liability that could bankrupt the business. All of these events result in lost business opportunities and fewer jobs.

Employers are Already Impacted by Partial Withdrawal Liability Assessments. Due to the declining number of union workers, there are businesses that may have only one or two employees left in a business unit. If those employees decide to leave or retire, the employer is assessed with a partial withdrawal liability estimate. Because of the unfunded liabilities, the partial withdrawal liability can be several times the amount of the employee's actual benefit. Such liabilities clearly constrain the ability of an employer to efficiently run a business and immediately impact a business's cash flow.

High Contribution Rates Make it Difficult to Retain Employees and Remain Competitive. As unfunded liabilities have increased, the contributions made by remaining employers have increased. There are some employers paying $15.00 per hour (or more) to plans for every hour an employee works. Because of these unfunded liabilities, employees understand that they are never going to receive a benefit that is commensurate with the contribution rate the employer is paying. This provides a disincentive for the employee to stay with the employer, and this retention problem threatens an employer's competitiveness.

Plan Insolvency Will Devastate Contributing Employers.

Contributing employers face a very uncertain future. Whether insolvent plans officially terminate or not, the consequences for contributing employers can be dire.

Ongoing Contributions to Insolvent Plans is Not Viable for Business. In testimony before the Joint Select Committee, the Director of the PBGC stated that it was the opinion of the PBGC that plans would not terminate, but would instead continue indefinitely with employers making ongoing contributions. However, even if this scenario is plausible, there are still significant concerns for employers.

The contribution rates that many employers are currently paying into multiemployer plans are exorbitantly high because the contribution rates for the last several years have been imposed by the plan's trustees via rehabilitation plans. While most employers would rather absorb the higher contribution rates than incur withdrawal liability in the near-term, the long-term effect of the high rates is that they make the employer less competitive. For example, higher pension costs are ultimately passed on to customers, who might look elsewhere to do business. In addition, high contribution rates paid into an insolvent plan exacerbates the inability to retain employees. As discussed above, active employees already are concerned about future benefit accruals. Once a plan is insolvent, the maximum benefit the worker can receive is the PBGC guaranteed benefit so employees will receive even less compared to what is being paid on their behalf, so there is no incentive for the employee to stay with the employer.

Furthermore, while continuing to pay contributions into an insolvent plan may save an employer from short-term economic disaster, it is doubtful that employers can endure such high pension contribution rates over the long-term. It is likely that plan insolvency could lead to employers going out of business, filing for bankruptcy, or both.

Plan Termination Can Lead to Unplanned Withdrawal Liability Assessments. There is a very real concern for employers that plans will terminate. When that happens, employers will face withdrawal liability assessments, minimum funding requirements, and possible excise taxes.

While continuing to contribute to an insolvent plan will generally allow an employer to avoid the imposition of withdrawal liability, there are scenarios where withdrawal liability can be imposed despite the employer's intention to remain a contributing employer to the plan. The issue is problematic for employers because in many cases they have no control over the withdrawal.

One such instance could occur if an employer tries to negotiate lower contribution rates—to avoid bankruptcy or to shift cash to active employees. Attempting to negotiate lower contribution rates could lead to unplanned withdrawal liability assessments if either the plan trustees or the PBGC object to the decreased contribution rate. If the trustees reject the lower contribution rate, the employer must either continue contributing at the higher rehabilitation plan rate or risk the plan's trustees rejecting the employer's continued participation in the plan, which will lead to full withdrawal liability. As a secured party in all assets of an insolvent plan, the PBGC could take the position that a reduction in the contribution rate constitutes a diminution in the collateral in which it is secured. Additionally, PBGC has the authority under the insolvency provisions of ERISA to provide financial assistance under conditions the PBGC determines are "equitable and are appropriate to prevent unreasonable loss to" the [PBGC] with respect to the Plan."[1]While the PBGC has not yet opined on a post-insolvency employer contribution rate decrease, the statutory language gives the PBGC the authority to do so.

