

Nos. 24-1739, 24-1740, 24-1741, 24-1742

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
and CHARLES A. WHOBREY, Trustee,
Plaintiffs-Appellants,

v.

EVENT MEDIA INC., doing business as COMPLETE CREWING,
Defendant-Appellee.

EVENT MEDIA INC., doing business as COMPLETE CREWING,
Plaintiff-Appellee,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Defendant-Appellant.

PACK EXPO SERVICES, LLC, *Plaintiff-Appellant,*

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Defendant-Appellant.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
and CHARLES A. WHOBREY, *Plaintiffs-Appellants,*

v.

PACK EXPO SERVICES, LLC, *Defendant-Appellee.*

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Case Nos. 1:22-cv-6133, 1:22-cv-6143, 1:22-cv-6471, 1:22-cv-6553
Edmond E. Chang, District Judge

**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
IN SUPPORT OF DEFENDANT-APPELLEE**

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Amici curiae Professors Maria O’Brien and Colleen E. Medill move under Rule 29(a)(3) of the Federal Rules of Appellate Procedure for leave to file an *amici curiae* brief in this matter for the following reasons:

1. This case involves a question as to the proper interpretation of 29 U.S.C. § 1085(g)(3) of the Multiemployer Pension Reform Act of 2014 (“MPRA”).

2. Although not briefed by the parties, this case also involves the underlying issue of whether the Pension Fund was legally permitted to increase benefits under the Pension Protection of 2006 (“PPA”), as the Fund’s benefit increases are the sole justification provided by the Pension Fund for the actions now being challenged as unlawful by the two employers.

3. *Amici* are two law professors and nationally recognized scholars in employee benefits law. Both are deeply invested in the legal and financial integrity of private pensions in the United States—in sum, the promise of ERISA—including the regulation of pensions and plan sponsors consistent with their fiduciary duties and other obligations.

4. Given *amici*’s expertise in ERISA and the regulation of private pensions in the United States, *amici* can contribute meaningfully to the issues presented in this appeal by providing broader legal and policy context to the narrower questions of statutory interpretation briefed by the parties.

5. In particular, both *amici* have written previously about the PPA, the law that in some sense forms the legal genesis of this case because it required the Pension Fund to design and implement a rehabilitation plan, the source of the contribution increases that lie at the core of the parties' dispute.

6. *Amici* respect the difficult task faced by Congress when it sought to tackle the thorny challenges and systemic crises facing the defined benefit pension system, and believe that some of the broader legal and policy context of the PPA's reforms may help this Court as it weighs the legal issues in the underlying dispute.

7. Counsel for the parties were informed of this filing. Defendant-Appellees consented; counsel for Plaintiffs-Appellants stated that the Pension Fund did not consent.

8. *Amici's* proposed brief is attached to this motion as **Exhibit 1**.

Professors Maria O'Brien and Colleen Medill respectfully request that this Court grant this motion for leave to file the brief of *amici curiae* that accompanies this motion.

Dated: October 4, 2024

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Certificate of Service

Brett Swearingen certifies that, on October 4, 2024, he caused a copy of this document to be served upon all parties of record, and that such service is being made electronically upon each counsel of record so registered with the Court of Appeals for the Seventh Circuit.

Dated: October 4, 2024

/s/ Brett Swearingen

EXHIBIT 1

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BRIEF OF *AMICI CURIAE* SUPPORTING DEFENDANT-APPELLEE

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule

26.1.1, Brett Swearingen, as counsel for *amici curiae*, states as follows:

1. I represent *amici curiae* Professors Maria O'Brien and Colleen E. Medill.
2. Only myself and my law firm, Miller Johnson, have appeared or are expected to appear on behalf of *amici curiae* in this case for *amici curiae* in this Court.
3. *Amici curiae* state that neither they nor any affiliates have a financial interest in the outcome of this case.

Respectfully submitted,

/s/ Brett Swearingen

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STATEMENT OF INTEREST¹

Amici curiae Professors Maria O’Brien and Colleen E. Medill are both nationally recognized scholars in employee benefits law.

Professor O’Brien received her law degree from Yale University where she was editor of the *Yale Law & Policy Review*. After graduation, she served as a law clerk for Judge Gilbert S. Merritt of the U.S. Court of Appeals for the Sixth Circuit. She has taught employee benefits law for more than 30 years, and is currently the Paul Suskind Scholar and Professor of Law at Boston University. Professor O’Brien is co-author of *Cases and Materials on Employee Benefits Law* and has lectured on topics such as “Understanding the Moral Hazard of Public Pensions” and “Employee Benefits in Turmoil.” She also serves on the board of the Pension Action Center, which provides free legal services to low-income retirees and their dependents.

Professor Medill received her law degree from the University of Kansas, where she graduated first in her class. After graduation, she clerked for Judge Deanell Reece Tacha of the Tenth Circuit Court of Appeals. She has taught

¹ *Amici curiae* submits this brief accompanied by a motion for leave of the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2). Counsel for the parties were informed of this filing. Defendant-Appellees consented; counsel for Plaintiffs-Appellants stated that the Pension Fund did not consent.

Counsel for *amici curiae* states pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) that no party or party’s counsel authored this brief in whole or in part, and no person other than *amici* and their counsel contributed money intended to fund preparing or submitting this brief.

employee benefits law for 25 years, and is currently the Barbara Wittman Schaefer Endowed Chair in Law at the University of Nebraska-Lincoln. Professor Medill is the sole author of *Introduction to Employee Benefits Law: Policy and Practice* (6th ed. 2024), which has been used in over 50 ABA-accredited law schools to teach an introductory course in federal employee benefits law.

Her scholarly articles have been published in such journals as the Cornell Law Review, Iowa Law Review, Emory Law Journal, North Carolina Law Review, and Michigan Journal of Law Reform. She has served as a member of the U.S. Department of Labor’s ERISA Advisory Council, and testified before the Department on trends in fiduciary plan administration. She is also an elected member of the American Law Institute and the American College of Employee Benefits Counsel, and in 2020 was named a Best Lawyer in America in the field of ERISA litigation.

Professors O’Brien and Medill are deeply invested in the legal and financial integrity of private pensions in the United States—in sum, the promise of ERISA—including the regulation of pensions and plan sponsors consistent with their fiduciary duties and other obligations. In particular, both professors have written about the Pension Protection Act of 2006 (“PPA”), and respect Congress’ difficult efforts in that law to tackle the thorny challenges and systemic crises facing the defined benefit pension system. *Amici* believe that some of the broader policy context of the PPA’s

reforms will be helpful to this Court as it weighs the legal issues in the underlying dispute.

INTRODUCTION

The parties' briefs in this case both address the immediate interpretive question at the core of their dispute—the proper interpretation of 29 U.S.C. § 1085(g)(3) of the Multiemployer Pension Reform Act of 2014 (“MPRA”). While *amici curiae* believe the District Court was correct when it sided with Event Media and Pack Expo Services on that question, they submit this brief for a different reason. *Amici* believe it is important that the Court understand the statutory and policy context of the Pension Fund's behavior at issue in this case before it becomes the first (and perhaps only) appellate court to resolve this question. This brief is intended to provide that further context.

Put simply, the Pension Fund argues it may include increases in employer contribution rates required by the Fund's rehabilitation plan in the Fund's calculation of the employers' withdrawal liability because those contribution increases have been used to provide increased benefit accruals for Fund participants and beneficiaries. But this argument skips over a key fact: the Pension Fund, a massively underfunded multiemployer pension plan until its receipt of \$35.8 billion in Special Financial Assistance (“SFA”) in January 2023, was never permitted to increase benefits at all. Instead, Congress had prohibited “red zone” plans like the Fund from increasing benefits when it passed the Pension Protection Act (“PPA”) in 2006—a

very difficult act of lawmaking that was designed in part to enforce fiscal responsibility on severely underfunded multiemployer plans like the Fund.

In the PPA, Congress gave “red zone” plans important tools to restore themselves to financial health—most notably, the ability to mandate employer contribution increases and impose benefit reductions. But the Fund interpreted the PPA’s mandate to restore underfunded plans like itself to financial health as sanctioning continued benefit increases that would have the opposite effect. As a result, the Fund set in motion a series of actions that doubled participants’ pension benefits, even though it knew that very few participants would ever receive these benefits in retirement absent a rescue by Congress.

The Fund’s behavior in this case—unlawfully inflating the withdrawal liability of withdrawing employers—is a downstream consequence of its earlier decision to increase benefits in violation of the Pension Protection Act. But two wrongs do not make a right, and the Pension Fund should not be allowed to further profit from its wrongdoing.

BACKGROUND

Until its receipt in January 2023 of \$35.8 billion in Special Financial Assistance (“SFA”) from the federal government² (more than \$100,000 per

² See www.voicesforpensionsecurity.com.

participant) the Pension Fund was only about 27 percent funded—the most underfunded large multiemployer pension fund in the entire country. (**Ex. A** at 11-14.) In 2004, the Fund’s actuary had estimated that the Fund faced a \$1.3 billion funding deficiency, and after the 2008 stock market collapse the Fund’s annual funding deficit—the amount benefits exceeded contributions—was \$1.8 billion. (**Ex. B** at 18.3-18.5) (2015 Fund suspension application). These challenges faced by the Fund exemplify the kinds of problems that led Congress to tackle the multiemployer funding crisis in 2005 and 2006.

I. The Pension Protection Act of 2006.

When the 109th Congress sought to tackle the multiemployer pension crisis, it faced a multiemployer sense that “ha[d] suffered recent and significant funding losses,” with “long-term declines in participation and new plan formation” and “reduced assets and increased liabilities for many plans” caused by “stock market declines, coupled with low interest rates and poor economic conditions.” (**Ex. C** at 95) (Sept. 2005 House PPA committee report) (quoting March 2004 GAO report).

The multiemployer pension provisions of the Pension Protection Act were the product of a highly-complex legislative effort involving multiple stakeholders that was led by Congressmen John Boehner and George Miller, then-Chairman and Ranking Member of the House Committee on Education and Labor. As the Democratic minority noted in the bill’s committee report:

The multiemployer pension reform provisions of [the bill] are crafted from proposals offered by a coalition of labor and management representatives in the multiemployer plan community. These proposals are the result of good-faith negotiations by the stakeholders of this system. They come from the plans, the businesses, and the unions which are best situated to understand the problems they face and the real-world consequences of any changes in the law.

(Ex. C at 276.) In consultation with these stakeholders, the Committee determined that “multiemployer pension funding and benefit structure need[ed] to be reformed as soon as possible, including the addition of quantifiable measures of improvement and adjustments to the benefit structures for severely underfunded plans, in order to maintain the health of the plans that are in existence.” (*Id.* at 97) One of the goals of these reforms was to strongly incentivize (if not require) multiemployer plans to ensure that “the level of plan benefits be more closely tied to the level of plan contributions and available assets.” (*Id.*) Going forward, the Committee even hinted that its goal of fiscal sustainability “may require a hard look at anti-cutback provisions,” quoting witness testimony that if multiemployer plans “want to increase benefits during good times, there should be less restriction on their ability to reduce benefits during bad times.” (*Id.*)

In order to address the Committee’s concerns, the PPA required “critical status” (“red zone”) plans like the Pension Fund to develop “rehabilitation plans” designed to improve the financial condition of the plan in accordance with the standards set forth in the law. Under the PPA, rehabilitation plans “shall reflect

reductions in future benefit accruals and adjustable benefits, and increases in contributions, that the plan sponsor determines are reasonably necessary to emerge from critical status.” 29 U.S.C. § 1085(e)(1).³

One area of particular concern for the Committee was the problem of severely underfunded pension plans continuing to raise benefits: “[I]t is the view of the Committee that plan sponsors should not be able to continue to increase benefits when a plan is underfunded,” as “[t]his practice perpetuates systematic underfunding and is a moral hazard which threatens the retirement security of the participants and beneficiaries as well as the future of the defined benefit pension system.” (**Ex. C** at 80.)⁴ As a result, the PPA only permitted red zone plans to increase benefits under very strict conditions, none of which the Fund has claimed it satisfied. Perhaps implicitly acknowledging the unlikelihood of a red zone plan satisfying these conditions, the Committee’s Democratic minority summarized the bill’s restrictions as allowing “no new benefit increases.” (*Id.* at 274.) It was clear that Congress intended red zone plans to use contribution increases to combat underfunding, not raise benefits.

³ Unless otherwise indicated, all statutory citations herein refer to 29 U.S.C. § ____.

⁴ Regarding the risks of moral hazard in the context of pensions, see Michael Dambra, Phillip Quinn & John Wertz, *Economic Consequences of Pension Bailouts: Evidence From the American Rescue Plan* (Oct. 19, 2023), <https://ssrn.com/abstract=4406502>.

II. The Pension Fund's Benefit Formula.

Unlike the benefit formulas of most multiemployer pension plans, which are based on length of service, the Fund's benefit formula is based on the amount of contributions made by employers to the Fund on a participant's behalf. Prior to 2004, the Fund's benefit formula for a participant's monthly benefit level at retirement was equal to two percent of total contributions received by the Fund on the participant's behalf. (**Ex. D** at § 1.01(b)(2)) (plan document). In 2004, the Fund reduced its benefit formula from two percent of contributions to one percent in response to projections that the Fund could begin experiencing annual funding deficits that year. (**Ex. B** at 18.3.)

Under the Fund's formula, the amount of a participant's benefit is a function of both the benefit accrual rate and employers' contribution rates. As a hypothetical example, if one employer contributed to the Fund at the rate of \$100 per week per participant in year one, but then its contribution rate increased to \$200 per week per participant in year two, its employees would accrue twice as much pension benefits per week of work in year two as in year one, even though employees' benefit accruals in both years were governed by the same benefit formula.

