Solutions not Bailouts

A Comprehensive Plan from Business and Labor to Safeguard Multiemployer Retirement Security, Protect Taxpayers and Spur Economic Growth

A Report on the Proceedings, Findings and Recommendations of the

RETIREMENT SECURITY REVIEW COMMISSION

OF THE

National Coordinating Committee for Multiemployer Plans

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DEDICATION

This report is dedicated to the memory of Mr. D. James (Jim) Walker, Jr., Chief Executive Officer, Great Lakes Fabricators & Erectors Association. Jim served for many years as a trustee to multiemployer plans in Michigan and participated in this process a Commission member. His passion and commitment exemplified the true nature of cooperation between labor and management in improving the lives of multiemployer plan participants now and in the future.

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EXECUTIVE SUMMARY

This report of the Retirement Security Review Commission (the “Commission”) represents the culmination of over a year of work by dozens of representatives from more than forty labor and employer organizations, plans and large employers from across the multiemployer universe that utilize multiemployer defined benefit pension plans as their primary form of retirement security. The genesis of the Commission was twofold: first, to provide Congress with input regarding the impending sunset of the multiemployer funding provisions of the Pension Protection Act of 2006 (PPA) scheduled for the end of 2014; and second, realization of a need for fundamental restructuring of some basic precepts of ERISA for multiemployer plans if such plans are to continue their mission for the foreseeable future. This realization was precipitated by the two recent cataclysmic investment events that exacerbated the cumulative effects of three decades of statutory and regulatory changes. These were further compounded by the addition of broader financial reporting requirements, tightening credit markets, and unprecedented competitive pressures on contributing employers. The end result is that in some industries the long-term viability of many plans and the retirement security of their participants have been jeopardized by discouraging new employers from participating and encouraging existing employers to withdraw.

In evaluating these factors the Commission identified and agreed upon two primary objectives of its work:

1. Any recommendations for change to the existing system must still provide regular and reliable lifetime retirement income to the participants.
2. In doing so, the proposals must be structured to reduce or eliminate the financial risks to the contributing employers.

In the following pages the process utilized and the resources employed by the Commission in defining and gaining a full appreciation for the magnitude of the issues facing plans and their sponsors in preserving retirement security are described in detail. While many of the individual members of the Commission brought vast multiemployer pension plan experience directly to the process, the group sought the opinions of experts from a variety of disciplines, including those within and beyond the scope of experts normally consulted when plan fiduciaries evaluate their plans. These included economists, public pension policy experts, investment firms, investment consultants, actuaries, and experts in alternative plan designs, operations and the statutory and regulatory environments that govern similarly structured plans in Europe and Canada. The goal was to provide a common frame of reference for Commission members to discuss the issues confronting the future of multiemployer defined

benefit pension plans in the 21st century. In addition to seeking their opinions on the current system and recommendations for changes, the process involved asking many of these experts the same questions to obtain independent external validation of opinions expressed and recommendations offered across disciplines in areas such as whether current long-term assumed rates of return remain appropriate.

Objective and creative discussions among Commission members were welcomed. Pre-conceived conclusions were actively discouraged. The group was asked to try to discard the usual nomenclature of "defined benefit" or "defined contribution" of the current statutory and regulatory structures and instead focus on meeting the two objectives set forth above. In doing so the Commission agreed to use the collective experience of the past sixty years to develop additional tools for the bargaining parties (settlors) and plan trustees (fiduciaries) to better respond to the challenges they face now and can anticipate in the future. Their deliberations were extensive; with the group convening at first for full-day meetings monthly, but when it became obvious that more time was required, the schedule was increased to two full days per month plus small group conference calls between Commission meetings. Their charge included consideration of both changes to the rules set out in the PPA and, where necessary, recommendations regarding modifications to prior law.

The Commission considered bold new suggestions. It carefully evaluated the current fiscal realities facing contributing employers and the government. It acknowledged the very clear message sent by Congressional leaders that, unlike many other elements of the financial services sector that received financial relief (many of whom bear direct responsibility for the crisis), there will be no "bailouts" forthcoming for the private pension system.[1] The group also considered the uncertainty presented by the current structure of the Pension Benefit Guaranty Corporation ("PBGC" or "Corporation") as one that is not backed by the full faith and credit of the U.S. government.[2] The Commission was very aware of the financial challenges facing the Corporation's multiemployer guaranty fund and the potentially ruinous affects that failure of any of the nation's largest pension funds would have for the multiemployer guaranty fund's long-term viability.[3] In evaluating the extent to which the system would have to be self-correcting in the future, the Commission discussed the very real possibility that, in light of these considerations, the current guarantees may be more illusory than real. Discussions ensued among the group as to whether alternatives to the current PBGC guaranty system would be more pragmatic.

The Commission discussed the special problems of those certain large plans whose fates were directly and adversely affected by public policy decisions enacted by Congress in the 1980s and 90s. These decisions had unintended but deleterious consequences for those sponsoring industries.[4] The Commission also discussed the need for additional tools for those plans to address their situations, especially in light of the magnitude of the impact such plans would have on the public perception of the overall health of the multiemployer defined benefit system. For these and for the small but significant minority of other plans that, despite the adoption of all reason-

1 House of Representatives Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions hearing "Examining the Challenges Facing PBGC and Defined Benefit Pension Plans," February 2, 2012.

2 ERISA requires that PBGC programs be self-financing. *"The United States is not liable for any obligation or liability incurred by the corporation."* (See ERISA § 4002 (g) (2))

3 PBGC estimates that, as of September 30, 2012, it is reasonably possible that multiemployer plans may require future financial assistance in the amount of $27 billion. The comparable estimates of the multiemployer program's reasonably possible exposure for FY 2011, 2010 and 2009 were $23 billion, $20 billion and $326 million, respectively. The significant increase from prior years is primarily due to the addition of two large plans to the reasonably possible inventory. The sponsor of one plan, now with net liability of $20 billion, is in the *"transportation, communication, and utilities"* industry category; the other, now with net liability of $6 billion, is in the *"agriculture, mining, and construction"* industry category. Pension Benefit Guaranty Corporation FY 2012 Annual Report, P 35. In its 2010 Annual Exposure Report, the agency was even more explicit concerning the impact the failure of these two large plans could have on the long-term viability of the multiemployer program, noting that their *"projections show a 6.2 percent chance that the multiemployer program will be insolvent by 2020 and a 29.2 percent chance that it will be insolvent by 2030."* Pension Benefit Guaranty Corporation FY 2010 Annual Exposure Draft pp. 1.

4 Note especially the *Motor Carrier Regulatory Reform and Modernization Act of 1980* which deregulated the trucking industry and the *Clean Air Act* which decimated the core of the unionized bituminous coal mining industry.

able measures of available corrective actions by plan settlors and fiduciaries, are still projected to become insolvent, the Commission discussed alternatives to the current rules that would enable such plans to take more timely actions to avoid insolvency. Where such actions would be effective, they would preserve greater benefits in the long run for all participants and ensure the continuation of many of these plans for current and future generations of workers.

The Commission also discussed plan design alternatives proposed or currently in use here or in other countries that either reduce or eliminate ongoing financial responsibility to employers beyond making their contractually required contributions. Considerable debate ensued regarding the need for such design alternatives in certain industries as a means of stemming attrition out of plans by existing contributing employers and facilitating new entries. Some strongly advocated for a legislated mandatory transition away from traditional defined benefit plans to one or more of the new design alternatives. Others expressed concern that the mere existence of such an alternative could result in the displacement of the defined benefit system as it currently exists. In the end, however, the Commission reaffirmed its initial intent to provide additional tools to plan settlors and fiduciaries that can be voluntarily adopted to meet the specific circumstances of those industries and plans to ensure long-term retirement security.

The results of the Commission's deliberations are set forth in detail in the pages that follow, but the three primary areas of recommended action can be summarized as follows:

1. **PRESERVATION: PROPOSALS TO STRENGTHEN THE CURRENT SYSTEM** The Commission has developed a series of recommendations that are intended to enhance the current multiemployer defined benefit system. Some of these proposals represent technical refinements to PPA, while others address shortcomings of the system outside of PPA. These recommendations are designed to provide additional security for (a) the majority of plans that have successfully weathered the recent economic crises; (b) those that are on the path to recovery as measured against the objectives set forth in their Funding Improvement and/or Rehabilitation plans; and (c) those that, with expanded access to tools provided in the PPA and subsequent relief legislation, will be able to achieve their statutorily mandated funding goals.

2. **REMEDIATION: MEASURES TO ASSIST DEEPLY TROUBLED PLANS** Under current law, a relatively small but significant minority of deeply troubled plans are projected to become insolvent.[5] These plans are unable to act in a meaningful way to prevent the dissipation of all of their remaining assets until insolvency requires that they reduce the benefits of all participants to the modest guaranty levels provided by the PBGC, resulting in the inevitable termination of the plan for all future accruals.[6] For the limited number of plans that, despite the adoption of all reasonable measures available to the plans' settlors and fiduciaries, are projected to become insolvent within certain prescribed time frames, the Commission recommends that limited authority be granted to plan trustees to take early corrective actions, including the partial suspension of accrued benefits for active and inactive vested participants, and the partial suspension of benefits in pay status for retirees.[7] Such suspensions would be limited to the extent necessary to prevent insolvency, but in no event could benefits go below 110% of the PBGC guaranteed amounts. To protect participants against potential abuse of these additional tools, the Commission further recommends the adoption of special protections for vulnerable populations including PBGC oversight and approval of any proposed actions, taking into consideration certain specified criteria.

3. **INNOVATION: NEW STRUCTURES TO FOSTER INNOVATIVE PLAN DESIGNS** To encourage innovative approaches that meet the evolving needs of certain plans and industries, the Commission recommends the enactment of statutory language

5 The number of plans estimated to fall in this category is between 5% and 10% of all plans.

6 Currently, the maximum annual benefit payable to participant who retires at normal retirement age (65) with 30 years of service is $12,870.