Even if an employer makes the decision to withdraw, it could see an unexpected spike in withdrawal liability if there is a mass withdrawal. A "mass withdrawal" occurs upon withdrawal of every employer from the plan, the cessation of the obligation of all employers to contribute to the plan,[2] or the withdrawal of substantially all employers pursuant to an agreement or arrangement to withdraw from the plan.[3] If substantially all employers withdraw during a period of three consecutive years, the employers are assumed to have withdrawn due to an agreement or arrangement.[4] This means that an employer that intentionally withdraws from a plan and intends to pay its calculated withdrawal liability could become part of a mass withdrawal if substantially all of the other employers that contribute to the plan withdraw within the three year period after the employer withdraws. The employer that intends to withdraw has no control over what the other employers do.

The danger of being part of a mass withdrawal is that it can require an employer to pay much more in withdrawal liability than it would under a standard withdrawal. Certain employers are subject to reallocation liability. Reallocation liability means that plan's full costs of all unfunded vested benefits are allocated among all withdrawing employers. In a mass withdrawal, the withdrawal liability is calculated using PBGC interest rates that are often lower than the rates used by the plan in a standard withdrawal. Reallocation liability can significantly increase the amount of the plan's unfunded liability that is allocated to an employer. In addition, the 20-year cap applicable in a standard withdrawal does not apply to mass withdrawal liability. This results in some employers having to pay withdrawal liability for a period longer than 20 years. This unexpected and expanded withdrawal liability could cause a business to end up in bankruptcy.

<u>Uncertainty Concerning Minimum Funding Considerations is a Significant Risk for Contributing Employers</u>. Multiemployer plans are generally subject to minimum funding standards; however, the Pension Protection Act of 2006 ("PPA") allowed necessary changes to these general funding rules for multiemployer plans in critical status.[5] Trustees of plans in

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[1] ERISA Section 4261(b)(1)
[2] ERISA Section 4041A(a)(1)(2)
[3] 29 C.F.R. § 4001.2.
[4] The presumption can be rebutted by the employer.
[5] A plan is in critical status if the plan: (1) is less than 65% funded and will either have a minimum funding deficiency in five years or be insolvent in 7 years; or (2) will have a funding deficiency in four years; or (3) will be insolvent within five years; or (4) liabilities for inactive participants is greater than the liability for active

critical status are required to adopt a rehabilitation plan that is expected to put the plan on track for making scheduled progress toward emerging from critical status. One of the advantages of a plan's critical status designation is that if the trustees adopt and comply with the terms of a rehabilitation plan, then the plan is not required to satisfy the minimum funding rules.

Thus far, plans that have become insolvent have not been terminated, and, because employers continue to contribute to the plan in accordance with the rehabilitation plan, the minimum funding rules do not appear to automatically apply just because a plan becomes insolvent. However, there are situations where it appears a contributing employer to an insolvent plan could be required to make up a plan's minimum funding deficiency and/or be assessed an excise tax. Although this has not happened yet, the risk of it happening increases as the insolvency date of the PBGC gets closer.

One scenario that poses a risk to employers as plans and the PBGC go insolvent is the requirement that a plan's rehabilitation plan must satisfy certain Code provisions. 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 to (1) the amount of the contributions necessary to leave critical status or make scheduled progress or (2) the plan's actual funding deficiency, if any.[6]

It is possible that the IRS could take a more aggressive approach in assessing excise taxes when the PBGC can no longer provide a backstop for insolvent plans. Such an outcome would be troubling because employers have no control over whether the rehabilitation plan satisfies the requirements of the Code, nor do they have any control over the actuarial certification. This means that an employer that continues to make contributions in accordance with its rehabilitation plan post-insolvency can still be required to make up a funding deficiency and pay an assessed excise tax. Because the funding deficiencies of most insolvent plans would be expected to be large, this would effectively put the employer out of business.