This contrasts with most multiemployer plans, whose benefit accruals are not a function of employers' contribution rates because their benefit formulas are based on length of service or an employee's compensation rather than contributions. (**Ex.**

E at 2.) For participants in these plans, increasing their employers' contribution rates (under a rehabilitation plan other otherwise) has no effect on the amount of their accrued pension benefit.

III. The Pension Fund Adopts a Rehabilitation Plan that Increases Benefits.

The Pension Fund's Trustees approved the Fund's rehabilitation plan in March 2008. The rehabilitation plan's Primary Schedule mandated 8 percent per year contribution rate increases for the first five years for most contributing employers, 6 percent increases for the next three years and 4 percent increases each year thereafter, with all increases compounded annually. (Ex. F at 2.) The Fund's benefit formula remained unchanged. (*Id.* at 1-2.)

Because the benefit formula is based on the contributions made by employers, any increase to employers' contribution rates automatically increases participants' benefits (and thus the Fund's liabilities) in direct proportion to the contribution increase. Therefore, the Fund was required by the PPA to ensure that the required contribution increases were not "benefit-bearing"—by maintaining benefit accrual rates at pre-rehabilitation plan levels and thus avoiding any prohibited benefit increases.⁵ Despite the PPA's requirements, the Fund chose not to suspend benefit accruals on the rehabilitation plan's mandatory contribution increases. (*Id.*)

⁵ See, for example, an FAQ by the IAM National Pension Fund regarding its rehabilitation plan, explaining that "it is important to understand that all additional contributions made as a result of the Rehabilitation Plan . . . do not result in future

When the Fund's rehabilitation plan was adopted, Fund participants understood that it would significantly increase benefits. A grassroots Teamsters organization posted on its website that "[p]ension benefits will actually increase over the next several years—even with the fund in the Red Zone. That's because the amount of retirement benefits that Teamsters earn each year (called "pension accrual") is tied to employer contributions, which go up each year. By August 2012, a freight Teamster will accrue nearly \$200 a month in pension for a year of work."⁶ In 2009, for the first time the Fund was projected to become insolvent, with the Fund's actuaries predicting it would be unable to pay benefits in 2022. (**Ex. B** at 18.7.) Yet the Fund continued to provide benefit accruals on the annual contribution increases each year. It did so despite the Fund's rapidly deteriorating funded status and despite the PPA's requirement to "annually update the rehabilitation plan ... to reflect the experience of the plan." § 1085(e)(3)(B).

Because the rehabilitation plan adopted by the Fund left the Fund's benefit formula intact while significantly increasing contribution rates, the Fund has more

benefit accruals, they are designed to improve funding only," and the rehabilitation plan for the Plasterers Local #82 Pension Plan, stating that "[t]he additional contributions required under the schedule will not translate into additional benefit accruals" because "[t]hese contributions are directed solely toward improving the Plan's funding status." www.iamnpf.org/sites/iamnpf.org/files/2019-04/Active%20Participant%20FAQs_0.pdf (Q28).

⁶ www.tdu.org/news/central-states-fund%E2%80%99s-letters-stir-concerns.

than doubled benefit accruals for participants since it was adopted—completely reversing the 50 percent reduction in benefit accruals the Fund trustees implemented in 2004.⁷

IV. The Pension Fund’s Behavior Makes It an Outlier Among Red Zone Plans.

Counsel for *amici* has been unable to find any evidence that other red zone plans followed the Pension Fund’s path—doubling benefits over the course of a dozen years—even among plans with a similar benefit formula as the Fund’s.

For example, a 2013 tri-agency report to Congress mandated by the PPA found that in 2009 and 2010 approximately 180 critical status plans reported they had reduced future benefit accruals. (Ex. G at 46.) The report also reviewed 15 rehabilitation plans of multiemployer pension plans and found that “the vast majority propose for consideration, or have already implemented, an increase in the contribution rate and reductions in future benefits,” *id.* at 50, and stated that “steep contribution rate increases and benefit cuts . . . typically are required for plans in

⁷ Because benefit accruals under the Fund’s benefit formula increase in direct proportion to employer contribution rates, the following formula calculates the effect on participant benefit accruals of 5 years of 8% annual contribution rate increases followed by 3 years of 6% rate increases and 4% annual rate increases thereafter, compounded annually, as required by the Fund’s Primary Schedule: 1.08 (2008 rate increase) * 1.08 (2009) * 1.08 (2010) * 1.08 (2011) * 1.08 (2012) * 1.06 (2013) * 1.06 (2014) * 1.06 (2015) * 1.04 (2016) * 1.04 (2017) * 1.04 (2018) * 1.04 (2019) = **2.05**. See Ex. F at 10 (2008 column).

endangered and critical status.” (*Id.* at 4.) The report did not indicate that any rehabilitation plans had increased benefits. (*Id.* at 50.) As one actuary commented to the PBGC, for “[v]irtually all of the plans I work on personally and the vast majority of plans I am familiar with that have a percentage-of contribution benefit formula . . . increases in future accruals due to contribution rate increases are usually the first in line when benefits have to be cut or reduced” under a rehabilitation plan.⁸

In addition, the substantial benefit increases contained in the rehabilitation plan may mean the Fund has had the highest benefit accrual rates of any other “critical and declining” status plan in the country.⁹ According to an October 2020 PBGC report using 2016 plan year data, no critical and declining status plans provided an average estimated monthly benefit accrual of more than \$150 (\$1,800 annually) for a hypothetical active participant with 15 years of service, and only 3 percent of such plans provided average monthly accruals of more than \$125. (**Ex. E** at 16) (Table 17); *see also id.* at 1 (Figure 1) (showing average accrual rates for all plan types by industry classification). However, an active participant employed by the two employers in this case for all of 2016 would have accrued a monthly

⁸ www.pbgc.gov/sites/default/files/the_mckeogh_company.pdf.

⁹ Starting in plan year 2015 and continuing, the Fund’s actuary certified that the Fund was in “critical and declining” status, a new designation that was added by the MPRA.

benefit of \$195 (\$2,346 annually) on the basis of their 2016 contribution rate of \$376 per week and the Fund's one percent of contributions benefit formula.¹⁰ See Fund Br. 6 (Doc. 14).

Unlike participants in the Fund, however, few participants in other critical status plans have seen any benefit increases in the 18 years since Congress passed the PPA.

V. Congress Similarly Restricted Pension Funds from Increasing Benefits When It Enacted Special Financial Assistance.

Congress continued its focus on restricting underfunded multiemployer plans from increasing benefits when it passed the law authorizing the PBGC to provide Special Financial Assistance (SFA) to such plans. Section 4262(m) of that law provides authority for the PBGC to impose conditions on multiemployer plans receiving SFA relating to both prospective and retroactive benefit increases. See § 29 U.S.C. § 1432(m)(1).

Following Congress' instruction, the PBGC promulgated regulations restricting plans receiving SFA from increasing benefits during the SFA coverage period. Plans may increase future benefits only if the actuary certifies that additional

¹⁰ \$376/week * 52 weeks worked = \$19,552 of total annual contributions. Under the Fund's benefit formula, 1% of \$19,552 results in a monthly accrued benefit of \$195.52.

contributions not included in the plan's application for SFA are sufficient to fund the benefit increase. *See* 87 Fed. Reg. 40968, 40991 (2022).¹¹

ARGUMENT

I. The Pension Fund's Benefit Increases Violate the Pension Protection Act.

The Pension Fund's entire argument in this case is premised on the benefit increases it provided in its rehabilitation plan, as the subsidization of those benefit increases is the only justification the Fund provides for including the employers' mandatory contribution increases in the Fund's calculation of their withdrawal liability. But in addition to the employers' statutory arguments against the Pension Fund's position stated in their brief, the Fund's conduct transgresses the law for a different reason: the Fund may not rely on unlawful benefit increases to justify unlawfully inflating employers' withdrawal liability.

As stated earlier and argued below, the PPA simply does not allow severely underfunded plans to increase benefits (unless they satisfy the strict requirements of § 1085(f)(1)(B), which the Fund has not done). Therefore, contribution increases required by PPA-mandated rehabilitation plans may not bear any benefits, making the Fund's entire "benefit-bearing" argument an unlawful red herring. The House committee report for the PPA makes clear that "plan sponsors should not be able to

¹¹ However, the PBGC's regulations allow plans to request an exception from the rules against benefit increases 10 years after they receive SFA. *See* 29 CFR § 4262.16(b)(3).

continue to increase benefits when a plan is underfunded.” (Ex. C at 80.) For Congress, a core premise of the PPA’s statutory design was that underfunded pension plans must stop increasing benefits.

The language of the PPA itself is consistent with this legislative history:

First, § 1085(f)(1)(B) of the law defines benefit increases as “including future benefit accruals.” The Fund concedes the PPA’s language of “future benefit accruals” encompasses the increased benefits that accrue under the Fund’s benefit formula as a result of employers’ contribution increases—indeed, that is the only way the Fund can argue it qualifies for the exception in § 1085(g)(3)(B) for “increase[s] in future benefit accruals permitted by subsection . . . (f)(1)(B).”

Second, the PPA explicitly states that plans may not increase benefits either before or after they adopt a rehabilitation plan, § 1085(f)(1)(B) & (f)(3)(B), and the Fund was therefore bound by the prohibitions of subsection (f) at the time it adopted its rehabilitation plan. *See* § 1085(a)(2)(B). As one commenter to the PBGC noted, this “statutory language is premised on the common-sense notion that a plan that cannot pay for existing benefits cannot be allowed free rein to willy-nilly increase benefits for its participants.”¹²

¹² www.pbgc.gov/sites/default/files/conn_maciel_carey_llp_on_behalf_of_the_national_grocers_association.pdf.

Third, the PPA states that the schedules of rehabilitation plans “shall reflect reductions in future benefit accruals and adjustable benefits, and increases in contributions, that the plan sponsor determines are reasonably necessary to emerge from critical status.” § 1085(e)(1)(B) (emphasis added). Likewise, the House committee report states that the legislation “requires that a rehabilitation plan for a critical plan must include a combination of employer contribution increases, expense reductions, funding relief measures, restrictions on future benefit accruals, and benefit reductions of certain ancillary benefits.” (Ex. C at 66.)

Fourth, the PPA later states that rehabilitation plans “may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions, if agreed to by the bargaining parties, or any combination of such actions[.]” § 1085(e)(3)(A) (emphasis added).

Case law also consistently affirms that rehabilitation plans may not increase benefits. The Fourth Circuit has observed that rehabilitation plans are “designed to return the plan to financial stability,” and that “[t]o accomplish this objective, the rehabilitation plan must adopt revised schedules of reduced benefits and increased contributions.” *Bakery & Confectionary Union & Indus. Int’l Pension Fund v. Just Born II, Inc.*, 888 F.3d 696, 698 (4th Cir. 2018) (citations omitted) (emphasis added).

The Third Circuit has said rehabilitation plans “must set forth new schedules of reduced benefits and increased contributions.” *IBT Local 863 Pension Fund v.*

C&S Wholesale Grocers, 802 F.3d at 538 (3rd Cir. 2015) (quoting *Local 138 Pension Fund v. F.W. Honerkamp Co.*, 692 F.3d 127, 131 (2d Cir. 2012)); *see also Ely v. Bd. of Trustees*, 2019 WL 438338, at *10 (D. Idaho 2019) (“The acceptable tools for constructing a rehabilitation plan include reductions in plan expenditures, reductions in future benefit accruals, or increases in contributions.”).

If a critical status plan like the Fund wanted to increase benefits, the only options Congress provided in the PPA were the deliberately narrow exceptions in (f)(1)(B). The Fund does not dispute that it cannot satisfy these conditions. Instead, the Fund claims that the very same benefit increases it was prohibited from providing via a plan amendment were completely permissible if implemented via the rehabilitation plan itself.

II. The Pension Fund’s Defenses Lack Merit.

As made clear above, the Pension Protection Act does not allow red zone plans to increase benefits either during or after the adoption of a rehabilitation plan unless they comply with (f)(1)(B). To counter the obvious statutory premise that Congress did not want severely underfunded pension plans to increase benefits, the Fund has previously made three points in a separate case in the District Court involving the same legal issues.¹³

¹³ *See Central States v. SC Transport, Inc. and Steelcase Inc.* (Case No. 24-cv-663).

Most prominently, the Pension Fund claims that because its rehabilitation plan made no changes to the Fund’s benefit formula, there has been no prohibited increase in benefits. (Case No. 24-cv-663, Dkt. 44, PageID 4129) (**Ex. H** at 2). This is not a serious argument, for two reasons. First, under the heading “Special rules for benefit increases,” the PPA defines “increase[d] benefits” as “including future benefit accruals,” § 1085(f)(1)(B), and the Fund concedes—as it must to argue it may impose higher withdrawal liability against the employers—that the benefit increases contained in its rehabilitation plan fall under that definition. Second, it is simply absurd to claim that a doubling of benefit accrual rates is not a benefit increase. Under the Pension Fund’s benefit formula, participant’s benefit accruals are a function of contribution rates, and the Fund cannot escape Congress’ prohibition by looking at only the first half of the equation. As illustrated by the chart below, the fact of the matter is that under the Pension Fund’s rehabilitation plan (“RP” below) participants accrue at least twice as much in pension benefits per week worked as they did before it was adopted.¹⁴

Year	Contribution Increase under RP Primary Schedule	Weekly Contribution Rate	Monthly Accrued Pension Benefit Per Week Worked	Monthly Benefit Per Week Worked <u>Under Amici’s Position</u>
Pre-RP	N/A	\$170	\$1.70	\$1.70
2008	8%	\$183.50	\$1.84	\$1.70

¹⁴ These illustrative contribution rates are taken from the employer in Case No. 24-cv-663 (Dkt. 39, PageID 3997) (**Ex. I**).