7 Certain deeply troubled plans, including one of the two plans referenced in footnote 3 above, have problems of such severity that the proposed partial suspension of benefits would be insufficient to address their problems. Consequently, this proposal is not applicable to such plans. Furthermore, such plans in certain industries both require and are more amenable to solutions that take into account both their problems and available industry specific sources of funding.

and/or promulgation of regulations that will facilitate the creation of new plan designs that will provide secure lifetime retirement income for participants, while significantly reducing or eliminating the financial exposure to contributing employers. This would be accomplished through encouraging the development of new flexible plan designs including, but not limited to, variable annuity and "Target Benefit" plans. Such plan designs may or may not meet the current definitions as either defined benefit or defined contribution plans. While, by definition, such models would permit adjustment of accrued benefits, in order to protect plan participants from this risk, these models would impose greater funding discipline than is required under current defined benefit rules. The adoption of such new models by plan settlors would be entirely voluntary and subject to the collective bargaining process.

These proposals represent a consensus of the group, developed through months of review, evaluation and debate among the Commission members. As with any project involving large numbers of groups representing diverse interests, they do not necessarily represent unanimous agreement by every group on each issue any more than any completed collective bargaining agreement includes only the items everyone actively endorses. While unanimity is ideal, in a project of this scope the Commission recognized that the challenges facing plans require an array of additional tools not currently available to plans to address problems and accomplish the objectives set forth above. The following report provides specifics regarding these recommendations.

The following organizations participated in the development of these recommendations:

Associated General Contractors of America
The Association of Union Constructors (TAUC)
Association of the Wall and Ceiling Industry Employers
Bakery, Confectionery, Tobacco Workers and Grain Millers International Union
Bechtel Corporation
Bituminous Coal Operators Association
The Broadway League Inc.
Central States Funds
Cultural Institutions Retirement System
Eastern Contractors Association, Inc.
Finishing Contractor Association
Great Lakes Fabricators & Erectors Association
International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers
International Association of Heat and Frost Insulators and Allied Workers
International Association of Machinists and Aerospace Workers
International Brotherhood of Electrical Workers
International Brotherhood of Teamsters
International Council of Employers of Bricklayers and Allied Craftworkers
International Union of Bricklayers and Allied Craftworkers
International Union of Bricklayers and Allied Craftworkers Local 3, New York
International Union of Operating Engineers
International Union of Painters and Allied Trades
Laborers International Union of North America
Mason Contractors Association of St. Louis
Mechanical Contractors Association of America
National Electrical Contractors Association
Operative Plasterers' and Cement Masons' International Association
Retail Food Industry
Service Employees International Union
Sheet Metal and Air Conditioning Contractors' National Association, Inc.
Sheet Metal Workers' International Association
Trebour Consulting Services
United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of U.S. & Canada
United Brotherhood of Carpenters
United Food and Commercial Workers International Union
United Mine Workers of America
United Parcel Service
United Union of Roofers, Waterproofers and Allied Workers
Western Conference of Teamsters Pension Trust

BACKGROUND

Retirement security is a defining social issue of the 21st century. With two notable exceptions, the traditional system of employer sponsored defined benefit plans that proliferated during the post-war period in the 1940s and 50s and helped define retirement security for tens of millions of America's middle class since then has been abandoned by much of corporate America in favor of a defined contribution approach to retirement savings. Those exceptions exist in public sector employment (which is under severe attack) and in industries characterized by mobile work patterns in which multiemployer plans have provided industry-based (rather than company specific) employee benefit plans. The deliberations and recommendations of the Commission that are contained in this report are limited to the latter.

The multiemployer system has served employers and workers alike, by providing incentives for trained employees to remain with employers who contribute to common trusts which allow employees to accrue benefits as they move among contributing employers throughout their active employment and into retirement. This model has enabled tens of thousands of small employers to provide the kind of retirement income security to their employees that otherwise could only be provided by much larger, more heavily capitalized and sophisticated firms.

The shift away from defined benefit plans is recognized as a major contributing factor to retirement income insecurity in the United States.[8] It has been demonstrated that defined benefit plans are a much more efficient way to achieve a desired income replacement than defined contribution plans, with estimated savings of up to 46% over the cost of providing similar retirement income through defined contribution models due largely to the pooling of longevity risk and superior investment returns achieved by the economies of scale present in the defined benefit model.[9] The usual argument that defined contribution plans are more attractive to employees because they are portable is much less persuasive in the multiemployer context where portability is a fundamental feature of defined benefit plans as well as the largely supplemental defined contribution plans.

Multiemployer plans are a product of the collective bargaining process. Their past success and future survival are conditioned on the ability of the parties to reach agreement on a compensation package that

8 The absence of any defined benefit accruals is cited as a factor in workers being "at risk" of failing to have sufficient income to meet basic economic needs in the EBRI/ERF Retirement Security Model (VanDerhei—August 2011). The study showed that overall, the presence of a defined benefit accrual reduced the probability that a household would be "at risk" from 45% to 34% across all income groups, but added that the greatest differential appeared in the lowest income group which saw their probability of being at risk fall from 85% to 45% when a defined benefit was present.

9 See "*A Better Bang for the Buck*", Beth Almeida and William Fornia, National Institute on Retirement Security, August 2008, page 1.

meets the wage and benefit requirements of workers while enabling their employers to remain profitable. In fact, it would be reasonable to say that in industries that rely on multiemployer plans for retirement security, the success of the defined benefit system in providing a modest but dignified retirement for generations of working Americans, and their companion health and welfare and training trust funds, represents one of the greatest achievements of the collective bargaining process during that time.

In their infancy, negotiated benefit plans, including both pension and health and welfare plans, represented a minor commitment from the overall compensation package (hence the term "fringe benefits"). These programs provided collective economic security, which is the fundamental concept behind insurance, at a modest cost. As the tax treatment of these plans was clarified, it became clear that contributions were both deductible and not subject to payroll taxes, demonstrating a societal endorsement of the expansion of a private system of employment based retirement income security and providing at least an implicit incentive for employers to agree to increasing portions of the wage package to be allocated to the benefit package.

For more than half a century, these plans successfully met the objective of providing collective economic security for covered participants. Although the scope of benefits expanded considerably over the years, as did the costs, a growing economy, robust investment markets and cautious management allowed plans to thrive, despite a plethora of new laws and regulations. While the issues associated with multiemployer health benefit plans are not addressed in this report, because the cost of health benefits coverage is an important consideration in determining the adequacy of retirement income security, it is important to note that the number of active and retired workers and their family members who receive their health benefits from these plans currently exceeds 20 million, creating an inseparable nexus between these benefit programs.

Over the latter half of the 20th century, the fortunes of multiemployer plans and their participants mirrored the economic conditions of the industries they served. The introduction of automation in labor intensive industries in the late 1950s and 60s resulted in modifications in eligibility rules to align plan liabilities with available resources consistent with the prevailing "pay as you go" system. While this system worked well for plan sponsors given the economic realities of the times, insufficient participant protections highlighted by the closure of the Studebaker auto plant in 1963, left a trail of broken promises, resulting in the impetus for passing pension reform legislation.

That reform became a reality with the passage of the *Employee Retirement Income Security Act* (ERISA) in 1974. Plans were redesigned to protect the interests of participants through the adoption of minimum vesting and pre-funding requirements, and the Pension Benefit Guaranty Corporation was created to provide a backstop to plans whose employers or industries became unable to support the promised benefits.[10] The rules governing benefit provisions continued to evolve. While plans initially had broad discretion to modify provisions that, after adoption, were found to be unaffordable, over time federal regulations were gradually tightened, imposing increasingly stringent anti-cutback requirements and making it more difficult for plans to respond to changing economic conditions. As the plans matured, the law's pre-funding requirements, combined with strong employment and robust investment markets, created rapidly expanding pools of assets that gradually replaced contributions as the primary source of pension fund income. Consistently rising investment returns resulted in assumed rates of return being gradually increased from their initial levels of approximately 5% to the current rates that range from 7% to 8%, allowing benefits for active employees and existing pensioners to be increased without requiring corresponding increases in contributions, but making adjustments to funding shortfalls increasingly difficult to address through changes in contributions alone.

With the passage of ERISA, multiemployer plans also experienced special problems. Some in the employer community challenged (unsuccessfully) the interpretation that multiemployer plans were in fact defined benefit plans, believing that the collective bargaining agreements they had signed committed them only to the agreed upon contribution rates, making them more akin to defined contribution plans. In addition, some of the more opportunistic contributing employers realized that as a result of the new vesting and pre-funding requirements, they could gain a double competitive

10 Note that the multiemployer guaranty fund was not implemented until the subsequent passage of the *Multiemployer Pension Plan Amendments Act of 1980* (MPPAA) out of concern of the likelihood of the failure of certain large funds.

advantage by walking away from the plans to which they had previously contributed, leaving their competitors to fund the past service liabilities attributable to their employees and eliminating the contributions required to fund the plans' normal cost for current and future service. These abuses were curtailed with the passage of the *Multiemployer Pension Plan Amendments Act of 1980* (MPPAA), which activated PBGC's multiemployer guaranty fund and created the concept of withdrawal liability under which employers who left plans with unfunded vested benefits were to be assessed an exit fee theoretically based on their proportionate share of the underfunding. However, these developments brought with them a new set of problems, not the least of which included a growing resistance by new employers to participate in multiemployer plans.

Throughout the 1980s and 90s, carefully managed benefit levels and conservative investment policies permitted concerns over unfunded vested liabilities to be replaced with more immediate concerns over the deductibility of contractually required contributions as plans reached their full funding limitations. These requirements were controlled by conflicting government policies that were originally designed to prevent professional services firms from sheltering income, to be misguidedly applied to plans serving average workers. Such policies not only prevented plans from accumulating reserves to protect against periods of adverse market performance, but resulted in the adoption of plan amendments that increased liabilities.

When the multiemployer guaranty program became effective in 1980, the PBGC reported that it covered approximately 8 million participants in 2,244 plans.[11] Today, multiemployer defined benefit plans are the primary source of retirement income for approximately 10.37 million active, inactive and retired workers and their survivors in 1,459 plans in virtually all segments of the economy.[12] With only 63 plans having ever received financial assistance from the PBGC, the contraction in the number of plans within the multiemployer universe is almost entirely attributable to mergers. With the adoption of the PPA funding rules, however, merger activity has scaled back considerably. This trend is detrimental to the future of many plans, especially smaller plans dealing with fixed professional services and administrative compliance costs that are similar to those incurred by larger plans. These small plans could benefit greatly from the economies of scale offered by larger plans.