Another complication for employers is the broad authority the PBGC wields over an insolvent plan. As noted previously, the PBGC has the authority under the insolvency provisions of ERISA to provide financial assistance under conditions the PBGC determines are "equitable and are appropriate to prevent unreasonable loss to" the [PBGC] with respect to the plan. Accordingly, if the PBGC determines that the continued operation of the plan somehow poses a financial risk to itself, the PBGC may impose as a condition of providing financial assistance that the plan be terminated. While ERISA states that minimum funding does not apply to a plan that terminates by mass withdrawal, there is no such provision relating to termination by plan amendment. Though the PBGC has opined that insolvent plans will continue to operate, there does appear to be at least a statutory mechanism through which a plan can be terminated without consent of the employer or even the trustees. If such a scenario were to arise, many employers would be forced out of business.

participants, and contributions are less than the plan's normal cost, and there is an expected funding deficiency in five years.

[6] Plans may apply for a waiver if the failure is due to reasonable cause and not willful neglect.

The Contagion Effect is a Serious Threat Due to the Number of Employers that Contribute to Numerous Plans. Many employers contribute to more than one multiemployer plan. There is a valid concern that the failure of a multiemployer plan (particularly a large plan) could cause other plans to go insolvent. For example, if employers were assessed withdrawal liability, a minimum funding deficiency and/or an excise tax, it could cause the employer to go out of business. If such an employer contributes to one or more other plans, then it would likely be unable to continue contributing to the other plans. If the employer is the major contributing employer to these plans, all the plans to which the employer contributes would be in jeopardy. While to date no extremely large plan has gone insolvent, there are several that are projected to go insolvent within the next five to ten years.

Additionally, many Critical and Declining Status plans are dependent on a very small number of employers to provide a disproportionate share of the contributions being made to the plans. For example, in the UMW 1974 Pension Plan, currently there are 10 contributing employers with approximately 97% of the contributions derived from two controlled groups of signatory companies. For the New York State Teamsters Conference Pension and Retirement Fund, there are 156 contributing employers with approximately 83% of the contributions derived from two companies. For the Local 707 Teamster Pension Fund, there are 8 remaining contributing entities with 84% of the contributions coming from 2 companies. For the Tri-State Pension Plan, there are 9 contributing employers with one controlled group entity accounting for 95% of the contributions.

Taken together, these factors pose a dual risk. If a large, "systemically important," plan was to become insolvent, it has the potential to adversely impact the contributing employers and their participation in other plans. Conversely, if one of the large employers were to exit one of the above mentioned plans, it would significantly and negatively impact the plan, the remaining contributing employers, and ultimately the beneficiaries.

RESOLVING THE CRISIS

We admit that there are no easy solutions and that finding a comprehensive solution will be difficult. The Chamber worked with the National Coordinating Committee on Multiemployer Plans to issue joint principles to provide direction in reaching a solution. We have shared these principles with the Committee to aid in your work and reiterate them here.

- First, all members of the Committee must recognize that rescue legislation is urgently needed. Congress can no longer kick the can down the road.
- Second, struggling plans will need financial assistance. Our recommendation is for long-term, low-interest loans that will protect taxpayers from financial liability.
- Third, all parties will have to be part of the solution, including plan beneficiaries and participating employers.
- Fourth, while the PBGC may ultimately need more money, in the form of increased premiums paid by employers, these increases must be evaluated after tools to restore the solvency of these plans are put in place.
- Finally, composite plans must be authorized so that healthy multi-employer plans can stay that way. Composite plans are a hybrid between traditional pension plans

and individual accounts plans that can bridge the gap between current existing options.

We realize these principles are a start and we look forward to working the Committee and the Administration on finding specific and comprehensive solutions.

CONCLUSION

These are difficult issues. The answers will not be easy. However, the problem is not going away, and only grows worse with inaction. Put simply, something that cannot go on forever, will not. And if we do not find a comprehensive solution, there will be a devastating impact on the entire multiemployer system when the day of reckoning arrives.

The Chamber is here to represent the employer voice. At the same time, we are keenly aware that all parties are inextricably connected in this scenario. Within the multiemployer system, businesses are already being impacted by high contributions and potential withdrawal liability; active workers are seeing fewer and fewer benefit accruals; and some retirees are already experiencing reduced benefits. As the crisis grows, the impact will be felt beyond the multiemployer system through a significant drag on the economy, decreased tax revenues, and possible increased reliance on social programs. A definitive solution is needed to address a looming crisis that will affect us all.