2009	8%	\$198.00	\$1.98	\$1.70
2010	8%	\$214.00	\$2.14	\$1.70
2011	8%	\$231.00	\$2.31	\$1.70
2012	8%	\$249.50	\$2.50	\$1.70
2013	6%	\$264.50	\$2.65	\$1.70
2014	6%	\$280.50	\$2.81	\$1.70
2015	6%	\$297.50	\$2.98	\$1.70
2016	4%	\$309.50	\$3.10	\$1.70
2017	4%	\$322.00	\$3.22	\$1.70
2018	4%	\$334.50	\$3.35	\$1.70
2019	4%	\$348.00	\$3.48	\$1.70

The Fund has also raised the red herring that the PPA did not require the Fund to *reduce* benefits. (Case No. 24-cv-663, Dkt. 34-15, PageID 2336-37) (**Ex. J** at 28-29). *Amici* agree, but the Fund’s argument misses the mark—the point is that the PPA banned red zone plans from *increasing* benefits in rehabilitation plans, not that it required the Fund to reduce them. As illustrated by the chart above, the Fund’s rehabilitation plan would have complied with the PPA if it had maintained the same monthly accrued pension benefit per week of work (far right column) under its rehabilitation plan (in this example, \$88.40/month per year worked, for an accrued pension of approximately \$32,000/year after 30 years), rather than increasing its monthly accrued benefit for these participants to as much as \$3.48 (\$180.96/month per year worked, approximately \$65,000/year after 30 years) (second from right column). In other words, no benefit cut under the rehabilitation plan—but no increase either.

Finally, the Fund has made the breathtaking claim that Congress “expected” it to increase benefits as employer contribution rates rose, as illustrated in the chart

above. (Case No. 24-cv-663, Dkt. 34-15, PageID 2338) (**Ex. J** at 30). To justify this claim, the Fund points to § 1085(e)(6), a PPA provision that limits the amount of benefit cuts red zone plans may impose under their default schedules, which under the PPA must reduce “future benefit accruals and other benefits . . . to the maximum extent permitted by law.” § 1085(e)(1). Section 1085(e)(6) states the following:

(6) Limitation on reduction in rates of future accruals

Any reduction in the rate of future accruals under the default schedule . . . shall not reduce the rate of future accruals below—

(A) a monthly benefit (payable as a single life annuity commencing at the participant’s normal retirement age) equal to 1 percent of the contributions required to be made with respect to a participant . . . under the collective bargaining agreements in effect as of the first day of the initial critical year
....

With respect to the Fund, the “first day of the initial critical year” quoted above is the date the Fund was certified to be in critical status—March 24, 2008. (**Ex. F** at 1.) Therefore, section 1085(e)(6) prohibits the Fund from lowering the rate of future benefit accruals under its default schedule below a monthly benefit equal to one percent of contributions required to be made on a participant’s behalf under the relevant collective bargaining agreement in effect on March 24, 2008.

Because the language of the statute matches exactly the Pension Fund’s one-percent-of-contributions benefit formula (and continuing with the illustrative chart above), that means that Fund participants could not have had their monthly accrued pension benefits under the rehabilitation plan’s Default Schedule reduced below

\$1.70 per week worked—as that amount represents one percent of the required contributions for participants under the CBA that was then in effect. But because this limitation is explicitly defined in relation to “the contributions required to be made with respect to a participant . . . under the collective bargaining agreements *in effect as of the first day of the initial critical year*,” this benefit floor is locked in at that amount on the basis of the March 24, 2008 contribution rate, and does not adjust upwards as contribution rates increase. As such, the Fund has no basis to claim that § 1085(e)(6) indicates that Congress “expected” it to increase benefits under its rehabilitation plan, let alone that it was permitted to do so.

Amici wish to emphasize one final point regarding the Fund’s position: The Pension Fund’s arguments against the employers require the Fund to acknowledge that the benefit increases in its rehabilitation plan constitute benefit increases under the MPRA (so that the Fund can claim that it qualifies for that statute’s exception allowing it to increase employers’ withdrawal liability). At the same time, the Pension Fund denies that these *same benefit increases* qualify as such under the PPA (thus avoiding that statute’s prohibition on increasing benefits). See **Ex. K** at 13-14 (Fund responses to Interrogatories 14 & 15 [PPA] and 16 [MPRA]). The Fund has taken this position even though both the PPA and MPRA define benefit increases as including increases in future benefit accruals—see (f)(1)(B) in the PPA and (g)(3)(B) in the MPRA—and even though the Fund has stated that its benefit

increases were encompassed by (g)(3)(B) “because part (g)(3)(B) expressly states that an ‘increase in benefits’ includes an ‘increase in future benefit accruals.’” (Case No. 24-cv-663, Dkt. 34-22, PageID 3380 #22) (**Ex. L** at 15).

Dividing ERISA against itself in this way is a highly opportunistic form of statutory interpretation. There is no non-frivolous argument that the same words meant one thing when Congress sought to rescue the multiemployer pension system in 2006 but something else when it tried again in 2014.

CONCLUSION

In 2006, Congress passed the Pension Protection Act in part to stop severely underfunded pension plans from implementing benefit increases—a problem that had played a significant role in causing the multiemployer pension system’s funding crisis. Congress did not expect that one of those severely underfunded plans would interpret Congress’ mandate to “rehabilitate” the plan’s funding status as a permission slip to double pension benefits. Without an understanding of the decisions made by the Pension Fund when it designed and adopted its rehabilitation plan, a necessary part of the story regarding the Fund’s misconduct in this case is missing.

The District Court’s judgment should be affirmed.

Date: October 4, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the word limitations contained in Fed. R. App. P. 29(a)(5) as modified by Circuit Rule 29 because, excluding the parts of this brief exempted by Fed. R. App. P. 32(f), this brief contains 5,119 words.

I hereby also certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Times New Roman font.

Date: October 4, 2024

By /s/ Brett Swearingen

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2024, I electronically filed the foregoing Brief of *Amici Curiae* Supporting Defendant-Appellee with the Clerk of the Court for the Seventh Circuit Court of Appeals via the Court's Case Management/Electronic Case Filing (CM/ECF) system pursuant to Circuit Rule 25(a). Participants in the case who are registered CM/ECF users were served electronically at the time of filing.

Date: October 4, 2024

By /s/ Brett Swearingen

Counsel for Amici Curiae

EXHIBIT A



**Congressional
Research Service**

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Data on Multiemployer Defined Benefit (DB) Pension Plans

Updated May 22, 2020

Congressional Research Service

<https://crsreports.congress.gov>

R45187

Summary

Multiemployer defined benefit (DB) pension plans are private-sector pensions sponsored by more than one employer and maintained as part of a collective bargaining agreement. In DB pension plans, participants receive a monthly benefit in retirement that is based on a formula. In multiemployer DB pensions, the formula typically multiplies a dollar amount by the number of years of service the employee has worked for any of the employers that participate in the DB plan.

Some DB pension plans have sufficient resources from which to pay their promised benefits. But, as a result of a variety of factors—such as changes in the unionized workforce and the 2007 to 2009 recession—many multiemployer DB plans are likely to become insolvent over the next 20 years and run out of funds from which to pay benefits owed to participants.

The Pension Benefit Guaranty Corporation (PBGC)—a federally chartered corporation—insures the benefits of participants in private-sector DB pension plans up to a statutory maximum. Although PBGC is projected to have sufficient resources to provide financial assistance to smaller multiemployer DB plans through 2025, the projected insolvency of large multiemployer DB pension plans would likely result in a substantial strain on PBGC’s multiemployer insurance program. In its FY2018 Projections Report, PBGC indicated that the multiemployer insurance program is highly likely to become insolvent by 2025. In the absence of increased financial resources for PBGC, participants in insolvent multiemployer DB pension plans would likely see sharp reductions in their pension benefits.

This report’s data are from the public use Form 5500 data for the 2017 plan year (the most recent year for which complete information is available). Nearly all private-sector pension plans (including multiemployer DB plans) are required to file Form 5500 with the Internal Revenue Service (IRS), the Department of Labor (DOL), and PBGC. The Form 5500 information includes breakdowns on the number of plan participants, financial information about the plan, and details of companies providing services to the plan. Multiemployer DB plans specifically are required to report their financial condition as being in one of several categories (referred to as the plan’s “zone status”).

The insolvencies of these plans could affect the employers that contribute to multiemployer plans. For example, an employer in a plan that becomes insolvent might have to recognize the total amount of its future obligations to the plan on its financial statements, which could affect the employer’s access to credit and, potentially, its participation in other multiemployer plans.

This report provides 2017 plan year data on multiemployer DB plans categorized in several ways. First, the report categorizes the data based on plans’ zone status. Next, it provides a year-by-year breakdown of the number of plans that are expected to become insolvent and the number of participants in those plans. It then provides information on the 25 largest multiemployer DB plans (each plan has at least 75,000 participants). Finally, the report provides data on those employers whose plans indicate they contributed more than 5% of the plans’ total contributions (referred to in this report as “5% contributors”). It lists (1) the 5% contributors whose total contributions to multiemployer plans were at least \$25 million and (2) the 5% contributors in the 12 largest multiemployer plans (as ranked by total contributions to the plan) that are in the “critical and declining”—the most poorly funded—zone status.

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Background on Multiemployer Pension Plans

In general, pension plans are a form of deferred compensation: workers do not receive income when it is earned but rather receive that income in the future. The Internal Revenue Code (IRC) provides tax advantages to certain deferred compensation schemes: rather than including such compensation in taxable income when it is earned, the compensation is included in taxable income when it is received by the individual (presumably, in retirement).

Pension plans may be classified according to whether they are (1) defined benefit (DB) or defined contribution (DC) plans and (2) sponsored by one or more than one employer. In DB plans, participants receive regular monthly benefit payments in retirement (which some refer to as a “traditional” pension).¹ In DC plans, of which the 401(k) plan is the most common, participants have individual accounts that can provide a source of income in retirement. The plans that are the subject of this report are DB plans.

Pension plans are also classified by whether they are sponsored by one employer (single-employer plans) or by more than one employer (multiemployer and multiple employer plans). *Multiemployer* pension plans are sponsored by more than one employer (often, though not required to be, in the same industry) and maintained as part of a collective bargaining agreement. *Multiple employer* plans are sponsored by more than one employer but are not maintained as part of collective bargaining agreements.² The plans that are the subject of this report are multiemployer plans.

Multiemployer DB pensions are of current concern to Congress because approximately 10% to 15% of participants are in plans that may become insolvent.³ When a multiemployer pension plan becomes insolvent, the Pension Benefit Guaranty Corporation (PBGC) provides financial assistance to the plan so the plan can continue to pay benefits up to the PBGC guaranteed amount.⁴ Plans that receive PBGC financial assistance must reduce benefits to a statutory maximum benefit, currently equal to \$12,870 per year for an individual with 30 years of service in the plan.⁵ Neither the guarantee amount nor benefits are adjusted for changes in the cost of living.

Using 2013 data (the most recent year for which this data point is available), PBGC estimated that 79% of participants in multiemployer plans that were receiving financial assistance receive their full benefit (i.e., their benefits were below the PBGC maximum guarantee).⁶ Among

¹ In some defined benefit (DB) plans, participants have the option to receive an actuarially equivalent lump-sum payment at retirement in lieu of the annuity. Typically, an annuity is a monthly payment for life.

² Multiple employer pension plans are not common. The Government Accountability Office (GAO) indicated that about 0.7% of private-sector pension plans were multiple employer pension plans. See U.S. Government Accountability Office, *Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans*, GAO-12-665, September 13, 2012, p. 10, at <http://www.gao.gov/assets/650/648285.pdf>.

³ For additional background, see CRS Report R43305, *Multiemployer Defined Benefit (DB) Pension Plans: A Primer*.

⁴ For more about PBGC, see CRS Report 95-118, *Pension Benefit Guaranty Corporation (PBGC): A Primer*, or CRS In Focus IF10492, *An Overview of the Pension Benefit Guaranty Corporation (PBGC)*.

⁵ The guarantee is more than \$12,870 per year for an individual with more than 30 years of service in the plan and less than \$12,870 per year for an individual with less than 30 years of service in the plan. More information is available at Pension Benefit Guaranty Corporation, *Multiemployer Benefit Guarantees*, at <https://www.pbgc.gov/prac/multiemployer/multiemployer-benefit-guarantees>.