Historically, multiemployer defined benefit pension plans have been well funded.[13] In fact they were so well funded it is estimated that approximately 75% of all multiemployer plans had to raise benefits in the 1980s and 90s in order to avoid the consequences of the maximum deductible limitations on contractually mandated contributions. Today they collectively represent approximately $450 billion in assets, providing one of the largest sources of investment capital in the economy.[14] While they were initially primarily dependent on contribution income, over time they grew increasingly dependent on investment income as their primary source of funding. This maturing process was accompanied by predictably shifting demographics including growing proportions of inactive and retired participants. This is not an anomaly, but a design feature of any mature defined benefit plan.

By the beginning of the 21st century, the inevitable reversal of fortunes occurred with the first of two "once in a lifetime" market contractions as the tech "bubble" burst and the economy experienced three consecutive years of negative investment performance for the first time since before the beginning of World War II. For the first time in decades, plans were forced to focus on meeting ERISA's minimum funding requirements rather than the maximum deductible contribution limitations and with them, the additional contribution requirements and excise tax exposure that accompanied plans that experienced funding deficiencies.

11 See *PBGC Pension Insurance Data Book*, 2010, Tables M5-6.

12 Pension Benefit Guaranty Corporation *FY 2011 Annual Report*, Page 29

13 The historical funded position of multiemployer plans has been challenged in the past by those who do not understand collective bargaining agreements or the maximum deductible contribution provisions of IRC §404(a)(1)(D) (see *ERISA: The Law and the Code* 2000 Edition, Edited by Michael G. Kushner and Karen Hsu, The Bureau of National Affairs, Inc., 2000, p. 3–134. For a more thorough discussion of this issue see "*Multiemployer Pension Plans: Main Street's Invisible Victims of the Great Recession of 2008*," Randy DeFrehn and Joshua Shapiro, The National Coordinating Committee for Multiemployer Plans, April, 2010, p.6.)

14 Testifying before the Joint Economic Committee of Congress on July 10, 2008, Sherrill Neff, a partner in Quaker Bio Ventures commented on the significant role defined benefit plans play in providing a source of patient capital to the private venture capital markets, noting: *"The US venture capital industry would not be the economic engine it is today without the strong investment participation from defined benefit plans."*

Relief measures enacted in the *Pension Funding Equity Act of 2004* designed to provide extended amortization of losses suffered during this period were inadequate for multiemployer plans, setting the stage for the major legislative initiative that culminated in the passage of the *Pension Protection Act* (PPA) of 2006. While the PPA would impose new, more stringent funding requirements for plans that faced significant funding challenges, it successfully protected the employers that sponsor the most seriously challenged plans from potentially crippling additional contribution and excise tax requirements. Faced with a new funding regime, the bargaining parties took corrective action in anticipation of the implementation of the PPA in 2008. These actions included increasing contribution rates and reducing accruals, at times stretching the limits of competitiveness. While these actions were very helpful in restoring the average funded position of plans to their earlier levels, they could not have anticipated the even more destructive markets that coincided with the effective date of the PPA in 2008.

THE IMPACT OF THE GREAT RECESSION AND THE PENSION PROTECTION ACT

The preeminence of multiemployer defined benefit pension plans to workers' long-term retirement income security throughout recent decades is indisputable. This conclusion is supported by the literature and was confirmed by the experts who appeared before the Commission. Like every other aspect of the financial services industry, however, pension plans suffered significant losses in the two catastrophic market upheavals of the last decade. The greater of the two, often described as the "Great Recession" of 2008, resulted in a median net investment loss among multiemployer pension plans of 22.1% in 2008. It also resulted in a decline in the median funded position on an actuarial value of assets basis, which allows gains and losses to be recognized over time (as required for government reporting), from 90% to 77%. In jargon coined pursuant to the *Pension Protection Act* of 2006, the average funded status of all multiemployer plans moved from 76% of plans being financially healthy, (in the "Green Zone") at the beginning of 2008, to just 20% of plans in the "Green Zone" at the beginning of 2009. By comparison, on a market value of assets basis the decline was much starker, dropping from 89% to approximately 65% in one year.[15]

Already stretched by actions taken in anticipation of the PPA, plan settlors and fiduciaries nevertheless, responded swiftly and aggressively, increasing contributions and reducing future accruals even further and, for more troubled plans, reducing adjustable benefits by rolling back subsidized early retirement and survivors' benefits.[16] While plans have shown steady progress back to health since then, a lagging

15 See *"Multiemployer Pension Plans: Main Street's Invisible Victims of the Great Recession of 2008"*, by Randy DeFrehn and Josh Shapiro, National Coordinating Committee for Multiemployer Plans, April 2010, pp. 17—18. Zone status is shorthand for a plan's relative funded status under the rules set forth in the Pension Protection Act of 2006 which variously describes plans facing funding challenges as "Endangered", "Seriously Endangered" or "Critical Status". Within the community, plans that are "Endangered" or "Seriously Endangered" (plans that are below 80% funded and/or face a funding deficiency within six years) are known as "Yellow Zone" plans. Similarly, "Red Zone" plans that are below 65% funded and face a funding deficiency within the next 4 to 7 years, or which would be unable to pay benefits within 5—7 years, or whose liabilities for inactive participants exceed those of active participants and whose expected contributions are insufficient to pay the plan's Normal Cost plus interest on the plans' accrued liability.

16 The *Pension Protection Act of 2006* permitted the reduction of certain benefits that were previously subject to anti-cutback regulations for plans that were determined to be in critical status.

economy has suppressed employment in many of these industries and with it, hours of contributions to their plans. By 2012, the number of plans that had returned to the health as measured by attaining "Green Zone" status had improved to 62% of all plans.[17]

For plans that have successfully weathered these financial hardships, strategic modification of the existing tools may be sufficient to continue to meet their obligations and continue to provide the current "gold-standard" defined benefit pension plans. For others, however, the changing environments in which they exist clearly indicate the need for rules that are more resilient in responding to rapid market volatility, to changing demographics, to a more dynamic appraisal of their investment risk parameters and to a recognition of the difficulties faced by such plans to meet changing funding requirements from contribution income alone.

The multiemployer funding rules contained in the Pension Protection Act of 2006 are scheduled to sunset at the end of 2014. Congress and, in particular, the committees of jurisdiction over pension policy, have begun their work to assess the effectiveness of the PPA and determine what changes are indicated based on the experience of plan sponsors and the agencies charged with its implementation. In anticipation, Congress mandated a review of the impact on employers of the PPA to be completed by the Departments of Labor, Treasury and the Pension Benefit Guaranty Corporation. Additionally, the House Committee on Education and the Workforce has directed the General Accountability Office (GAO) to conduct two separate studies on the subject of multiemployer plans.

As part of this work, Congressional and GAO staff reached out to the NCCMP as the chief advocates for multiemployer plans, for its input in formulating statutory changes that may be indicated in the reauthorization of the PPA. Taking into account the collective experience of plans in recent years in response to both the PPA and to the obstacles faced by plans in responding to the changing economic and workforce conditions, it became clear that simply adjusting the new PPA rules would be insufficient to address the other challenges to plans posed in recent years. It also became clear that this process may present an opportunity to address some of the other fundamental structural concerns that have presented impediments to the entry of new employers to the system, as well as those that contribute to the desire of existing employers to exit the system.

In order to address these growing concerns, the NCCMP called for the creation of a multiemployer "Retirement Security Review Commission" ("Commission") in the summer of 2011.

17 See "*Segal Survey—Survey of Calendar Year Plans*" 2012 Zone Status", Spring 2012, Copyright 2012, The Segal Group, Inc.

THE RETIREMENT SECURITY REVIEW COMMISSION

METHODOLOGY

The Retirement Security Review Commission was developed with the intent of soliciting input from the broadest possible representation of multiemployer plan sponsors across the economy. Invitations were sent to more than forty labor unions and employer associations, large employers, plan representatives and other individuals whose particular expertise was sought to broaden the group's perspective.

The initial meeting was held in August 2011 to define the problems facing plans, determine the objectives of the Commission and review the proposed agenda. Among the main comments offered were:

- The two main focuses of the group should be 1) to provide regular and reliable income in retirement for participants and 2) to reduce the financial risk to all stakeholders—employers, union, and participants.
- "Employers should not have to subject their business to risks over which they have no control"
- There was some disagreement among the group regarding whether traditional defined benefit plans are stable for the long term.
- Polls say retirement security is the #1 issue that participants are concerned about—before both health care costs and job security.
- PPA overly restricts Trustees' options to correct funding problems.
- More flexibility is needed under PPA for plans that are doing well, and more options for alternative plan designs are also needed for those that are not doing well.
- The group is interested in hearing more about developing new alternative plan designs.
- There is some concern that providing pension benefits is no longer a competitive advantage for employers because of the onerous funding requirements (i.e. competition from employers that do not contribute to multiemployer plans and can therefore underbid those that do).
- Pension regulations have not kept up with the maturing of plans. Regulations have assumed that Plans' workforces will keep growing, but that has not happened—many plans are currently upside down in terms of actives to inactives.
- There needs to be a focus on how to attract new employers, and slow down employer withdrawals from the current system. Employers do not want to be the "last man standing."

The group discussed the proposed methodology and schedule for the Commission's work and reviewed a proposed list of experts to invite to share their views with the Commission. They determined that the list should include public policy experts, economists, investment advisors, consultants and managers, actuaries, lawyers and foreign plan professionals. Some specific names were suggested for staff to pursue.

Over the next several meetings, the Commission heard from a variety of experts in these disciplines. Among the most significant observations were the following:

- **Jack VanDerhei, Ph.D., Research Director, Employee Benefit Research Institute** reviewed the findings of the most recent EBRI Retirement income adequacy survey. Dr. VanDerhei reported on the inverse correlation between defined benefit accruals at all income levels and the likelihood a household would be at risk for meeting even the basic needs, stating that even a small defined benefit accrual reduced the likelihood at all income levels. He also noted that effects of the trend towards frozen plans on retirement income adequacy would depend on what replaces the former defined benefit plan. He said that it would be unlikely that a defined contribution plan would provide as much in replacement income as the frozen defined benefit plan.

- **Monique Morrissey, Ph.D., Economist and Josh Bivens, Ph.D., Research and Policy Director of the Economic Policy Institute (EPI)** who reported on the need to preserve Social Security and expand defined benefit plans. They also commented on the Group Retirement Account (GRA) and on work done by the National Institute on Retirement Security and on the Retirement Universal, Secure and Adequate (Retirement USA) Initiative to develop hybrid multiemployer plans. They observed that multiemployer plans are currently a model for Retirement USA, as they are very long lasting, will outlive any individual employer, and benefits are both portable and simple. EPI is trying to expand multiemployer plans beyond the traditional industries and outside the current organized labor context. Dr. Morrisey commented that EPI does not believe the government should be required to subsidize individuals' investment choices, nor their longevity risk, but that they believe these risks can and should be pooled. They commented on the GRA as a model that is designed to illustrate the problems with the traditional IRA.

  In response to a question from the group regarding where EPI sees long-term interest rates going over the next 40 years, Dr. Morrissey commented that rates of return in the range of 7.5%–8.0% are attainable, but said that she believes the current inflation expectations may be overstated. Dr. Bivens stated that he believes the real determinant will be the extent of Asian investment in the U.S. He also noted that he believes that the U.S. could be in store for a decade of low-growth, Japanese style economic stagnation.

- **Diane Oakley, Executive Director, National Institute on Retirement Security** commented on the impact defined benefit plans have on the nation's elderly, saying that approximately 5 million people are kept out of poverty because of these plans and noted that without private pensions and Social Security, the amount of public expenditures would have to double for care for the elderly. In response to a question from the Commission, regarding what new framework could be created that would help to sustain the system in the absence of outside help, Ms. Oakley responded that she thought some type of risk sharing with employees would be needed, similar to some international models that work well. She also stated that there is a need to begin paying down the legacy costs over a period of time and noted that this would go a long way to gaining political support.

  In response to a further question regarding what lessons might be transferrable from the public sector to multiemployer plans as the group attempts to review the appropriateness of a new framework, Ms. Oakley commented on the growing problem of "pension envy" by people who believe that if they are not covered by traditional pension plans, why should anyone? She stated that there needs to be a focus on how to provide more people with an adequate level of income in retirement. She reported that one new idea at the moment is to create a multiemployer plan on a state basis, rather than on an industry basis. She concluded by noting that it was important to emphasize why defined benefit pension plans are

more efficient, why are they important, and what these plans do for people in retirement. A final important message she conveyed is that pension benefits create 5 million jobs in the economy today, and generate significant dollars in tax revenue.

- **David Blitzstein, Special Assistant to the President for Multiemployer Plans, United Food and Commercial Workers** discussed a hybrid form of variable annuity defined benefit plans that his union had spent considerable time and resources developing along with consultants from Cheiron. He said this model was patterned after a design that had been around for a number of years, having been advanced by Donald Fuerst, an actuary with Mercer who likened this model to a variable annuity product that had been developed in the 1960s.

  Mr. Blitzstein noted that this model would be less vulnerable to capital market risks than under the typical current investment portfolio construct as they follow a more liability driven model. Under the new model, the guaranteed benefit would be determined pursuant to a floor benefit using a relatively low assumed rate of return (e.g. 5.0%), but that the benefit could be higher based on the plan's actual investment performance. At retirement, the participant would receive the greater of the floor or the variable amount. The design would further reduce investment risk by annuitizing pension benefits payable at retirement.

  Noting that this design has been discussed extensively with regulators, Mr. Blitzstein said they had been receptive to the proposal, but that some reservations remained because the variable nature of the benefit called into question whether the plan had definitely determinable benefits. He noted that they believe they have a solution to that concern by defining the benefit payable in terms of "shares."

  While no UFCW groups have adopted this model, their primary concern relates to the way the legacy costs would be addressed. He noted that several UFCW plans were recently merged with the major common employer financing these liabilities through a public debt offering for 5 years at 2.2% that was well received by the market. He noted, however, that the situation was somewhat unique, and that similar offerings with more participating employers may benefit from more creative approaches to funding legacy costs.

  Mr. Blitzstein's presentation led to a discussion among Commission members of methods of risk mitigation. The items discussed included questions of the feasibility of transferring retiree liabilities to the PBGC; commentary on dynamic asset allocation as a means of reducing equity exposure as plan funding improves; and a proposal that would extend the amortization period of costs associated with a reduction in a plan's investment risk profile.

- **Thomas Nyhan, Executive Director, Central States Funds—**At the request of other members of the Commission, Mr. Nyhan explained the recently adopted alternative withdrawal liability method referred to as the "two pool" method. Under this model, employers who had been contributing to the plan would be offered an opportunity to retire their current legacy liabilities in exchange for a commitment to join and remain with a new withdrawal liability pool that uses the direct attribution model over a specified number of years. Employers have found this approach to be appealing because the direct attribution method reduces their risk by making them liable primarily for their own unfunded liabilities. Protections have been included in the design to protect the fund in the event the employer subsequently withdraws from the fund before fulfilling the commitment period. Mr. Nyhan reported that other Teamster plans had also adopted this method and that employers were signing on.

- **Kevin Kneafsey, Managing Director, BlackRock** discussed his firm's perspectives on the investment outlook for multiemployer pension funds. He began by explaining that any return that an investor achieves above what is available on cash assets can be attributed to the investor taking on risk. While investors generally understand this concept, they often do not realize that their investments are subject to many different kinds of risk, and that each of these risks contributes to the overall return that the portfolio achieves. In a typical multiemployer pension portfolio, while the assets are likely to be diversified across a variety of asset classes, the dominant risk associated with these asset classes is the economic risk. This risk produces high returns when the economy is strong and low returns or losses when the economy is weak.

Mr. Kneafsey then discussed how multiemployer plans can use risk diversification as a way to achieve a targeted level of return while minimizing volatility. By deliberately constructing portfolios that hedge against economic risk while emphasizing other risks such as interest rate risk, liquidity risk, and political risk, plans can reduce the variability of their returns without sacrificing potential gains. Mr. Kneafsey commented that he believes that the 7.5% long-term return expectation used by many multiemployer pension funds is attainable, particularly if the trustees construct a portfolio that diversifies the investment risk across multiple sources.

- **James Moore, Managing Director, PIMCO** discussed PIMCO's perspectives on multiemployer asset allocation and the outlook for the future. His presentation focused on various economic trends and cycles that have occurred historically. He noted that over various time frames, while taking on additional volatility in the form of investment risk has generated excess returns, the relationship is not one-to-one with the marginal return per unit of risk generally decreasing as the risk increases. Mr. Moore also pointed out how looking at different periods of time can produce drastically different results. His presentation looked at the past 100 years as being composed of 6 epochs, each of which produced widely varying equity risk premiums.

  Mr. Moore also discussed the impact of demographic shifts on investment policy. As the population ages, there will be greater demand for asset classes that produce higher levels of cash flow with lower levels of volatility, which will affect the yields available in the bond market. Additionally, historically there has been a loose relationship between bond yields and equity returns. He also commented on the current financial crisis, which he does not believe has reached rock bottom yet. Looking forward, Mr. Moore stated that he expects pension fund asset returns of 3.5% to 5.0% over the next three years, and 5.5% to 7.0% over the next ten years. As the short-term returns are depressed by the continued effects of the financial crisis, long-term returns may increase, though long-term returns significantly above 7.0% are unlikely.

- **Jim Meketa, Managing Principal & CEO, Meketa Investment Group** began his presentation by addressing the question of whether or not a 7.5% rate of return is attainable for a multiemployer pension fund. Mr. Meketa stated that this return is attainable, and that he believes rates of return between 8.0% and 9.0% are realistic with a 20 to 30 year time frame. He said the key to attaining these returns is to study 'the tide of history' and noted that he and his firm look for markets that are poised for growth. For example, with the aging of the baby boomers and growth of a global middle class, investors need to focus on industries that provide the goods and services that these groups consume.

  Mr. Meketa then discussed both the current financial crisis and the possibility of future catastrophic events. He placed the current crisis in the context of the past fifty years, which have been unusually stable from an economic and political perspective. The baby boomer generation is only shocked by the crisis because they became used to the atypical period in which they have lived. Regarding future crises, it is important for funds to consider the impacts that events such as a crash of the Chinese economy, a period of runaway inflation, or a global liquidity crisis would have on their portfolios, and to plan accordingly.

  Lastly, Mr. Meketa discussed the appropriateness of equity investments in pension fund asset portfolios. He suggested that if the current average allocation of approximately 60% equity securities were to change, it should result in an increase, rather than a reduction in equities. It is critical that these investments focus on industries that profit from expanding populations such as older Americans, new global entrants into the middle class, and recent immigrants into America. Additionally, investors must realize that while the American economy is unlikely to grow dramatically in the coming years, many other countries are poised for growth from which investors can profit.

- **Eli Greenblum, Senior Vice President, and Stewart Lawrence, Senior Vice President, Segal—**Their presentation began with Mr. Greenblum reviewing the findings of both the annual Segal Zone Survey and a paper he recently co-authored that discussed the reaction of multiemployer plans to the 2008 financial crisis.

He observed that over 60% of plans are now in the Green Zone, and the Red Zone population is down to approximately 25% of plans. Of the plans in the Red Zone, roughly 25% face likely insolvency. Among Red Zone plans the average funded percentage is comparable for plans that are expected to recover and plans that are not expected to recover, which highlights the limitation of this measurement. Mr. Greenblum also discussed the fact that absent significant legislative changes, the PBGC is unlikely to be able to pay the benefits it guarantees for the plans headed to insolvency.

Mr. Lawrence discussed trends in plan design, noting that in 2011 only 30% of newly hired employees at private sector companies were covered by a single-employer defined benefit plan. Since the investment returns in defined contribution plans have traditionally lagged defined benefit plans by 100 basis points, this trend has significant retirement income adequacy implications. In addition, since defined contribution plans do not smooth out short-term fluctuations in asset returns, the benefit that a participant in these plans receives at retirement is highly dependent on the particular year of retirement. Mr. Lawrence also discussed various plan design features and how they relate to the risks facing multiemployer pension plan participants and sponsors.