⁶ See Pension Benefit Guaranty Study, *PBGC's Multiemployer Guarantee*, March 2015, at <https://www.pbgc.gov/documents/2015-ME-Guarantee-Study-Final.pdf>. The study considered only reductions in benefits because of the maximum guarantee and did not consider the effect of the likely insolvency of PBGC.

participants in plans that were terminated and likely to need financial assistance in the future, 49% of participants have a benefit below the PBGC maximum guarantee, and 51% have a benefit larger than the PBGC maximum guarantee. Among ongoing plans (neither receiving PBGC financial assistance nor terminated and expected to receive financial assistance), the average benefit is almost twice as large as the average benefit in terminated plans. This suggests that a larger percentage of participants in plans that receive PBGC financial assistance in the future are likely to see benefit reductions as a result of the PBGC maximum guarantee level.⁷

PBGC estimates that in the future it will not have sufficient resources from which to provide financial assistance for insolvent plans to pay benefits at the PBGC guarantee level. Most participants would receive less than \$2,000 per year because PBGC would be able to provide annual financial assistance equal only to its annual premium revenue, which was \$310 million in FY2019.⁸ There is no obligation on the part of the federal government to provide financial assistance to PBGC, although some policymakers have stated that some form of federal assistance to PBGC might be necessary to ensure that participants' benefits are not reduced to a fraction of their promised benefits.⁹

Multiemployer Pension Plan Data

CRS analyzed public-use Form 5500 data from the Department of Labor (DOL) for the 2017 plan year, the most recent year for which complete data are available.¹⁰ Most private-sector pension plans are required to annually report to the Internal Revenue Service (IRS), DOL, and PBGC information about the plan, such as the number of participants, financial information, and the companies that provide services to the plan. In addition to Form 5500, pension plans are generally required to file additional information in specific schedules. For example, most multiemployer DB plans are required to file Schedule MB, which contains information specific to multiemployer

⁷ The average monthly benefit in terminated plans that are likely to receive PBGC financial assistance was \$383.33; in plans that were projected to become insolvent within 10 years was \$546.17; and in remaining, ongoing plans was \$1,010.44. See Pension Benefit Guaranty Corporation, *PBGC's Multiemployer Guarantee*, March 2015, Figure 4, at <https://www.pbgc.gov/documents/2015-ME-Guarantee-Study-Final.pdf>.

⁸ See Pension Benefit Guaranty Corporation, "PBGC Projections: Multiemployer Program Likely Insolvent by the End of 2025; Single-Employer Program Likely to Eliminate Deficit by 2022," press release, August 3, 2017, at <https://www.pbgc.gov/news/press/releases/pr17-04>. Additionally, the National Coordinating Committee for Multiemployer Plans (NCCMP) estimated that participants in 12 plans that applied for benefit reductions under MPRA would see a 53% reduction in benefits as a result of the PBGC maximum guarantee were these plans to become insolvent and receive PBGC financial assistance. The presentation did not indicate what percentage of participants in those plans would see benefit reductions. See National Coordinating Committee on Multiemployer Pensions, *Multiemployer Pension Facts and the National Economic Impact*, January 5, 2018, at <http://nccmp.org/wp-content/uploads/2018/01/Multiemployer-Pension-Facts-and-the-National-Economic-Impact-Jan-5-2018.pdf>. For premium revenue, see PBGC, *Annual Report Fiscal Year 2019*, p. 26, <https://www.pbgc.gov/sites/default/files/pbgc-fy-2019-annual-report.pdf>.

⁹ See 29 U.S.C. §1302 (g)(2), which states that the "United States is not liable for any obligation or liability incurred by the corporation." For example, S. 2147, the Butch Lewis Act of 2017; H.R. 4444, the Rehabilitation for Multiemployer Pensions Act; and S. 1076/H.R. 2412, the Keep Our Pension Promises Act, would provide U.S. Treasury funds to PBGC if it had insufficient resources from which to provide financial assistance to plans as required by the bills.

¹⁰ A plan year is "a 12-month period designated by a retirement plan for calculating vesting and eligibility, among other things. The plan year can be the calendar year or an alternative period, for example, July 1 to June 30." See <https://www.irs.gov/retirement-plans/plan-participant-employee/definitions>. Data are available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/public-disclosure/foia/form-5500-datasets>.

DB plans, such as the zone status of the plan (described below). Each pension plan's Form 5500 and required schedules are available by search on DOL's website.¹¹

The public-use Form 5500 data included 1,355 plans that indicated they were multiemployer DB pension plans for the 2017 plan year.¹² These plans had 11.0 million participants.¹³

The analyzed data in this report consider only multiemployer DB pension plans that filed Schedule MB for the 2017 plan year. Not all multiemployer DB pension plans file Schedule MB. For example, some plans that received PBGC financial assistance or had experienced a withdrawal of all employers in the plan (but which were still paying benefits to retired participants) did not file Schedule MB in 2017. This analysis does not include 59 plans that did not file a Schedule MB, 64 plans that received PBGC financial assistance in FY2017 or FY2018, and three terminated plans. This analysis provides information only about the remaining 1,229 plans in the 2017 plan year.

In 2017, these 1,229 active plans not receiving PBGC financial assistance that filed Schedule MB had 10.4 million participants. Among participants in these plans

- about 36.3% were active participants (working and accruing benefits in a plan);
- about 35.7% were retired participants (currently receiving benefits from a plan) or beneficiaries of deceased participants who were receiving or are entitled to receive benefits; and
- about 28.0% were separated, vested participants (not accruing benefits from a plan, but owed benefits and will receive them at eligibility age).

Plans report two values of assets and two values of liabilities: (1) the actuarial value and current value of assets and (2) the actuarial value and the current value of liabilities (also called the RPA '94 [for Retirement Protection Act of 1994] liability, passed as part of the Uruguay Round Agreements Act [P.L. 103-465]). The two values of assets are generally similar. The two values of liabilities often differ. The main difference is the value of the discount rate that is used to value plan liabilities.¹⁴ The actuarial valuation of liabilities typically discounts them using the expected return on assets. The RPA '94 valuation of liabilities discounts them using a lower rate, based on interest rates on 30-year Treasury securities.¹⁵ The RPA '94 valuation method results in a higher valuation of plan liabilities compared to the actuarial valuation method.

¹¹ Available at <https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1>.

¹² These were plans that indicated on Form 5500 that they were a multiemployer plan on Part I, Line A, and (1) that they were a DB plan in the List of Plan Characteristics Codes in Part II, Line 8a, or (2) that they filed a Schedule MB. One plan had three filings in the data; only the most recent filing was included in this analysis. Four plans had duplicate filings in the data. In three cases, a plan submitted two filings because it was merged with another plan and provided a separate filing with plan information at the time of the merge. In these cases, the filing that provided information about the plan prior to the merge was used. In the fourth case, two filings were in the dataset, but only one of the filings was available for download by search on the Department of Labor's (DOL's) website, and so the downloadable filing was used.

¹³ This includes the number of active participants, retired participants receiving benefits, retired or separated participants entitled to future benefits, and deceased participants whose beneficiaries are receiving or are entitled to receive future benefits.

¹⁴ For more information on discounting liabilities in pension plans, see Appendix A of CRS Report R43305, *Multiemployer Defined Benefit (DB) Pension Plans: A Primer*.

¹⁵ See Pension Benefit Guaranty Corporation, *Technical Update Number: 95-1*, January 26, 1995, at <https://www.pbgc.gov/prac/other-guidance/tu/technical-update-95-1-retirement-protection-act-1994>.

In 2017, these 1,229 plans had \$494.5 billion in assets and owed participants \$1,145 billion in benefits, resulting in total underfunding of \$651.0 billion (on a current value [RPA '94] basis). On an actuarial basis, these plans had \$512.5 billion in assets and owed participants \$659.2 billion, resulting in total underfunding of \$146.7 billion.¹⁶

Among plans that filed Schedule MB in 2017, the median RPA '94 discount rate was 3.05%, and the median discount rate used to calculate the actuarial value of liabilities was 7.25%.¹⁷ The discount rate used by PBGC is based on a survey of insurance annuity prices and is closer to the RPA '94 rate.¹⁸ For example, the PBGC for discounting multiemployer plan liabilities in 2016 (the most recent year available) was 2.81%.¹⁹

Among the 1,229 multiemployer plans in 2017 that submitted Schedule MB, 1,217 were underfunded (owed more in future benefits than they had in current assets) and 12 plans were overfunded (had more in assets than they owed in future benefits) on a current value basis. On actuarial value basis, 990 plans were underfunded, and 239 plans were overfunded.

Zone Status of Multiemployer Plans in 2017

The Pension Protection Act of 2006 (PPA; P.L. 109-280) required that multiemployer plans that meet specified financial criteria must report to the IRS their financial condition as being in one of several categories. The categories are described in **Table 1**. Several of the categories refer to a measure called the *funded percentage*, which is a measure of a plan's ability to pay benefits owed based on the plan's assets. For example, a funded percentage of 100% indicates that a plan's current value of assets is adequate to cover the present value of future owed benefits, and a percentage lower than 100% indicates that the value of a plan's liabilities exceeds the value of its assets.

¹⁶ Current value of assets are found on Schedule MB, Line 2a, and the current value of liabilities are found on Schedule MB, Line 2(b)(4)(2). Actuarial value of assets are found on Schedule MB, Line 1b(2), and the actuarial value of liabilities are found on Schedule MB, Line 1c(3).

¹⁷ Fifty-seven plans had RPA '94 rates that were manually corrected (e.g., the plans indicated a rate of 305% instead of 3.05%).

¹⁸ See Pension Benefit Guaranty Corporation, *The Financial Condition of PBGC's Multiemployer Insurance Program*, 2001, footnote 2, at https://www.pbgc.gov/documents/financial_condition_of_multiemployer_1201.pdf.

¹⁹ See Pension Benefit Guaranty Corporation, *2017 Pension Insurance Data Tables*, table M-9, at https://www.pbgc.gov/sites/default/files/2017_pension_data_tables.pdf.

Table I. Multiemployer Funding Status Categories

Category	Description
No Category (sometimes called <i>green zone</i>)	Plans that do not meet any of the categories below are often called <i>green zone</i> plans. A <i>green zone</i> plan does not have to address its underfunding, if any.
Endangered (sometimes called <i>yellow zone</i>) / Seriously Endangered (sometimes called <i>orange zone</i>)	A plan is in endangered status if (1) the plan's funded percentage is less than 80% funded or (2) the plan has a funding deficiency in the current year or is projected to have one in the next six years. A plan is seriously endangered if it meets both of these criteria.
Critical (sometimes called <i>red zone</i>)	A plan is in critical status if any of the following conditions apply: (1) the plan's funded percentage is less than 65% and in the next six years the value of the plan's assets and contributions will be less than the value of benefits; (2) in the current year, the plan is not expected to receive 100% of the contributions required by the plan sponsor, or the plan is not expected to receive 100% of the required contributions for any of the next three years (four years if the plan's funding percentage is 65% or less); (3) the plan is expected to be insolvent within five years (within seven years if the plan's funding percentage is 65% or less); or (4) the cost of the current year's benefits and the interest on unfunded liabilities are greater than the contributions for the current year, the present value of benefits for inactive participants is greater than the present value of benefits for active participants, and there is expected to be a funding deficiency within five years. Plans not in critical status may elect to be in critical status if they are projected to be so in the next five years.
Critical and Declining	A plan is in critical and declining status if (1) it is in critical status and (2) the plan actuary projects the plan will become insolvent within the current year or within either the next 14 years or the next 19 years, as specified in law. Plans in critical and declining status must provide notice to plan participants, beneficiaries, the collective bargaining parties, PBGC, and DOL. Plans in critical and declining status may be eligible to apply to the U.S. Department of the Treasury to reduce benefits to participants up to certain limits, if the benefit reductions restore the plan to solvency.

Source: Congressional Research Service (CRS).

Note: The Pension Protection Act of 2006 (PPA; P.L. 109-280) required plans to report their status as endangered, seriously endangered, or critical. The Multiemployer Pension Reform Act of 2014 (MPRA; passed as part of P.L. 113-235) added the status of critical and declining.

Table 2 lists the number of plans, participants, and total underfunding in each zone for the 2017 plan year.

Plans that are in endangered or seriously endangered status must adopt a funding improvement plan.²⁰ A funding improvement plan is a range of options (such as increased contributions and reductions in future benefit accruals) that, when adopted, will reduce a plan's underfunding. The reduction in underfunding is by 33% during a 10-year funding improvement period (for plans in endangered status) or by 20% during a 15-year funding improvement period (for plans in seriously endangered status). Plans in endangered or seriously endangered status cannot increase benefits during the funding improvement period.

²⁰ See 26 U.S.C. §432(c).

Plans in critical status must adopt a rehabilitation plan.²¹ The rehabilitation plan is a range of options (such as increased employer contributions and reductions in future benefit accruals) that, when adopted, will allow the plan to emerge from critical status during a 10-year rehabilitation period. If a plan cannot emerge from critical status by the end of the rehabilitation period using reasonable measures (referred to as a plan that has exhausted reasonable measures, or an ERM plan),²² it must either install measures to (1) emerge from critical status at a later time (after the end of the rehabilitation period) or (2) forestall insolvency. Plans in critical status may not increase benefits during the rehabilitation period. In **Table 2**, plans that are in critical status are classified by whether (1) they are projected to emerge from critical status within the rehabilitation period, or (2) they indicated that they have exhausted reasonable measures and would not emerge from critical status within the rehabilitation period and that the rehabilitation plan is designed to forestall insolvency.²³ Some of the ERM plans are likely to become insolvent, although they do not meet the definition of being in critical and declining status.

CRS analysis of 2017 Form 5500 data reported in **Table 2** indicated the following:

- **Green Zone:** 794 plans were in the green zone. These plans covered 6.0 million participants, or 57.7% of participants in multiemployer DB plans that reported a zone status.
- **Endangered or Seriously Endangered:** 132 plans were either endangered or seriously endangered. These plans covered 1.0 million participants, or 9.6% of participants in multiemployer DB plans that reported a zone status.
- **Critical:** 190 plans were in critical status. These plans covered 2.2 million participants (20.8%). One hundred thirty-two plans were in critical status but were expected to emerge from critical status by the end of the rehabilitation period. Fifty-eight of the 190 plans in critical status do not expect to be able to emerge from critical status by the end of the rehabilitation period and will remain in critical status past the end of the rehabilitation period (or indefinitely), or possibly become insolvent.²⁴
- **Critical and Declining:** 113 plans were in critical and declining status. These plans covered 1.2 million participants, or 11.8% of participants in multiemployer DB plans that reported a zone status.

²¹ See 26 U.S.C. §432(e).

²² See <https://www.pbgc.gov/documents/Projections-Report-2015.pdf>.

²³ On Schedule MB of Form 5500, plans in critical status must indicate the year in which they (1) expect to emerge from critical status or (2) become insolvent.

²⁴ Ninety-three plans in critical status did not indicate whether their rehabilitation plan was based on emerging from critical status or forestalling insolvency. In these cases, CRS examined the actuarial report following the Form 5500. In 84 cases, the rehabilitation plan appears to have been based on emerging from critical status; in 9 cases, it appears to have been based on forestalling insolvency. CRS updated the data accordingly.

Table 2. Zone Status of Multiemployer Defined Benefit Plans in 2017
(among plans that reported zone status on Form 5500 Schedule MB for 2017 plan year)

Status	Plans				Participants (As Reported on Schedule MB)	
	Number	Percentage Among Multiemployer Plans That Reported Zone Status	Underfunding (in billions of dollars; RPA '94 basis)	Underfunding (in billions of dollars; actuarial basis)	Number	Percentage Among Participants in Multiemployer Plans that Reported Zone Status
Green Zone	794	64.6%	-\$345.9	-37.3	6,005,803	57.7%
Endangered	128	10.4%	-\$78.1	-20.8	908,394	8.7%
Seriously Endangered	4	0.3%	-\$6.5	-2.1	96,347	0.9%
Critical	190	15.5%	-\$120.5	-33.6	2,167,449	20.8%
<i>Projected to Emerge from Critical Status</i>	132	10.7%	-\$88.5	-\$22.8	1,309,280	12.6%
<i>Has Exhausted Reasonable Measures (ERM)</i>	58	4.7%	-\$32.0	-10.8	858,169	8.2%
Critical and Declining	113	9.2%	-\$100.0	-52.9	1,232,947	11.8%
Total	1,229	100.0%	-\$651.0	-146.7	10,410,940	100.0%

Source: CRS analysis of Form 5500 datasets available from the Department of Labor's (DOL's) website (data last modified February 28, 2020).

Notes: Percentages of plans and participants may not add to 100% due to rounding. Number of participants are found on Schedule MB, Line 2b(4)(1). Underfunding on an RPA '94 basis is calculated using the current value of assets (Schedule MB, Line 2a) and the RPA '94 current liability (Schedule MB, Line 2b(4)(2)). Underfunding on an actuarial basis is calculated using the actuarial value of assets (Schedule MB, Line 1b(2) and the actuarial value of liabilities (Schedule MB, Line 1c(3)). Plans report two values of assets and two values of liabilities: the actuarial value and current value of assets and the actuarial value and the current value (RPA '94, named for the Retirement Protection Act of 1994) of liabilities. The two values of assets are generally similar. The two values of liabilities often differ. The main difference is the value of the discount rate that is used to value plan liabilities. The actuarial valuation of liabilities typically discounts them using the expected return on assets. The RPA '94 current liability uses a lower discount rate, based on interest rates on 30-year Treasury securities. The RPA '94 valuation method results in a higher valuation of plan liabilities compared to the actuarial valuation method.

Sixty-four insolvent plans that received Pension Benefit Guaranty Corporation (PBGC) financial assistance are not included, even if the plan filed Schedule MB, because not all plans that receive PBGC financial assistance file Schedule MB. In addition, 25 plans that were not classified as terminated or not receiving PBGC financial assistance filed Schedule MB in the Form 5500 data but did not report a zone status for the 2017 plan year. For these plans, CRS examined the Form 5500 filed with DOL and added the plans' zone status after an examination of the Schedule MB attached to the plan's actuarial report. In 22 of the 25 instances, the zone status was in the Schedule MB attached to the plan's actuarial report. In 3 of the 25 instances, there was no zone status, but the plans had a funded percentage of over 90% and were assumed to be green zone.

A plan in critical status must develop a rehabilitation plan, which is a set of options intended to allow the plan to emerge from critical status during the rehabilitation period. However, some plans are in such poor financial condition that they cannot adopt any reasonable options to emerge from critical status by the end of their rehabilitation period. These plans are referred to as having exhausted reasonable measures (ERM plans). Rehabilitation for ERM plans is based on forestalling plan insolvency. Some ERM plans may become insolvent (but do not meet the criteria for being in declining status). Other ERM plans indicated that they would not become insolvent but would remain in critical status after their rehabilitation period will have ended. Ninety-three plans in critical status did not indicate whether their rehabilitation plan was based on emerging from critical status or forestalling insolvency. In these cases, CRS examined the actuarial report following the Form 5500. In 84 cases, the rehabilitation plan appears to have been based on emerging from critical status; in 9 cases, it appears to have been based on forestalling insolvency. The data in the table reflect CRS's updates.

Multiemployer Plan Insolvencies by Year

As noted above, data from Schedule MB of Form 5500 for the 2017 plan year showed that 113 plans indicated that they were in critical and declining status and expected to become insolvent.

As part of their Form 5500 filings, multiemployer plans that are in critical and declining status, which are by definition expected to become insolvent, must indicate the year in which they expect insolvency.

Table 3 lists the number of pension plans in critical and declining status by expected year of insolvency. The table also contains the number of participants in these plans and the dollar amount of benefits the plans paid in 2017. The amount of benefits paid on a yearly basis at insolvency is likely to be different compared to the amount reported for 2017, particularly for plans with an insolvency year many years in the future. However, this information provides context on the scale of the problem. In addition, because of the maximum guarantee, some participants would likely not receive 100% of the benefits earned under the plan. As noted above, using 2013 data, PBGC estimated that 51% of participants in plans that were terminated at the time and likely to receive PBGC financial assistance in the future would likely see their benefits reduced because of the PBGC maximum guarantee.

An additional 63 plans in critical status had exhausted reasonable measures and would either be unable to emerge from critical status or become insolvent. These plans are *not* included in the analysis of **Table 3**.

Table 3. Expected Year of Insolvency of Multiemployer Defined Benefit Plans in Critical and Declining Status

(2017 plan year data)

Expected Year of Insolvency	Number of Plans	Number of Participants	Benefits Paid by Plans in 2017
2017	1	3,497	\$13,315,611
2018	2	4,278	\$3,805,963
2019	4	4,524	\$35,054,271
2020	8	55,381	\$208,985,517
2021	5	11,498	\$69,415,267
2022	7	138,755	\$778,749,098
2023	8	18,309	\$77,343,532
2024	3	2,842	\$23,387,591
2025	7	395,113	\$2,986,150,904
2026	7	46,299	\$338,689,374
2027	2	5,247	\$11,594,123
2028	4	71,307	\$289,351,340
2029	11	124,320	\$345,624,215
2030	14	62,170	\$209,835,604
2031	6	4,551	\$39,883,087
2032	7	44,860	\$158,580,840
2033	6	85,807	\$657,125,445
2034	4	17,649	\$74,148,828
2035	2	13,500	\$43,373,700
2036	1	317	\$2,681,662
2040 ^a	1	2,037	\$7,613,815
2043 ^a	1	289	\$1,011,016
2048 ^a	1	110,714	\$653,412,457
2099 ^a	1	9,683	\$15,398,218
Total	113	1,232,947	\$7,044,531,508

Source: CRS analysis of Form 5500 data for the 2017 Plan Year (data last modified February 28, 2020).

Notes: Number of participants are found on Schedule MB, Line 2b(4)(1). Expected benefit payments are found on Schedule MB, Line 1d(3). This table only includes the 1,229 active plans not receiving Pension Benefit Guaranty Corporation (PBGC) financial assistance that filed Schedule MB in plan year 2017.

- a. Plans in critical and declining status are projected to become insolvent within 19 years. Each Form 5500 provides supplemental information that details the criteria for zone certification. The insolvency year listed for four plans exceeded 19 years. In three cases, it appears that the insolvency year listed is based on updated rehabilitation plans, which could be based on more recent actuarial valuations. In one case, the expected year of insolvency was listed as 2099. This plan indicated that its rehabilitation plan was based on forestalling insolvency but is no longer projected to become insolvent.

The 25 Largest Multiemployer Plans

Table 4 provides data on the 25 largest multiemployer DB plans (by number of participants) in the 2017 plan year, which were those with more than 75,000 participants. For each plan, the table contains the number of participants, the zone status in 2017, the current and actuarial funded percentage, the current and actuarial amount of underfunding in the plan, and the amount of expected benefit payments in the 2017 plan year. *Funding amount* is the difference between the plan's assets and present value of future benefits owed. A negative funding amount indicates that a plan is underfunded.

In total, the plans in **Table 4** have 4.8 million participants, which is 46.1% of participants in multiemployer DB plans that filed Schedule MB in plan year 2017. Three plans in **Table 4** were in critical and declining status in plan year 2017: Central States, Southeast, and Southwest Areas Pension Plan; Bakery and Confectionery Union and Industry International Pension Fund; and the United Mine Workers of America 1974 Pension Plan.

Table 4. The 25 Largest Multiemployer Defined Benefit Pension Plans in the 2017 Plan Year

Plan Name	Participants at End of Plan Year	Zone Status in 2017	Current Funded Percentage (Current Value of Assets / RPA '94 Current Liability)	Current Funding Amount, in billions (Current Value of Assets—RPA '94 Current Liability)	Actuarial Funded Percentage (Actuarial Value of Assets / Actuarial Accrued Liability)	Actuarial Funding Amount, in billions (Actuarial Value of Assets—Actuarial Accrued Liability)	Expected Benefit Payments in 2017 Plan Year
Western Conference of Teamsters Pension Plan	597,850	Green Zone	53.4%	-\$33.1	91.2%	-\$3.7	\$2,726,459,000
National Electrical Benefit Fund	543,708	Green Zone	41.3%	-\$18.8	83.0%	-\$2.8	\$1,045,133,461
Central States, Southeast and Southwest Areas Pension Plan	384,921	Critical & Declining	27.3%	-\$40.7	37.8%	-\$25.7	\$2,901,677,461
Legacy Plan of The National Retirement Fund	365,132	Critical	33.3%	-\$4.5	66.3%	-\$1.2	\$325,591,184
IAM National Pension Fund	275,996	Green Zone	47.3%	-\$12.3	92.2%	-\$1.0	\$753,576,944
1199 SEIU Health Care Employees Pension Fund	258,519	Green Zone	40.9%	-\$14.2	82.5%	-\$2.2	\$895,050,680

Plan Name	Participants at End of Plan Year	Zone Status in 2017	Current Funded Percentage (Current Value of Assets / RPA '94 Current Liability)	Current Funding Amount, in billions (Current Value of Assets—RPA '94 Current Liability)	Actuarial Funded Percentage (Actuarial Value of Assets / Actuarial Accrued Liability)	Actuarial Funding Amount, in billions (Actuarial Value of Assets—Actuarial Accrued Liability)	Expected Benefit Payments in 2017 Plan Year
United Food and Commercial Workers Intl Union - Industry Pension Fund	222,979	Green Zone	55.5%	-\$4.7	102.0%	+\$0.1	\$404,169,568
U.F.C.W. Consolidated Pension Fund	218,246	Green Zone	46.1%	-\$4.5	90.9%	-\$0.4	\$308,594,286
Central Pension Fund of the IUOE and Participating Employers	197,860	Green Zone	46.8%	-\$17.8	94.3%	-\$1.0	\$1,087,815,379
Southern California UFCW Unions and Food Employers Joint Pension Trust Fund	179,494	Critical	37.8%	-\$7.5	72.1%	-\$1.9	\$454,040,762
Plumbers and Pipefitters National Pension Fund	145,842	Endangered	38.7%	-\$9.2	76.2%	-\$1.9	\$613,764,304
Sheet Metal Workers' National Pension Fund	138,096	Endangered	32.1%	-\$9.1	60.6%	-\$3.0	\$510,152,731

Plan Name	Participants at End of Plan Year	Zone Status in 2017	Current Funded Percentage (Current Value of Assets / RPA '94 Current Liability)	Current Funding Amount, in billions (Current Value of Assets—RPA '94 Current Liability)	Actuarial Funded Percentage (Actuarial Value of Assets / Actuarial Accrued Liability)	Actuarial Funding Amount, in billions (Actuarial Value of Assets—Actuarial Accrued Liability)	Expected Benefit Payments in 2017 Plan Year
UFCW - Northern California Employers Joint Pension	128,138	Critical	32.1%	-\$6.8	60.2%	-\$2.3	\$414,707,165
Steelworkers Pension Trust	114,138	Green Zone	44.4%	-\$5.2	81.2%	-\$0.9	\$275,229,076
Bakery and Confectionery Union and Industry International Pension Fund	110,714	Critical & Declining	36.3%	-\$7.5	54.7%	-\$3.6	\$653,412,457
S.E.I.U. National Industry Pension Fund	102,276	Critical	42.1%	-\$1.5	75.4%	-\$0.4	\$132,613,865
Building Service 32BJ Pension Fund	102,039	Critical	34.1%	-\$4.5	61.5%	-\$1.5	\$283,132,941
Sound Retirement Trust	98,263	Critical	42.2%	-\$3.1	78.3%	-\$0.6	\$178,410,175
Southern Nevada Culinary and Bartenders Pension Plan	97,395	Green Zone	51.1%	-\$2.0	92.2%	-\$0.2	\$161,694,076

Plan Name	Participants at End of Plan Year	Zone Status in 2017	Current Funded Percentage (Current Value of Assets / RPA '94 Current Liability)	Current Funding Amount, in billions (Current Value of Assets—RPA '94 Current Liability)	Actuarial Funded Percentage (Actuarial Value of Assets / Actuarial Accrued Liability)	Actuarial Funding Amount, in billions (Actuarial Value of Assets—Actuarial Accrued Liability)	Expected Benefit Payments in 2017 Plan Year
United Mine Workers of America 1974 Pension Plan	96,324	Critical & Declining	29.9%	-\$6.5	46.3%	-\$3.5	\$614,269,617
I 199SEIU Home Care Employees Pension Fund	88,238	Green Zone	53.9%	-\$0.3	93.4%	-\$0.03	\$28,053,188
Adjustable Plan of the National Retirement Fund	85,494	Green Zone	50.8%	-\$0.1	91.7%	-\$0.01	\$8,576,077
International Painters and Allied Trades Industry Pension Plan	84,877	Seriously Endangered	33.2%	-\$6.2	62.2%	-\$2.0	\$413,951,740
Motion Picture Industry Pension Plan	84,389	Green Zone	31.2%	-\$7.5	67.4%	-\$1.9	\$305,644,000
Bricklayers & Trowel Trades International Pension Fund	76,523	Endangered	38.3%	-\$2.3	65.1%	-\$0.8	\$162,267,691

Source: CRS analysis of Form 5500 data for the 2017 Plan Year (data last modified February 28, 2020).