- **Gene Kalwarski, CEO, Cheiron** presented the concept of the Variable Defined Benefit Plan which was discussed earlier in the context of Mr. Blitzstein's presentation. In this plan design, participants earn a benefit that varies based on the investment performance of the plan assets. To protect participants from a severe market downturn, there is a floor below which the benefits are not allowed to decrease. A portion of the investment gains that occur during strong markets is used to fund the cost of this floor benefit. The benefit levels do not float once a participant retires, as retiree benefits are locked in through either an annuity purchase or a dedicated bond portfolio that is owned by the plan. In order for this plan design to be stable across varying economic conditions, the plan assets are invested more conservatively than is currently common in multiemployer pension plans. Consistent with this approach, the floor benefit level would be determined using a 5% rate of return assumption.

- **Jacques-Andres Schneider, Professor - Université of Lausanne and Partner, LACHAT HARARI & Associès** discussed the private pension system in Switzerland. In this system employers are required to provide pension coverage to their employees, and these plans resemble cash balance plans in the US. The plans are integrated with the Swiss equivalent of Social Security, and the targeted combined income replacement level for both income sources is approximately 60%. However, unlike the typical cash balance plans in the U.S. the benefits are paid as annuities instead of as lump sums. The benefits are funded both by employer and employee contributions and the contributions (plus a minimum crediting interest rate) are protected by anti-cutback provisions.

- **Michael Mazzuca, Partner, Koskie Minsky** delivered a presentation on the Canadian multi-employer pension system. The voluntary nature and general structure of these plans is very similar to multiemployer plans in the U.S. While the rules vary by province, in most Canadian provinces multiemployer plans do not have the concept of withdrawal liability. In the event of a funding shortfall, the plan cannot compel the employers to fund the promised benefits. If the collective bargaining process does not produce enough contribution income to support the benefits, the trustees of the plan have the authority to adjust the benefit levels, even for retired participants, to a level that the plan assets can support.

- **Sibylle Reichert, Representative, Federation of Dutch Pension Funds** described the Dutch system of private pensions. In the Netherlands 85% of employees have access to collectively agreed-upon pension plans that are mandatory for employers. The plans are career average defined benefit plans and are indexed to inflation. The funding rules employ bond driven interest rates that are currently below 2%, and plans are required to target 105% of the liabilities determined on this basis. In the event that plans and sponsoring employers cannot achieve this funding target, the first response is to reduce or suspend the indexing of the benefits for inflation. Additional reductions may be considered if they are necessary to achieve the funding target.

- **Matti Leppälä, Secretary-General, European Federation for Retirement Provision** discussed the Finnish private pension system. The system consists of a single plan in which participation is mandatory for all companies. The plan is primarily funded on a pay-as-you-go basis, with employer contributions averaging approximately 15% of salary and employee contributions averaging approximately 5%. In general, funding challenges have been addressed through contribution increases rather than benefit reductions. However, recently the system adopted an adjustment to reflect increased longevity, which constituted the largest reduction in the history of the plan.

COMMISSION RECOMMENDATIONS

As discussed previously, the Commission's recommendations fall into three categories:

- **PRESERVATION:** Proposals to Strengthen the Current System
- **REMEDIATION:** Measures for Deeply Troubled Plans
- **INNOVATION:** New Structures to Foster Innovative Plan Designs

The following sections summarize the recommendations within each of these categories.

PRESERVATION: PROPOSALS TO STRENGTHEN THE CURRENT SYSTEM

As described earlier, the vast majority of multiemployer plans have suffered from the impact of external economic events including the upheaval in the investment markets, a continuing lagging economy, and punitive government policies that have artificially depressed interest rates in order to stimulate the economy at the expense of investors. Nevertheless, as demonstrated by the gradual but consistent restoration of their funded status, with 62% of all funds returning to the "Green Zone" by 2012, most plans will eventually emerge under the funding rules imposed by the Pension Protection Act. That being said, the plans' collective experience of four years under the PPA has revealed a number of modifications which, if enacted, will further advance the PPA's legislative objective of strengthening plans' funded positions and ensuring greater long-term retirement security for participants without unnecessarily jeopardizing their funding sources. The Commission's Proposals to Strengthen the Current System are intended to achieve these objectives for the majority of plans.

Technical Corrections and Enhancements to PPA and Prior Laws

In the course of its discussions, the Commission identified a number of small and technical changes to current law that address various shortcomings. Some of these changes target provisions of PPA that experience has shown to be counterproductive to the goal of enabling plans to improve their funding levels, while others focus on highly technical inconsistencies in the law.

The following list summarizes the Commission's recommended technical corrections and enhancements, and the Appendix to this report contains detailed descriptions of each of these recommendations. Note that the Appendix contains additional information only on these highly technical and narrowly focused provisions. All other aspects of the Commission's proposal are fully discussed in the body of this report.

1. Allow plans that are reasonably projected to enter critical status in any of the next five plans years to elect to enter critical status in the current year.

2. Resolve the critical status revolving door issue which applies differing standards for the treatment of amortization extensions to plans entering and exiting critical status causing plans that emerge to immediately reenter in the next testing cycle.
3. Provide that a yellow zone plan that has a Funding Improvement Plan that requires no action to emerge from endangered status is not considered to be endangered.
4. Amend the target yellow zone funded percentage so that it is determined based on the plan's funded percentage at the time of certification, removing the current uncertainty of having to base it on the percentage projected to the start of the funding improvement period.
5. Extend the critical status ("red zone") rules regarding benefit improvements, contribution decreases, and waiver of excise taxes on funding deficiencies to the endangered status ("yellow zone") plans.
6. Consistent with the narrowly constructed relief provisions of PRA and WRERA, provide that amortization extension and asset smoothing provisions automatically trigger whenever plans encounter a dramatic decline in the financial markets.
7. Amend the PPA to state that funding improvement and rehabilitation plans can specify what schedule takes effect in the event the bargaining parties fail to agree on a renewal schedule.
8. Amend the reorganization rules to specify that the red zone rules take priority over the reorganization rules in the event of a conflict.
9. Provide that any contribution increases attributable to compliance with a Funding Improvement or Rehabilitation Plan shall be disregarded for withdrawal liability allocation purposes.
10. Modify the PBGC multiemployer guaranty provisions to provide coverage for the survivors of non-retired participants who die after the plan becomes a ward of the PBGC.
11. Specify that ad-hoc 13th checks are not part of participants' accrued benefits, even if the trustees adopt them for several consecutive years.
12. Eliminate the potential excise tax exposure attributable to amortization extensions that the IRS granted under Section 412(e) prior to the passage of PPA.
13. Clarify Section 414(k) to facilitate its use by plans seeking to allow participants to convert defined contribution accounts into annuities payable from a defined benefit plan in a manner that is equitable for all participants and employers.

Other Commission Recommendations to Strengthen the System

The Commission also suggests that Congress explore other innovative ideas to provide funds with the tools necessary to continue their recovery from the financial crisis and encourage employers to fund the existing (often referred to as "legacy") liabilities to the greatest extent possible. For example, with respect to the question of legacy costs, the federal government could provide guarantees on bond offerings that companies use to raise capital for the purpose of reducing unfunded liabilities in multiemployer pension plans. Another possibility is that there could be a temporary enhancement to the tax benefit that companies receive for contributions to multiemployer plans over and above the minimum contribution requirements of ERISA and PPA. A third suggestion is that plans could have the option of voluntarily opting out of the PBGC guarantee in exchange for the receipt of the present value of that guarantee in the form of special Treasury bonds issued by the U.S. Treasury.

Mergers and Alliances

Legislation introduced in 2010 by Congressmen Pomeroy and Tiberi and Senator Bob Casey included provisions to encourage plans to join together to improve their financial health. This legislation included the new concept of an "Alliance", and also clarified the PBGC's authority related to facilitating plan mergers. The Commission believes that these concepts deserve further consideration in its reform proposal.

ALLIANCE— An alliance would allow a large plan to form a partnership with a smaller plan without taking on responsibility for the smaller plan's unfunded liability. The plans would share a common benefit structure and administration prospectively, which provides the opportunity to drastically reduce the operating costs for the smaller plan. However, in contrast to a merger under current law, the current unfunded liabilities of the plans would remain separate and distinct.

MERGERS— Although in the past the PBGC has actively facilitated plan mergers, more recently the PBGC has expressed the opinion that it lacks

the regulatory authority to do so. This provision makes it clear that the PBGC has the explicit authority, and it includes the ability to contribute assets from the multiemployer guaranty fund to the combined plan if it reasonably concludes that doing so will reduce its long-term financial exposure.

The Commission fully supports the reconsideration of these proposals.

Allow Plans to Harmonize Normal Retirement Age with Social Security

While the Social Security Normal Retirement Age (SSNRA) has gradually increased to age 67, pension plans remain unable to move their Normal Retirement Age past age 65. Such changes to Social Security were intended to respond to the additional costs resulting from increases in expected longevity and to introduce the concept of a "new normal" view of one's expected working life, yet private sector plans have been precluded from following the government's lead and reinforcing this notion despite the fact that Social Security has done so for decades.

Under this proposal, all plans would have the option of changing their Normal Retirement Age in a manner consistent with Social Security. Plans could apply this change to accrued benefits, with the exception of participants who are either in payment status or within 10 years of the plan's current Normal Retirement Age. Plans that do not currently have age 65 as their Normal Retirement Age would be able to adjust their provisions in a manner comparable to a plan that has a Normal Retirement Age of 65. For example, if a plan currently has an age 62 Normal Retirement Age, for a participant with an age 67 SSNRA, the plan could adjust this participant's Normal Retirement Age to 64.

REMEDIATION: ADDITIONAL TOOLS FOR DEEPLY TROUBLED PLANS

Overview

As discussed previously, while most plans have taken steps that will be sufficient to return them to financial stability, a number of plans (estimated at between five and ten percent)[18] including some of the largest and best known plans, are facing insolvency. The reasons why some plans will suffer this fate include factors specific to a given industry, local economic erosion, reduction in market share, overly optimistic income projections and conflicting government policies. While the specific causes may vary, unfortunately, the possible solutions fall within a much more narrow range.

In assessing the options available to such plans, the Commission weighed a number of factors including the status quo—and the likelihood that the current protections provided under the PBGC's multiemployer guaranty fund to ensure future payments even at today's modest levels, can be met. Commission members discussed the clear message from Congressional leaders that no "bailout" would be forthcoming to protect the private multiemployer pension system overall, despite having provided enormous financial relief to those in the financial services industry whose actions precipitated the depletion of the pension funds' assets. After extensive discussion, the Commission concluded that going forward settlors and fiduciaries must be granted broader voluntary authority to take timely corrective action to preserve the long-term viability of their plans for current and future participants.

Accordingly, to the extent that the bargaining parties are unable to allocate sufficient additional contributions to return a troubled multiemployer plan to financial health, the only practical alternative is to reduce the liabilities of the plan. Current rules that place the entire burden for liability reductions on the active employee populations are insufficient for the most troubled plans to recover from the 2008 crisis. In some extreme instances, such reductions may not be sufficient to enable the plan to avoid insolvency. Those plans need additional tools to protect the benefit payment stream and restore the financial integrity of the fund in the future.

Severely troubled plans facing inevitable insolvency must have the ability to intervene in advance of the plan's insolvency. The proposal being put forth by the Commission has the advantages of preventing insolvency for affected plans, improving the long-term net income position of affected participants, reducing the exposure of contributing employers to termination liabilities and significantly reducing the exposure of

18 In their presentation to the Commission, Mr. Greenblum and Mr. Lawrence of Segal estimated the magnitude of potentially insolvent plans at approximately 25% of the 25% of plans currently in Critical Status. The PBGC provided a somewhat higher estimate of reasonably probable plans in their 2012 Annual Report, stating that the number could be as high as 148 of the approximately 1,459 multiemployer defined benefit plans covered by the Multiemployer Guaranty Fund.

the PBGC to plan insolvencies. Such intervention may include the management of retiree as well as active liabilities in order to preserve retirement security for plan participants to the greatest extent possible. Benefit suspensions that preserve benefits above the PBGC guarantees are preferable to plan insolvency. In order to return such plans to solvency, it is necessary to modify the rules regarding the suspension of accrued benefits for all categories of participants, including pensioners, provided that certain protections for vulnerable populations are included.

Plans Eligible for Benefit Suspensions

Suspending accrued benefits represents a change to the social contract between the plan and the participants. As such, this tool must not be used arbitrarily and its use must be restricted to plans that are facing inevitable insolvency and only in situations where the long-term benefit to participants as a group after such intervention is advantaged. Furthermore, the protections contained in the Pension Protection Act that disregard adjustable benefit reductions in determining contributing employers' withdrawal liability to remove that as an incentive to adopt such reductions are also applicable to these additional tools. In order to be eligible for benefit suspensions under this proposal, a severely troubled plan must satisfy all of the following criteria:

- The plan is projected to become insolvent[19] within 20 years, and the ratio of inactive participants to active participants exceeds 2 to 1; or the plan is expected to become insolvent within 15 years. A plan that does not currently satisfy these criteria may meet the threshold in a future year.
- After application of the benefit suspensions, the plan is projected to avoid insolvency;[20] and
- Plan sponsors and trustees have exercised due diligence in determining that suspensions are necessary, including having taken all reasonable measures to improve the plan's funded position.

19 Insolvency calculations include consideration of features of any rehabilitation plan currently in place.

20 Some plans would not be able to forestall insolvency through benefit suspensions and so would not be eligible. These plans typically are in declining industries and have ratios of retirees to active employees of more than six to one.

As it is impractical to develop a precise and complete list of quantitative tests to measure the due diligence of the sponsors and trustees, the following considerations are illustrative rather than definitive, in determining whether due diligence has been exercised:

- Contribution levels (past and current)
- Level of benefit accrual (including prior reductions in rate of accrual)
- Impact on solvency of the subsidies and ancillary benefits available to active participants
- Compensation level of active participants relative to the industry
- Competitive factors facing sponsoring employers
- Impact of benefit levels on retaining active participants and bargaining groups

Approval Process

In order to access this tool, plans must apply to PBGC for approval. In evaluating Trustee and plan sponsor due diligence in taking action to suspend benefits, deference will be granted to such action in the absence of clear and compelling evidence to the contrary. After receiving an application, the PBGC will have 180 days to approve or deny the request. In the event the PBGC does not act within this time period, the application will be deemed to have been approved. In the event the PBGC approves the requested benefit suspensions, actions of trustees in adopting and implementing the plan of benefit suspensions will be deemed to satisfy fiduciary standards, absent clear and convincing evidence to the contrary.

Distribution of Suspensions

In addition to determining whether or not a plan is eligible for benefit suspensions, PBGC must also approve the proposed distribution of suspensions among affected participant populations.

The objectives of this determination are as follows:

- Equitable distribution across the participant population
- Protection of the most vulnerable segments of population

The deference granted to the trustees' initial decision to utilize benefit suspensions that is described above also applies to their judgment regarding the distribution of suspensions.

Limitations

The following limitations apply regarding the amount of individual and aggregate benefit reductions that may be imposed:

- No participant's benefit can be reduced to below 110% of the applicable PBGC guarantee level
- Suspension must achieve, but not exceed, the level that is necessary to avoid insolvency
- Any future benefit improvement must be accompanied by equitable restoration of suspensions, where the liability value of the improvement for actives cannot exceed the value of the restoration for retirees.

INNOVATION: NEW STRUCTURES TO FOSTER INNOVATIVE PLAN DESIGNS

Overview

While traditional defined benefit plans are likely to continue their vital role in providing retirement security for most multiemployer plan participants, changing economic realities and reduced credit opportunities resulting from widespread confusion in the financial community over withdrawal liability are placing additional obstacles in the path of some existing contributing employers to continue their participation and further reducing the ability of funds to attract new employers. These recent developments have exacerbated the unquantifiable risks faced by contributing employers arising from the existence of withdrawal liability and can be attributed to the following factors:

1. **MATURITY OF THE PLANS—**Over the past several decades, the demographics of multiemployer pension plans have gradually transitioned from populations dominated by active participants to populations dominated by retired and terminated vested participants. This shift has resulted in an increase in both the assets and liabilities of the plans. While this process is a part of the natural and anticipated development of pension plans, it has also increased the magnitude of the funding shortfall that can result from an asset downturn. The more assets a plan has, and the more reliant it becomes on investment income from those assets, the more money the plan could potentially lose if those assets experience a decline in value, and the harder it is to recover based solely on contribution income. In the context of multiemployer pension plans, in the event an investment loss occurs, the impact on each employer's potential withdrawal liability is much greater in a mature plan than it is in a young plan. This represents an increase in the level of risk to which the employers are exposed without any corresponding ability to respond to the potential negative consequences of this risk.
2. **RECENT FINANCIAL TURBULENCE—**Since the year 2000 there have been two major declines in the financial markets. The first occurred between 2000 and 2002 when plans lost an average of approximately 15% to 25%. The second occurred in 2008 when the S&P 500 Index lost 37% in a single year and the average market value of plan assets declined by 22%. The impact that these two events had on the funding position of multiemployer pension plans was dramatic. Many plans that had never had any unfunded vested benefits or imposed withdrawal liability on an employer, suddenly found themselves with large funding shortfalls. While there has always been a statistical possibility that these events could occur, the probability (based on historical performance) was considered remote until the events of the past ten years brought these risks to the forefront.
3. **ACCOUNTING AND RATINGS AGENCY ACTIVITY—**Both the Financial Accounting Standards Board (FASB), and various analysts and rating agencies such as Credit Suisse and Moody's, have increased their focus on multiemployer pension plans in recent years. Unfortunately, these organizations have exhibited a disturbing lack of understanding of how multiemployer pension plans calculate their liabilities, and the process under which plans allocate any unfunded vested benefits to contributing employers. Even more unfortunate than the lack of understanding reflected in the work of these groups is the damage it has caused. The confusion that this situation has created has caused many observers in the financial community, in government, and in the public at large to dramatically overstate the potential impact that participation in a multiemployer plan has on contributing employers' finances, resulting in credit downgrades and stricter lending requirements that have severely and adversely affected their ability to remain financially viable.

The confluence of these three factors has resulted in withdrawal liability becoming a much larger concern for the companies that participate in multiemployer

pension plans than it has been historically. In many cases, in today's environment these companies are experiencing reduced opportunities to obtain credit due to the concerns, both real and imagined, that lenders have regarding multiemployer plan participation. Employers are also acutely aware that the more stringent funding requirements of the PPA, coupled with their perceived exposure to withdrawal liability, have effectively changed the employers' role from simply making contractually required contributions to one of insuring the performance of the financial markets. These concerns have resulted in many companies that have sponsored multiemployer plans for decades now seeking to exit the system. Additionally, while there are some exceptions, for most plans the prospect of new employers beginning to contribute is not a realistic possibility.

While much is made of the threat that the current funding challenges pose to the future of multiemployer plans, in some industries there is another threat that is equally troubling. If a plan gradually loses contributing employers and is also unable to attract new ones, then over time it will ultimately fail regardless of how well funded it might be. For the plans to succeed over the long-term, the employers need to be confident that their participation in them is a prudent business decision that does not place their businesses at unreasonable risk from events over which they have no control. Without strong employer participation, no employer sponsored retirement plan can succeed. It is also critically important to note that this is a challenge that varies widely across different industries, and also across different plans within a single industry.

Under current law, neither the bargaining parties nor the board of trustees has the option of operating a multiemployer defined benefit plan that does not include the concept of withdrawal liability. While it is true that a defined contribution plan is available as an alternative that does not have the potential to create withdrawal liability, these plans have enormous shortcomings in their ability to provide adequate retirement income security to participants. For this reason, most employee groups have vigorously opposed their use as a means of providing primary retirement benefits to participants. Although many multiemployer groups have adopted defined contribution plans, they are almost always supplemental plans that are in addition to a much larger defined benefit plan that provides the primary source of retirement income security to participants.

The Commission believes that defined benefit plans must continue their vital role in providing retirement security to millions of multiemployer plan participants. Nevertheless, recognizing the fact that the potential for withdrawal liability is a primary barrier to the entry of new employers into the system, and is also a significant concern for many employers that currently sponsor plans, the Commission endorses the idea that the laws governing multiemployer retirement plans need to become more flexible to allow for plan designs that either do not create any withdrawal liability, or greatly reduce the potential for it to develop. Consistent with its stated objectives, the Commission evaluated several alternative pension designs in use in Canada and Europe which provide participants with strong retirement income protection and which do not include withdrawal liability features. They also discussed variable annuity and optional withdrawal methods that reduce contributing employers' exposure to withdrawal liability when compared with more generally used methods. The strengths and weaknesses of these systems were discussed extensively. Some Commission members expressed concerns that creation of an alternative structure without employer withdrawal liability backing would jeopardize the current system, if not quickly result in its demise. However, after extensive discussion the Commission ultimately concluded, without endorsing any specific design alternative, that encouraging innovation in the creation of new "flexible" plan designs that substantially reduce or totally eliminate withdrawal liability would ultimately strengthen the system by stemming the departure of existing employers and eliminating a major obstacle to the entry of new contributing employers. The Commission also emphasized the need to temper this flexibility with reasonable and appropriate participant protections that for the more vulnerable participant populations that are akin to the protections recommended for "Deeply Troubled" plans.