Notes: *Funded percentage* is a measure of a plan's ability to pay benefits owed based on the plan's assets (e.g., a funded percentage of 100% indicates that a plan's current value of assets is adequate to cover the present value of future owed benefits). *Funding amount* is the difference between the plan's assets and present value of future benefits owed. A negative funding amount indicates that a plan is underfunded. Two separate funded percentage and plan underfunding measures are included in the table: one uses the current value of assets (Schedule MB, Line 2a) and the RPA '94 current liability (Schedule MB, Line 2b(4)(2)), and the other uses the actuarial value of

assets (Schedule MB, Line 1b(2)) and the actuarial accrued liability (Schedule MB, Line 1(c)(3)). Plans report two values of assets and two values of liabilities: the actuarial value and current value of assets and the actuarial value and the current value (RPA '94) of liabilities. The two values of assets are generally similar. The two values of liabilities often differ. The main difference is the value of the discount rate that is used to value plan liabilities. The actuarial valuation of liabilities typically discounts them using the expected return on assets. The RPA '94 current liability (named for the Retirement Protection Act of 1994) uses a lower discount rate, based on interest rates on 30-year Treasury securities. The RPA '94 valuation method results in a higher valuation of plan liabilities compared to the actuarial valuation method. Number of participants are found on Schedule MB, Line 2b(4)(1). Expected benefit payments are found on Schedule MB, Line 1d(3).

5% Contributors

Some employers participate in more than one multiemployer DB pension plan, and the insolvency of one plan in which a particular employer participates could have implications for the other plans in which that employer also participates. For example, an employer that leaves a multiemployer plan generally has to pay withdrawal liability, which is the employer's share of unfunded benefits in that plan.²⁵ An employer that withdraws from a plan may be required to acknowledge the withdrawal liability in its financial statements, potentially affecting the employer's access to credit and its financial health.²⁶ Other multiemployer plans that receive contributions from an employer that is considered a large contributor could be affected if that employer is forced to withdraw from those plans because of financial difficulties.

Schedule R, Part V, Line 13 of Form 5500 requires multiemployer DB plans to list employers that contribute more than 5% of that plan's total contributions (referred to in this report as "5% contributors"). Employer contributions listed in Form 5500 include (1) regular employer contributions (for employers with active participants in the plan) and (2) employer withdrawal liability (for employers that have withdrawn from the plan).²⁷ For the purposes of calculating the 5% threshold, it is unclear whether plans should include withdrawal liability in the calculations. PBGC indicated that its staff's view was that withdrawal liability should not be included in the calculations and that other agencies were considering the issue in possible revisions to Form 5500.²⁸

In addition to the employer's name, the form lists each employer's Employer Identification Number (EIN)²⁹ and dollar amount contributed.³⁰

Of the 1,355 plans that indicated they were multiemployer DB pension plans, 1,161 plans indicated that they had at least one 5% contributor in 2017. Among plans with at least one 5% contributor, the median number of 5% contributors was four. **Table 5** lists employers whose

²⁵ For more on withdrawal liability, see <https://www.pbtc.gov/prac/multiemployer/withdrawal-liability>, or Charles B. Wolf and Patrick W. Spangler, *Withdrawal Liability To Multi-Employer Pension Plans Under ERISA*, Vedder Price P.C., <https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2015/05/updates-to-withdrawal-liability-to-multiemployer-p/files/2015-withdrawal-liability-to-multiemployer-pension/fileattachment/2015-withdrawal-liability-to-multiemployer-pension.pdf>.

²⁶ See, for example, Hazel Bradford, *Groups Tackle Multiemployer Plans' Withdrawal Liability*, Pensions and Investments, July 8, 2013, <http://www.pionline.com/article/20130708/PRINT/307089995/groups-tackle-multiemployer-plans-withdrawal-liability>; or McGuire Woods, *FASB Updates Multiemployer Plan Disclosure Requirements: Estimate of Withdrawal Liability Not Required*, September 28, 2011, <https://www.mcguirewoods.com/Client-Resources/Alerts/2011/9/FASB-Updates-Multiemployer-Plan-Disclosure-Requirements-Estimate-of-Withdrawal-Liability-Not-Required.aspx>.

²⁷ Attached to each Form 5500 available via search on the DOL website is the plan's audited financial statements report. Plans' financial statements sometimes report the amount of contributions from active employers and the amount of contributions that are withdrawal liability.

²⁸ See American Bar Association, Joint Committee on Employee Benefits, *Q&A Session with PBGC*, May 9, 2012, Question 31, https://www.americanbar.org/content/dam/aba/events/employee_benefits/2012_pbtc_final.authcheckdam.pdf.

²⁹ An EIN is a number issued by the IRS to identify a business entity. See *Employer ID Numbers* available at <https://www.irs.gov/businesses/small-businesses-self-employed/employer-id-numbers>.

³⁰ CRS examined the Schedule R data and made edits where appropriate. CRS first grouped employers based on the listed EIN. Employers that appeared on multiple Schedule Rs (e.g., they were 5% contributors in more than one plan) were sometimes spelled differently. For example, the United Parcel Service also appeared as United Parcel Services, UPS, and United Parcel Service Inc.

contributions as 5% contributors totaled \$25 million or more in 2017.³¹ Note that an employer's total contributions to all of the multiemployer plans to which it contributed could have been larger than the amount listed in **Table 5** if the employer contributed to additional plans, but whose contributions to those other plans were less than 5% of a plan's total contributions.³²

The United Parcel Service (UPS) is the largest 5% contributor in terms of the dollar amount of contributions as a 5% contributor. A number of grocery chains contributed at least \$25 million as 5% contributors: Kroger, Albertsons/Safeway, and Giant Food are among the 10 largest 5% contributors (as ranked by contributions as 5% contributors).³³

Table 5. Employers That Contributed at Least \$25 Million as 5% Contributors in the 2017 Plan Year

Employer	Amount of Contributions as a 5% Contributor	Number of Plans to Which Company Contributes at Least 5% of Total Contributions
United Parcel Service	\$1,819,291,390	26
Kroger	\$400,171,814	16
Albertsons/Safeway	\$327,770,305	17
SSA Marine, Inc.	\$139,661,920	14
Otis Elevator Company	\$112,402,669	1
ABF Freight System	\$110,993,664	10
Mount Sinai Medical Center	\$106,136,549	4
Montefiore Medical Center	\$93,962,953	3
Thyssenkrup Elevator	\$93,902,111	1
Giant Food	\$89,062,316	8
Twentieth Century Fox	\$77,849,927	6
Schindler Elevator Corporation	\$75,986,271	2
New York Presbyterian Hospital	\$75,731,033	2
Maersk Lines	\$71,121,939	8
Arcelor Mittal	\$69,165,334	1
Long Island Jewish Hospital	\$66,456,326	1
Kone, Inc.	\$64,356,471	1
Total Terminals International	\$61,239,682	2
United States Steel Corporation	\$58,767,259	1

³¹ Total contributions include both employer and employee contributions. Most contributions to multiemployer contributions are from employers. CRS analysis of the Form 5500 data indicated that among plans that filed Schedule MB, 1.5% had employee contributions in 2017. Among multiemployer DB plans that had employee contributions in 2017, employee contributions were 1.7% of the plans' total contributions.

³² It is not possible to determine the contribution amounts of employers that contributed 5% or less of total contributions to a plan.

³³ Safeway and Albertsons merged in 2015. In many instances, CRS included a grocery store subsidiary as belonging to its parent company (e.g., employer contributions from Ralphs were combined with Kroger's contributions because Ralphs is a subsidiary of Kroger).

Employer	Amount of Contributions as a 5% Contributor	Number of Plans to Which Company Contributes at Least 5% of Total Contributions
Bimbo Bakeries	\$56,097,114	12
Walt Disney	\$54,233,474	7
Warner Bros. Pictures	\$52,386,469	3
Marine Terminals Corporation	\$51,152,290	8
Eagle Marine Services Limited	\$51,066,866	1
United Airlines	\$50,071,833	1
Acco Engineered Systems	\$48,394,739	10
Precision Pipeline	\$48,159,767	8
Stater Brothers Market	\$47,107,280	1
NBC Universal City Studios	\$43,947,331	4
Pacific Crane Maintenance Co.	\$41,759,933	1
Everport Terminal Services	\$41,587,237	1
YRC Worldwide	\$40,784,968	9
Savemart Supermarkets	\$40,050,462	1
Allina Health System	\$38,696,657	4
Crowley Marine Services	\$36,796,397	3
UFCW International Union	\$36,168,000	1
CH2M Hill Plateau Remediation Company	\$35,319,001	1
Intrepid Personnel & Provisioning	\$34,567,245	2
Shoprite	\$34,362,509	27
NYU Hospital Center	\$33,508,227	2
Washington River Protection Solutions, LLC	\$32,517,828	1
American Building Maintenance	\$31,783,597	6
Mission Support Alliance LLC	\$31,645,484	1
Spirit Aerosystems, Inc	\$30,604,125	1
Matson Navigation Company	\$30,435,377	10
Tote Services Inc.	\$29,008,003	2
Supervalu	\$28,843,789	9
Rosendin Electric	\$28,838,177	10
Hilton	\$27,288,285	13
Kiewit	\$26,757,481	21
Brand Energy Services	\$25,470,742	12
Raley's Supermarkets	\$25,450,681	1

Source: CRS analysis of Form 5500 data for the 2017 plan year (data last modified February 28, 2020).

Notes: An employer's contributions to all multiemployer plans to which it contributed in 2017 could have been larger if the employer was not a 5% contributor in some additional plans. In many instances, CRS investigated whether a large company had any subsidiaries (and conversely, whether an employer belonged to a parent company). In cases where CRS found that an employer had one or more subsidiary companies, subsidiary employer contribution amounts were combined with the parent company. This occurred frequently in certain industries, such as grocery, hospitality, and entertainment. For example, Shoprite had over 10 separate subsidiaries (e.g., with employer names such as "Saker ShopRite" or "S/R Collitas") that were combined into one encompassing "Shoprite" contribution for the purposes of this table.

5% Contributors in the Largest Critical and Declining Multiemployer DB Plans

Table 6 lists the 5% contributors in the 12 largest multiemployer DB plans that are in critical and declining status (ranked by the amount of total contributions to the plan for the 2017 plan year) and the number of plans in which each employer is a 5% contributor.

Table 6 also lists the amount of the employer's contributions, the total number of contributing employers to the plan, the total amount of contributions to the plan, and the amount of contributions from 5% contributors as a percentage of total plan contributions. Total plan contributions include both required employer contributions and withdrawal liability, although plans might not include withdrawal liability payments when determining 5% contributors.³⁴

³⁴ The Form 5500 data do not list separately contributions from withdrawal liability and required employer contributions.