The Commission expressed a desire to encourage groups to be innovative in seeking new plan designs that meet these objectives. Without endorsing any specific model(s) as exclusive, within that broad context, it did express a desire to support two alternative "flexible" approaches that advanced the notions of reducing or eliminating withdrawal liability. These included the "variable annuity" approach described above, a form of the current defined benefit plans which reduces contributing employers' exposure to withdrawal liability; and a new form of benefit—a "target" benefit plan which

is neither a defined benefit nor a defined contribution plan under existing law, which is broadly modeled after the Canadian defined benefit model and which requires no extended employer financial exposure beyond the contractually negotiated contributions, thereby eliminating the concept of withdrawal liability.

Variable Annuity Plans

In the discussions noted above, Mr. Blitzstein and Mr. Kalwarski reviewed the fact that the variable annuity benefit is a form of defined benefit plan under existing law. The characteristics of this model include:

- At any point in time, and active participant's benefits is the greater of:
  - A "floor" benefit determined using conservative assumed rates of return (e.g. 5%); and
  - A "variable" benefit derived from investment gains in excess of the floor benefit assumption (after providing for a buffer to fund the floor benefit in periods of investment underperformance)
- The variable benefit would reflect the plan's investment experience, rising or falling depending on such experience.
- While the variable benefit would provide higher benefits to active employees in years of favorable experience, such benefits would be adjusted downward during periods of adverse experience.
- The benefit the participant would receive at retirement would be the greater of the floor benefit or the variable benefit, so that in no event would the benefit payable be less than the floor benefit.
- Benefits are not adjustable after retirement.
- Variable annuity plans meet the "definitely determinable benefit" requirement of a defined benefit plan by awarding pension "shares" for each year of service.
- While the number of shares awarded would be "definitely determinable" under the terms of the plan, the value of each share could vary as described above.
- Participants' risk would be mitigated by a combination of reduced investment volatility and the purchase of annuities or asset immunization at retirement.
- As a defined benefit plan, the variable annuity plan remains subject to current funding requirements including withdrawal liability, payment of accrued legacy liability costs and continued coverage under the PBGC multiemployer guaranty insurance fund.
- While not completely eliminated, the risk to contributing employers to withdrawal liability under such a structure is greatly reduced due to conservative investment and management policies.

Target Benefit Plans

In addition to the Variable Annuity model, the Commission recommends the creation of a new type of multiemployer benefit plan that is distinct from either defined benefit or defined contribution Plans. The objective of this model is to combine the retirement income security and economic efficiency of defined benefit plans with the predictable employer costs of defined contribution plans. This proposed plan type is called a Target Benefit Plan, and has the following characteristics:

- **BENEFITS PAID AS ANNUITIES—**In these plans all benefits are paid as annuities in a structure that would resemble, if not mirror, those of the predecessor defined benefit plan. The assets are pooled rather than being held in individual accounts, and the longevity risks are pooled as in a traditional defined benefit plan. The board of trustees professionally manages the assets, allowing for broad diversification across asset classes and the savings realized from negotiated fee levels.
- **ABSENCE OF WITHDRAWAL LIABILITY—**A Target Benefit Plan does not include any concept of withdrawal liability. Employers are only responsible for paying the plan the contributions that are negotiated and included in a Collective Bargaining Agreement.
- **MORE CONSERVATIVE FUNDING TARGET—**To compensate for the fact that the entire investment risk in this design is borne by participants, these plans will not be considered fully funded unless the assets reach 120% of the plan liabilities.
- **ABILITY TO IMPROVE BENEFITS LINKED TO FUNDING OUTLOOK—**To encourage disciplined funding and ensure that the trustees do not adopt benefit promises that the plan is unlikely to be able to support, the ability of the trustees to adopt benefit improvements will be closely tied to the funded position of the plan.

- **GREATER ABILITY FOR TRUSTEES TO ADJUST BENEFITS—**In the event that a Target Benefit Plan becomes underfunded and is unable to remedy the shortfall in a reasonable time period through the negotiation of additional contributions or reduction in future benefit accruals, the trustees will have greater ability to adjust participants' accrued benefits, including ancillary benefits, than is currently permissible in defined benefit plans. Ancillary benefits include early retirement subsidies, subsidized survivor benefits, post retirement benefit increases, and other benefits that can reasonably be distinguished from participants' accrued annuity benefits payable at normal retirement.
- **PROTECTION OF CORE BENEFITS FOR VULNERABLE POPULATIONS—**The expanded ability of trustees to adjust past benefits in a Target Benefit Plan does not extend to core accrued benefits for participants in payment status. These benefits will have full anti-cutback protection, unless adjusting them is necessary to prevent an imminent insolvency and all other remedies have been fully utilized.
- **ABSENCE OF PBGC PARTICIPATION—**Because this benefit model is self-adjusting and is not a defined benefit plan, it is not anticipated that this would be covered by the PBGC Multiemployer Guaranty Fund.

Scope and Transition

As with all Commission proposals, the establishment of any Flexible Benefit Plan model is entirely optional for the bargaining parties. No current defined benefit plan would be required to adopt any of these provisions. In addition, when the collective bargaining process produces a decision to convert from a traditional defined benefit plan to a Flexible Benefit Plan, the Flexible Benefit Plan provisions would apply prospectively only. All of the current funding rules, benefit protections, zone status provisions, and withdrawal liability requirements, including the enhancements proposed elsewhere in this document, would continue to apply to the benefits earned in the traditional defined benefit plan up to the point of conversion.

Nevertheless, for those groups who believe the traditional model can no longer adequately meet the needs of the parties and would otherwise covert to a defined contribution model, the new design provides a preferable path to enhance retirement security and can provide superior benefits to that model by addressing the acknowledged shortcomings of the current defined contribution system. In transition, all future benefit accruals in the legacy plan would cease and benefit accruals in the Flexible Benefit Plan would begin. Going forward, the employer contributions would be segregated between the legacy plan and the new Flexible Benefit Plan. The amounts contributed to the legacy plan would need to be sufficient to comply with all of the ERISA and PPA funding requirements. As this approach does not provide any relief to contributing employers as they attempt to fund their legacy costs, the Commission recommends that plans that convert to a Flexible Benefit Plan have a one-time opportunity to re-amortize their entire unfunded liability over a 30-year period.

SUMMARY AND CONCLUSIONS

As noted above, all multiemployer plans are the product of a collective bargaining agreement. In reaching such an agreement (and for many groups, each successive agreement over the decades), both parties have recognized the complementary elements that are critical for each other's success. The relative strength of the parties in the bargaining relationship may change over time, but when left to resolve their differences, the parties have generally found common ground that has been economically beneficial for both labor and their employers.

In a host of industries, this relationship has worked well in addressing their common interests, providing employers with ready access to a pool of highly skilled craftsmen whose skills are learned and continuously honed after graduation through multiemployer training and apprenticeship programs. In return, these employees are compensated accordingly, including receiving the economic security for themselves and their families derived from comprehensive multiemployer health benefit plans during one's active employment and into retirement, and from the ability to retire with the modest but dependable income provided by multiemployer defined benefit pension plans. Unfortunately, the new paradigm that has developed as a result of the financial services industry's new-found interest in withdrawal liability (whether real or perceived) has created new competitive pressures that have caused employers to consider abandoning the system that has worked so well for so many for so long.

The process employed by the Commission capitalized on the ability of this diverse group's understanding that the best way for either side to succeed is to find that common ground where both can achieve their shared long-term objectives. The group focused on the areas where agreement could be reached rather than dwelling on their differences. They engaged in a process to develop a common knowledge base by interviewing a variety of experts whose collective perspective helped Commission members define a broad set of additional tools designed to strengthen the existing system; provide remedies to "deeply troubled" plans that will enable many such plans to avoid insolvency, increase the net benefits for their participants, and survive for future generations; and create alternative designs which reduce or eliminate the financial disincentives that are causing current contributing employers to exit the system and discouraging new ones to participate.

For the first time in decades the Commission challenged much of the conventional wisdom about retirement security for participants in multiemployer plans, including: the role that withdrawal liability plays in either recovering the departing employers' share of any unfunded liabilities, or in contributing to

employer retention; whether the current anti-cutback rules may actually contribute to lower ultimate benefits for participants of deeply troubled plans that could otherwise be preserved with early intervention of the sort that is currently prohibited; and whether the benefit security provided by the PBGC guaranty fund within the context of the current federal budget realities is something on which multiemployer participants can rely over the long-term.

In the end, the proposals recognize that providing the private sector with the additional tools to address the current system's deficiencies will result in fewer failed plans, reduced exposure for the government and taxpayers, and provide participants in many troubled plans with higher net benefits than would be possible under the current system.

The Commission recommendations are not a plea for financial assistance. In fact, they are quite the opposite, with the potential to retain within the private sector billions of dollars in liabilities that already are, or will soon be, the responsibility of the PBGC. It is the Commission's hope that these proposals will be evaluated in the context of the new public and private economic realities and that ultimately when Congress acts on the expiring provisions of the Pension Protection Act, they will consider the broader context of retirement income security for the ten million active and retired American workers who participate in multiemployer plans, and enact the full range of measures that were so painstakingly developed to address the broad needs of multiemployer plan participants today and for the future.

NEXT STEPS

The recommendations for reform contained in this report represent significant and in some cases, profound changes from current law. Nevertheless, the Commission recognizes that the challenges confronting the sponsors and participants of multiemployer plans are unprecedented and without bold, decisive action, the ability and the desire by plan sponsors to continue to provide these essential benefits will quickly be subsumed by forces beyond their control. Having developed these recommendations as a community, the next steps will be for the community to take the recommendations, determine which can be accomplished through changes in the regulatory process and which will require legislation and actively come together to educate members of the regulatory agencies and, where needed, Congress to achieve their adoption.