Table 6. Contributions and 5% Employers in the 12 Largest Critical and Declining Multiemployer DB Pension Plans, Ranked by Total Contributions in 2017 Plan Year

Plan Name 5% Contributors (number of plans to which company is 5% contributor)	Contributions by 5% Contributors	Number of 5% Contributors	Total Number of Contributors^a	Total Plan Contributions	Contributions by 5% Contributors as a Percentage of Total Contributions
Central States, Southeast and Southwest Areas Pension Plan		2	1,325	\$809,879,331	14.0%
ABF Freight System (10)	\$77,823,194				
YRC Worldwide (9)	\$35,454,032				
New England Teamsters & Trucking Industry Pension		1	378	\$365,798,439	43.7%
United Parcel Service (26)	\$160,023,139				
New York State Teamsters Conference Pension & Retirement Fund		1	174	\$184,153,612	54.2%
United Parcel Services (26)	\$99,732,835				
Bakery & Confectionery Union & Industry International Pension Fund		5	192	\$165,190,396	60.4%
Bimbo Bakeries (12)	\$37,781,659				
Mondelez Global LLC (2)	\$22,489,252				
Albertsons/Safeway (17)	\$16,883,046				
Kroger (16)	\$12,371,034				
United States Bakery (1)	\$10,256,692				
United Mine Workers of America 1974 Pension Plan		3	40	\$112,301,000	22.0%
Murray Energy (1)	\$17,916,448				
Drummond Company, Inc. (1)	\$3,715,796				
Pinnacle Mining Company, LLC (1)	\$3,025,659				

Plan Name 5% Contributors (number of plans to which company is 5% contributor)	Contributions by 5% Contributors	Number of 5% Contributors	Total Number of Contributors^a	Total Plan Contributions	Contributions by 5% Contributors as a Percentage of Total Contributions
Western Pennsylvania Teamsters and Employers Pension Fund		1	115	\$66,777,902	44.5%
United Parcel Service (26)	\$29,705,920				
FELRA & UFCW Pension Plan		2	3	\$49,915,380	86.6%
Giant Food (8)	\$25,609,327				
Albertsons/Safeway (17)	\$17,597,148				
GCIU – Employer Retirement Benefit Plan		1	206	\$36,633,728	1.3%
Chicago Tribune Company (B,C) (I)	\$486,639				
Automotive Industries Pension Plan		3	144	\$34,424,825	22.5%
Gillig Corporation (I)	\$2,803,190				
SSA Marine, Inc. (14)	\$2,777,784				
United Parcel Service (26)	\$2,161,784				
Graphic Communications Conference of the International Brotherhood of Teamsters National Pension Plan		0	93	\$31,533,131	0%
No 5% employers	n/a				
National Integrated Group Pension Plan		2	168	\$22,020,540	7.0%
IAC Mendon LLC. (I)	\$894,325				
Tri County Electric Co., Inc. (I)	\$655,274				

Plan Name 5% Contributors (number of plans to which company is 5% contributor)	Contributions by 5% Contributors	Number of 5% Contributors	Total Number of Contributors^a	Total Plan Contributions	Contributions by 5% Contributors as a Percentage of Total Contributions
United Food and Commercial Workers Union & Employers Midwest Pension Fund		3	60	\$21,432,926	18.5%
Schnucks Markets (7)	\$2,428,262				
Supervalu (9)	\$1,112,081				
Comprehensive Systems, Inc. (1)	\$414,767				

Source: CRS analysis of Form 5500 data for the 2017 plan year (data last modified February 28, 2020).

Notes: A 5% contributor is an employer that contributed more than 5% of a plan's contributions. Multiemployer plans might or might not include withdrawal liability calculations in calculating the 5% threshold for employer calculations. The Pension Benefit Guaranty Corporation (PBGC) indicated that, in the view of PBGC staff, withdrawal liability was not meant to be included in the calculations; but PBGC indicated that the issue involved other federal agencies, which were considering a possible revision to Form 5500. See American Bar Association, Joint Committee on Employee Benefits, *Q&A Session with PBGC*, May 9, 2012, Question 31, at https://www.americanbar.org/content/dam/aba/events/employee_benefits/2012_pbgc_final.authcheckdam.pdf. For the purposes of this table, total plan contributions are taken from Schedule MB of Form 5500, which include withdrawal liability and required employer contributions.

- a. Plans report the total number of contributors to the plan on the Form 5500. In some cases, the actual number of contributors may be less than the reported number, since it is possible that plans identify subsidiaries as separate employers rather than aggregate them under a parent company.

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EXHIBIT B

Central States, Southeast and Southwest Areas Pension Plan

Item #18

Does the application include information on past and current measures taken to avoid insolvency.
See section 5.01.

Information on past and current measures taken to avoid insolvency is attached as document number 18.

SECTION 5. PLAN SPONSOR DETERMINATION RELATING TO REASONABLE MEASURES TAKEN TO AVOID INSOLVENCY

With respect to the plan sponsor's determination required under section 3.03 of this revenue procedure that the plan is projected to become insolvent unless benefits are suspended, the application must include the following information:

.01 Measures taken to avoid insolvency. A detailed description of measures taken in order to avoid insolvency over the past 10 plan years immediately preceding the plan year in which the application is submitted.

As described in detail below, the Trustees have taken all reasonable measures to avoid insolvency of the Plan. Because Congress has provided that the Trustees must take all reasonable measures to avoid insolvency, the Trustees determined that they must take those measures that are feasible under the Plan's particular circumstances and likely to further the statutory goal of avoiding insolvency, but that they need not take measures that, while theoretically available, would in practice not promote the goal of avoiding insolvency.

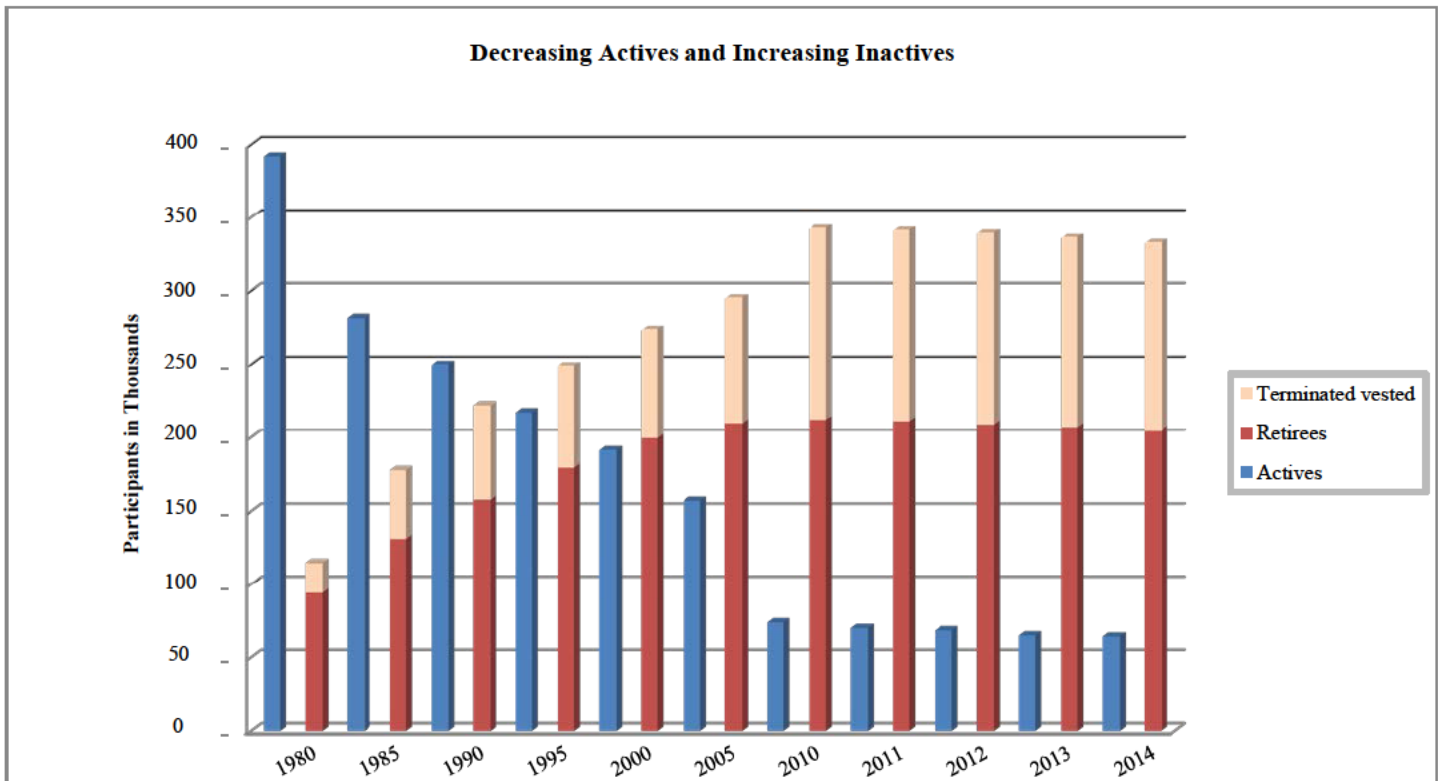
The primary measures available to the Trustees to allow the Plan to avoid insolvency are contribution rate increases and benefit reductions.¹ Over the past years and decades, the Trustees have worked with the bargaining parties to develop sustainable combinations of contributions and benefit levels. In doing so, however, both the Trustees and the bargaining parties are constrained by what the active, voting members of the union can reasonably be expected to accept and by what the employers can afford to pay.

In particular, the Trustees' ability to increase the annual contribution rate is limited by the rate that employers can afford to pay and not be compelled to withdraw from the Plan. Although withdrawal liability is generally intended to put the plan in the same position it would have been had the employer continued to contribute and to fund its share of the plan's unfunded benefit liabilities, in practice withdrawal liability often fails to achieve that goal, for reasons discussed in detail below. Therefore, the Trustees did not consider a measure to be reasonable if it would impose contribution increases so great that they would precipitate employer withdrawals, thereby further undermining the actuarial soundness of the Plan.

¹ In theory, reducing administrative expenses and increasing investment returns could also improve the funded status of the Plan. However, as one of the largest multiemployer pension plans in the United States, the Plan enjoys substantial economies of scale, and the Plan's administrative expenses already are very low. Annually, expenses are only about 1.35 percent of annual benefit payments. Even if *all* expenses of administering the Plan could be and were eliminated, the savings would be vastly insufficient to allow the Plan to avoid the projected insolvency. With respect to investments, the Plan's assets, pursuant to a consent decree between the Plan and the Department of Labor, are managed by several major financial institutions that are screened by the Department of Labor and approved by a federal judge. Those financial institutions maintain exclusive management and control over the Plan's investment function.

For this reason, the ongoing determination of which measures would aid the Plan in avoiding insolvency, and therefore would be reasonable to pursue, has required in-depth consideration by the Trustees of economic and industry conditions as they have developed over the recent years and decades, beginning with the passage of the Motor Carrier Act in 1980. With that Act, Congress took the first and most significant step toward complete deregulation of the trucking industry. Deregulation exposed the Plan's Contributing Employers (then numbering 11,657) to intense competition, as hundreds of new trucking companies were formed. According to the IRS, "It became increasingly difficult for the trucking companies to operate with union drivers. Their compensation is usually 35 percent more than non-union drivers. To reduce operating costs, new corporations were formed to operate with non-union drivers or independent contractors." "Trucking Industry Overview" (MSB 04-1107-075) (www.irs.gov/Business/Trucking-industry-overview-history-of-trucking).

The effects of deregulation were severe and continue to impact the Plan today. In the decade following deregulation, one third of the 100 largest trucking companies were forced out of business. Of the 50 largest Contributing Employers that participated in the Plan in 1980, almost all are out of business and only 3 contribute to the Plan today. More than 600 trucking companies that contributed to the Plan have gone bankrupt since 1980, and thousands of others have gone out of business without filing for bankruptcy. While in 1980 there was only one retiree for every four active employees in the Plan, today that ratio has flipped, and there are 5.2 retired or inactive participants for every active employee, as reflected in the chart below.



Although the ratio of actives to retirees had steadily decreased since deregulation, actives continued to outnumber retirees until the late 1990s. Then in 1999, the trucking industry entered a particularly difficult period. *Id.* A price collapse in the used truck market, along with skyrocketing fuel prices and an ongoing driver shortage, led to widespread bankruptcies among trucking companies. *Id.* On top of those difficulties, in 2000, the “tech bubble” burst, sending the stock market and the U.S. economy generally into steep decline. *Id.*

The economy entered a recession in March of 2001, and the industry experienced another rash of bankruptcies in this period. *Id.* An overabundance of used trucks, the worsening economy, and high diesel prices combined to push profit margins downward. *Id.* In 2002, Consolidated Freightways, once the nation’s largest long-haul trucking company and, at that time, among the largest Contributing Employers to the Plan, filed for bankruptcy, at the cost of more than 15,000 trucking jobs. *Id.* Meanwhile, the ongoing recession caused the Plan to experience investment returns far below its long term return assumption in 2000, 2001, and 2002, which erased the majority of the considerable gains the Plan had experienced during the tech boom. *Id.*

As the economy struggled to recover in 2003, the average price of a gallon of diesel fuel hit a record high. *Id.* Between 2001 and 2003, 11,500 trucking companies went out of business. *Id.* Another major Contributing Employer, Fleming Foods, withdrew from the Plan, and, together with Consolidated Freightways, failed to pay \$290 million of a total of more than \$403 million in withdrawal liability. By the end of 2003, only 3,172 of the 11,687 Contributing Employers that the Plan relied upon in 1980 remained, and the Plan was projected to experience annual funding deficiencies as early as 2004.

In response, the Trustees took a number of significant measures on both the benefits side and the contribution side of the equation to improve the Plan’s actuarial soundness going forward. Effective January 1, 2004, the Trustees amended the Plan to provide that the contribution-based benefit accrued by a participant would be reduced going forward from 2 percent of the contributions his employer made on his behalf to 1 percent of those contributions. In addition, the Trustees froze early retirement and “and-out” pensions at an amount based on years of service earned at that point, while still allowing participants to grow into eligibility for a portion of those benefits by earning additional years of service. Finally, the Trustees froze the various “Classes” of Contributory Service Pensions, meaning that the Plan would no longer allow any bargaining unit to bargain up to a higher Benefit Class.

On the contribution side, the Trustees worked with the bargaining parties to the major national contracts (National Master Freight Agreement (“NMFA”) and National Master Auto Transporter’s Agreement (“NMATA”), and National Master UPS Agreements) to reallocate employee benefit plan contribution rate increases from health plan contributions to the Plan from 2004 through 2007, resulting in additional revenue of approximately \$500 million per year to the Plan during that period.

Despite these measures, the Plan’s actuary estimated that the Plan faced a \$1.3 billion funding deficiency for plan year 2004, along with significant funding deficiencies in subsequent years. The Trustees concluded that imposition of this liability, along with associated excise taxes,

on the Plan's Contributing Employers would have caused additional catastrophic business failures among those employers, accelerating the deterioration of the Plan's own financial condition. As a result, in January 2004, the Plan filed a request with the Internal Revenue Service for a 10-year extension of the period for amortizing liabilities.