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INVITED COMMISSION MEMBERS AND OTHER PARTICIPATING ORGANIZATIONS

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Invited Commission Members

Associated General Contractors of America
The Association of Union Constructors (TAUC)
Association of the Wall and Ceiling Industry Employers
Bakery, Confectionery, Tobacco Workers and Grain Millers International Union
Bechtel Corporation
Bituminous Coal Operators Association
The Broadway League Inc.
Central States Funds
Eastern Contractors Association, Inc.
Finishing Contractor Association
Great Lakes Fabricators & Erectors Association
International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers
International Association of Heat and Frost Insulators and Allied Workers
International Association of Machinists and Aerospace Workers
International Brotherhood of Electrical Workers
International Brotherhood of Teamsters

International Council of Employers of Bricklayers and Allied Craftworkers

International Union of Bricklayers and Allied Craftworkers

International Union of Bricklayers and Allied Craftworkers Local 3, New York

International Union of Operating Engineers

International Union of Painters and Allied Trades

Laborers International Union of North America

Mechanical Contractors Association of America

National Electrical Contractors Association

Operative Plasterers' and Cement Masons' International Association

Retail Food Industry

Service Employees International Union

Sheet Metal and Air Conditioning Contractors' National Association, Inc.

Sheet Metal Workers' International Association

Trebour Consulting Services

United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of U.S. & Canada

United Brotherhood of Carpenters

United Food and Commercial Workers International Union

United Mine Workers of America

United Parcel Service

United Union of Roofers, Waterproofers and Allied Workers

Western Conference of Teamsters Pension Trust

Other Participating Organizations

Cultural Institutions Retirement System

Mason Contractors Association of St. Louis

SPEAKERS

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MEETING HOSTS

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APPENDIX TECHNICAL CORRECTION DETAILS

The Commission's recommendations contain a number of small and technical changes to current law. The body of this report lists these enhancements, and this Appendix provides detailed descriptions of each item. ***Please note that this Appendix is not a comprehensive list of the measures contained in the Commission's proposal. It merely contains additional detail on some of the most highly technical and narrowly focused aspects of the proposal.***

1. While the majority of plans have made significant progress toward regaining financial stability, there are many plans for which actuarial projections indicate that the funding levels are likely to deteriorate over time, despite the fact that the plans are in the yellow or even green zones. In these instances, while the plan does not yet meet the entry criteria for critical status, it is clear that under reasonable actuarial assumptions, the plan will meet these criteria in the near future. Since critical status provides trustees with the greatest flexibility for addressing funding challenges, this situation creates the illogical result that plans sometimes desire to accelerate their entry into critical status in order to access these tools. ***This proposal would allow plans that are reasonably projected to enter critical status in any of the next five plans years to elect to enter critical status in the current year.*** While a plan is in this 'elective critical' status, the employer surcharge provisions would not apply. All other provisions of the red zone would apply. Once a plan voluntarily enters elective critical status, it will remain in this status until it either satisfies the entry criteria for critical status (and thus is no longer 'elective critical'), or it is no longer projected to satisfy the critical status entry criteria within the next five plan years.

2. ***Resolve the critical status "revolving door" issues that exist with regard to both 431(d) amortization extensions and the shortfall method.*** Under current law, the test for entering Critical Status and the test for emerging from Critical Status incorporate 431(d) amortization extensions and the shortfall method inconsistently. The difference between these tests has created a "revolving door" for plans that emerge from Critical Status in a particular year, and then immediately reenter Critical Status in the following year. This situation has the potential to cause significant confusion among participants and employers, as well as an unnecessary administrative burden on the plan. The proposed solution is to amend the criteria for entry into the red zone to say that if the plan has previously entered and emerged from critical status, it will not reenter critical status unless is fails to satisfy the emergence criteria for that year.

3. ***Provide that a yellow zone plan that has a Funding Improvement plan that requires no action is not***

considered to be Endangered. When a plan enters Endangered Status, it must develop a Funding Improvement Plan that will achieve certain funding benchmarks within a specified time frame. Typically, the Funding Improvement Plan will include a combination of contribution rate increases and benefit accrual reductions. However, in some cases the contribution rates and benefit accrual levels currently in effect are sufficient that the plan will achieve the mandated funding benchmarks without taking any action at all. The Commission recommends that if a plan satisfies the yellow zone entry test, but is projected to safely emerge from yellow zone status based on the current plan of benefits and contribution rates in the current collective bargaining agreements, then the plan will not be considered to have entered Endangered Status.

4. In order to determine if a plan is in Endangered Status, the actuary must calculate the funded percentage as of the date the status is certified. Following a determination that a plan is endangered, the next step is to develop a Funding Improvement Plan that achieves certain funding benchmarks. When establishing these benchmarks, current law requires that the actuary project the funded percentage at the beginning of the funding improvement period. This figure is not typically known when the Funding Improvement Plan is developed, as it is as of a point in the future, which requires that the actuary perform a projection of the funded status from the certification date to the beginning of the funding improvement period. ***The Commission recommends that this process be simplified by amending the target yellow zone funded percentage so that it is determined using the plan's funded percentage at the time of the certification rather than the percentage projected to the start of the improvement period.*** This change would relieve the actuary of the need to perform a projection on top of a projection for the purposes of determining the yellow zone funding target.

5. ***Extend the critical status ("red zone") rules regarding benefit improvements, contribution decreases, and waiver of excise taxes on funding deficiencies to the endangered status ("yellow zone") plans.*** Currently many plans in the yellow zone actively seek to enter the red zone because the inconsistent treatment of these items imposes restrictions on endangered status plans that are more onerous than those that exist for critical status plans. The provision would correct this illogical structure by applying these red zone rules to yellow zone plans. Note that the ability to reduce adjustable benefits that exists in the red zone would not be extended to the yellow zone.

6. ***Consistent with the narrowly constructed relief provisions of PRA and WRERA, provide that amortization extension and asset smoothing provisions automatically trigger whenever plans encounter a dramatic decline in the markets.*** Both PRA and WRERA included funding relief provisions that were enacted in response to the impact of the dramatic decline in the financial markets on multiemployer pension plans. Rather than requiring Congressional action for relief in the event the markets experience contractions of a similar magnitude, this provision would automatically extend these relief measures to plans in any year in which the financial markets experience a similar dramatic decline.

7. The PPA is currently silent as to what occurs when the bargaining parties fail to reach an agreement on a renewal schedule (preferred or default) after the initial CBA that takes effect while in endangered or critical status expires. ***The Commission recommends that the PPA be amended to specify that funding improvement and rehabilitation plans can specify what schedule takes effect in the event that the bargaining parties fail to agree on a renewal schedule.***

8. Under current law the rules governing how the critical status plans operate in reorganization are unclear. ***The Commission recommends that the reorganization rules be amended to specify that the red zone rules take priority over the reorganization rules.*** In the event that a plan meets the criteria for both critical status and reorganization, only the critical status rules would apply. In the event that a plan qualifies for reorganization but not critical status, the reorganization rules would continue to be effective.

9. Under the PPA, employers who withdraw from multiemployer plans that have reduced adjustable benefits are not given the benefit of those reductions in calculating their withdrawal liability. In

contrast, a consequence of the withdrawal liability payment rules is that employers effectively increase their withdrawal liability exposure by increasing their contribution rates, even if the additional contributions are not linked to any additional benefit accruals. For many contributing employers, the additional contributions associated with remaining in a plan and complying with the requirements of the Funding Improvement or Rehabilitation Plan are producing a perverse incentive for many employers to withdraw now, rather than have these additional contributions result in greater total liabilities. ***As a result, the Commission recommends that any contribution increases attributable to compliance with a Funding Improvement or Rehabilitation plan shall be disregarded for purposes of determining the amount of withdrawal liability that is allocated to a withdrawing employer.***

10. Single-employer plan participants who die after the pension plan in which they participate has become insolvent and has become a ward of the PBGC remain eligible for qualified pre-retirement survivor annuities, while multiemployer plan participants do not. As a matter of equity, multiemployer plan participants should not be denied the protection provided to their families by such qualified pre-retirement survivor annuity benefits simply as a result of their not having died as of the date on which the plan becomes insolvent or is terminated. ***As a result, the Commission recommends modifying the multiemployer guaranty fund provisions to correct this inequity.***

11. In past years, when multiemployer plans experienced favorable investment returns it was common practice for the trustees to authorize the payment of a 13th check to the retirees of the plan. During periods of extended strong performance, these payments could temporarily become a regular annual event. The IRS has taken the position that if 13th checks are offered consistently over a period of time, they automatically become part of participants' accrued benefits and subject to anti-cutback protection. This position has the unfortunate consequence of forcing plans to incur a long-term cost from what was intended to be a short-term benefit, and also discouraging plans from offering 13th checks when they might otherwise have done so. ***The Commission recommends that the anti-cutback rules be clarified to specify that multiemployer plans may offer one-time 13th checks to participants annually over a period of many years without having this practice become part of participant's protected accrued benefit.***

12. Prior to the passage of PPA, a number of plans applied to the IRS for amortization extension relief under Section 412(e). In approving these applications, the IRS required that plans commit to a schedule of funding improvement with which plans would need to comply in the years following the approval of the extension. In the event that a plan failed to achieve the level of funding improvement described in the schedule, the IRS would be able to revoke the amortization extension retroactively, likely exposing the contributing employers to substantial excise tax penalties. The 2008 financial market crisis resulted in many plans failing to meet the benchmarks contained in their 412(e) schedules through no fault of their own. Additionally, the amortization extension provisions of PPA make the 412(e) amortization extension unnecessary and irrelevant. ***For these reasons, the Commission recommends the elimination of the potential excise tax exposure attributable to amortization extensions that the IRS granted under Section 412(e) prior to the passage of PPA.***

13. As plans seek to find innovative approaches to providing reliable lifetime retirement income to their participants while managing the financial risk to employers, one avenue that some plans have explored is to provide participants with defined contribution accounts, but allow them to use some or all of these accounts to purchase annuities from a defined benefit plan. One possible mechanism for implementing this approach is Section 414(k). ***The Commission recommends that this section be clarified to facilitate its use by plans seeking to allow participants to convert defined contribution accounts into annuities payable from a defined benefit plan in a manner that is equitable for all participants and employers.***

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