In 2004, the economy was finally on the path to recovery, and carriers experienced increased demand, particularly late in the year. *See* Trucking Industry Overview. Due to the recent years of contraction in the industry, however, many carriers lacked sufficient drivers to meet this increased demand. *Id.* As a result, they were forced to increase driver compensation. *Id.* Meanwhile, in summer and fall of 2004, diesel prices, pushed higher as a result of the Iraq War, repeatedly reached record highs. *Id.*

Entering the 10-year period immediately prior to the year of this application, the population of active participants had declined so that there were 156,744 active participants, 208,666 retirees, and 86,213 inactive participants. Compared to the roughly 11,657 employers that contributed to the Plan in 1980, only 2,783 contributed in 2005, a decline of nearly 80 percent.

On July 13, 2005, the IRS granted the Plan's request for an amortization extension, subject to the Plan satisfying certain funding targets going forward. To meet those funding targets and set the Plan on a stable path, the Trustees recognized, it would be necessary to couple the benefit reductions made in the previous year with contribution increases going forward. Thus, in November 2005, the Trustees determined to accept renewals of collective bargaining agreements expiring in 2006 only if they included compound contribution rate increases of 7 percent per year for the duration of the renewal agreement.

Meanwhile, the price of diesel fuel had more than doubled since 2002, and the trucking industry experienced a significant shortage of drivers in the wake of new post-9/11 government security regulations that made obtaining and maintaining certain licenses and certifications more difficult. *Id.*

Similarly in 2006, diesel prices hit new record highs, and regulatory issues continued to burden the trucking industry. *Id.* The economy was strong, however, and the Trustees determined that it was reasonable to require additional contribution increases of the Plan's Contributing Employers. In November 2006, the Trustees determined to accept renewal agreements for those CBAs expiring in 2007 only if they provided for compounded 8 percent annual contribution rate increases.

In 2007, United Parcel Service ("UPS") withdrew from the Plan. Although UPS paid its withdrawal liability in full, the withdrawal resulted in a loss of 44,400 active participants in the Plan. This in turn resulted in a loss of more than \$500 million in contribution revenue (which constituted about one third of total contribution revenue at that time).² The loss of a substantial

² Taking into account scheduled contribution rate increases, the current loss of annual revenue due to UPS's withdrawal is nearly \$800 million, not considering that UPS has likely experienced growth in bargaining unit members since withdrawal. This current amount of lost contribution

portion of the active population made the Plan more vulnerable to future investment losses. (Unfortunately, this withdrawal could not have come at a worse time for the Plan, as dramatic investment losses occurred in the very next year.) Nonetheless, the aggressive measures the Trustees had taken in recent years to increase income and reduce liabilities had set the Plan on a path toward full funding. As of January 1, 2008, the Plan's actuaries projected that the Plan would be fully funded by 2029, assuming normal investment returns.

Unfortunately, 2008 was a far from normal year in terms of investment returns, and the Plan, like practically all investors, experienced significant losses in the wake of the stock market collapse. The Plan suffered investment losses of \$7.6 billion that year. This forced the Plan to expend \$1.8 billion—the amount by which benefits exceeded contributions that year—out of principal.

The Pension Protection Act of 2006 ("PPA") took effect in 2008, providing the Trustees with additional tools to help address the Plan's financial difficulties. In March 2008, the Plan's actuary certified the Plan to be in critical status under PPA. In developing their rehabilitation plan as required by PPA, the Trustees concluded that, having recently imposed the significant benefit reductions and contribution increases discussed above, mandating the additional benefit cuts and/or contribution increases that would be necessary to emerge from critical status by the end of the 10-year rehabilitation period would not be reasonable because it would substantially accelerate the rate at which employers would withdraw from the Plan.

In reaching this conclusion, the Trustees considered the views of the International Brotherhood of Teamsters ("IBT"), the collective bargaining representative of active employees. The IBT submitted a letter to the Trustees on this topic, stating that, if the Plan adopted "a contribution schedule at this time or in the reasonably foreseeable future which would require additional benefit cuts, the result would be a serious erosion of support for the Fund among the rank-and-file Fund participants and their bargaining representatives." February 19, 2008 Letter from C. Thomas Keegel to Thomas C. Nyhan. The IBT further explained that "it would be virtually impossible to obtain membership support for a proposal which combines increased benefit contributions (and lower or no wage increases) with pension benefit cuts. If confronted with an employer's insistence on such a proposal, . . . members would likely become receptive to suggestions from their employers that they should simply bargain out of the Fund completely." *Id.*

The Trustees also recognized that active employees already had borne a 50 percent reduction in their benefit accrual rate as a result of the benefit changes adopted effective January 2004. At the same time, their ability to earn additional fully-subsidized early retirement benefits was frozen. Coupled with the greater contribution rate increases agreed to during the same time period, the Trustees concluded that bargaining parties may be at or near the limit of their ability and willingness to agree to further benefit reductions for active participants.

Because additional contribution rate increases would be likely to cause employers to withdraw, the Trustees considered whether withdrawal liability would fully compensate the Plan

revenue would be nearly 150% of current actual contribution revenue.

for any loss of employers resulting from application of the benefit reductions and contribution increases necessary to emerge from critical status by the end of the rehabilitation period. As noted above, employers often do not pay the entire amount of their withdrawal liability. Indeed, Congress recognized as much when it created a separate tier under MPRA for benefits attributable to an employer that has withdrawn from the plan and failed to pay the full amount of its withdrawal liability. Despite the Trustees' vigorous collection efforts, the Plan's projected collection rate for future withdrawn employers was 25 percent of the assessed withdrawal liability.

As noted above, withdrawal liability often fails to compensate a plan for unfunded vested benefits ("UVBs") for a number of reasons. First, even if all employers complied with all statutory requirements of ERISA and made all of their withdrawal liability payments, the duration of the payments is capped at 20 years, even if the payments do not pay the employer's full share of the UVBs. ERISA § 4219(c)(1)(B). Other rules further limit collection of an employer's full share of UVBs. *See, e.g.*, ERISA § 4209 (reducing employer's UVBs by *de minimis* amount), § 4225 (limiting UVBs allocable to employer based on employer liquidation or insolvency).

Second, the addition of withdrawal liability to an employer's debt load could cause the employer to file for bankruptcy. The Internal Revenue Service ("IRS") acknowledged this risk in connection with the Plan's amortization extension. *See* July 13, 2005 Letter to Thomas C. Nyhan from James E. Holland, Jr. ("Extension Letter"). The Extension Letter explains that, according to information submitted with the application for an extension, "if the extension is not granted, the potential increases in employer contributions necessary to avoid funding deficiencies . . . would severely harm the majority of the contributing employers to the plan. The authorized representative of the Fund represents that, in many cases, the additional expenses would wipe out the net income of the employers and potentially force them into bankruptcy. The additional expense and cash outflows would likely cause many employers to violate debt covenants or hamper their access to credit markets further straining their financial conditions." *Id.* at 4. In bankruptcy, the Plan has historically collected roughly 23.5 cents per dollar of assessed withdrawal liability, and several bankruptcies of large employers in recent years are likely to cause this figure to decline to less than 5 cents on the dollar.

Indeed, the risk of bankruptcy by Contributing Employers was high at this time even absent the imposition of further contribution increases. The Trustees recognized that 2008 had been a particularly difficult year for trucking companies due to factors such as the high cost of diesel fuel, a major expense of trucking companies. *See* Hearing Before the Subcomm. on Highways and Transit of the H. Comm. on Transportation and Infrastructure (July 9, 2008) (statement of Michael J. Smid, President and Chief Executive Officer, YRC North American Transportation) (hereinafter "Congressional Subcomm. Hearing"). Bankruptcies in the trucking industry had been on the rise in 2008, with June numbers showing a 143 percent increase over the previous year. Samantha Bomkamp, *Analysts Say Trucking Capacity Cutbacks and Bankruptcies to Speed Up and Help Balance Industry*, Associated Press, June 9, 2008. Nearly 1000 trucking companies with at least five trucks failed in the first quarter of 2008 alone. *See* Congressional Subcomm. Hearing.

Finally, each employer withdrawal shrinks a plan's contribution base. A smaller number of employers will likely be less able to absorb any contribution rate increases that become necessary in the future. Similarly important, as the number of Contributing Employers shrinks, the plan becomes more heavily dependent on investments, which makes the plan's source of income less diverse and riskier. As the number of active participants shrinks, each active participant must bear a greater share of the plan's liabilities. Employer withdrawals also lead to a shrinking asset base as benefit payments far exceed contribution income, so that as the market recovers there is less opportunity for the plan to realize gains.

Applying the draconian measures that would have been required for the Plan to emerge from critical status in ten years, the draft 2008 ten-year default schedule and alternative ten-year schedules projected that the number of active participants at emergence from critical status would decrease from approximately 100,000 to roughly 38,000, at best, and possibly as low as 12,000. The Trustees concluded that as the number of active participants and Contributing Employers to the Plan shrinks, remaining employers would likely become concerned about being the "last man" in the Plan. This, in turn, could cause additional employers to withdraw and lead to a downward spiral of withdrawals, ending in a mass withdrawal and termination of the Plan.

For these reasons, the Trustees concluded that the contribution increases and/or benefit reductions necessary to allow the Plan to emerge from critical status by the end of the rehabilitation period would cause employers to withdraw from the Plan and increase the risk of a catastrophic downward spiral toward eventual mass withdrawal. On this basis, the Trustees instead developed primary and default schedules of contribution increases and reductions to adjustable benefits designed to allow the Plan to emerge from critical status by the year 2028. The Primary Schedule maintained the current pension benefit levels for all bargaining units that adopted it, and generally required that all Contributing Employers and bargaining units agree to five years of compounded eight percent annual contribution rate increases, three years of six percent compounded increases, and then continuous four percent compounded annual increases. The Default Schedule required continuous compounded annual rate increases of four percent but eliminated all adjustable benefits under PPA (essentially any benefits other than those already in pay status prior to 2008, disability benefits in pay status at any time, and the accrued benefits (*i.e.*, Contribution Based Pensions) payable at age 65). In addition, bargaining units that voluntarily withdraw from the Plan, or are complicit in a withdrawal (called a "Rehabilitation Plan Withdrawal"), incur the elimination of all adjustable benefits).

In 2009, as a result of the stock market declines and global economic crisis, the Plan was not only certified to be in critical status under PPA, but was for the first time projected to become insolvent. The Plan's actuaries projected that the Plan would become insolvent in 2022. Recognizing the impact that the financial crisis would have on multiemployer plans, Congress had, in 2008, passed the Worker Retiree and Employer Recovery Act, which permitted plans to elect an exemption from updating their rehabilitation plans. Upon concluding that the Plan's Contributing Employers could not withstand additional contribution increases in the midst of the financial crisis, the Trustees elected to take advantage of that exemption. They continued the measures already in place to improve the Plan's funded status, including those in the existing

rehabilitation plan, and they sought a waiver of certain conditions of the 2005 amortization extension.³

For the 2010 plan year, the Plan's actuary again certified the Plan to be in critical status. Concluding that the contribution increases necessary to emerge from critical status would not constitute reasonable measures to improve the Plan's funded status but rather would accelerate possible insolvency by driving Contributing Employers out of business, the Trustees adopted schedules of benefit reductions and contribution increases designed to allow the Plan to forestall possible insolvency by the year 2023. In addition, the 2010 rehabilitation plan increased the minimum retirement age under the Plan to 57, effective after July 1, 2011.

Also as part of the 2010 rehabilitation plan update process, the Plan engaged Stout Risius Ross ("SRR"), a financial consulting firm, to study the capacity of the Plan's Contributing Employers to continue to absorb contribution rate increases. In November 2010, SRR reported to the Trustees that a number of the Plan's larger, publicly-traded Contributing Employers—whose pension contribution rates were already (or would soon be) at \$342 per week under the NMFA and \$348 per week under the NMATA—could not reasonably be expected to absorb additional contribution rate increases. Accordingly, in November 2010, the Trustees approved an amendment to the rehabilitation plan that froze the top NMFA and NMATA rates at such levels. For other Contributing Employers, the \$342 per week rate became the maximum rate necessary to be deemed to be in compliance with the Primary Schedule without the need for additional rate increases.

During this time period, the Trustees recognized that the trucking industry, along with the rest of the economy, was struggling through the recession and the slow recovery from that economic low. *See* Trucking Economic Review, American Trucking Association, Inc., at 4 (July 22, 2011) ("[C]arriers are getting hit very hard with price increases and have to contain costs as much as possible; otherwise, bottom-lines are going to suffer dramatically. . . . [T]here is no denying that trucking, like the rest of the economy, hit a soft patch so far this year."). Carriers faced continued high fuel costs throughout 2011 as the result of political uncertainty in the Middle East and other economic forces. *See* Harnessing American Resources to Create Jobs and Address Rising Gasoline Prices: Impacts on Businesses and Families, Statement of William P. Graves on behalf of the American Trucking Association before the U.S. House of Representatives Committee on Natural Resources (Mar. 31, 2011) ("Graves Statement"), at 3-5; Critical Issues in the Trucking Industry – 2011, The American Transportation Research Institute (Oct. 2011) ("Critical Issues"), at 7 (citing an industry report finding that "fuel and oil was the second highest motor carrier cost center after driver wages and benefits"). The Trustees understood that the trucking industry is "a highly competitive industry with very low profit margins" and that "the price of diesel fuel and motor carrier failures are highly correlated." Graves Statement at 2-3. The Trustees recognized that many trucking companies would not be able to withstand these increased economic pressures.

During this difficult economic time, the Trustees continued to seek innovative solutions to minimize employer withdrawals from the Plan. In particular, the Trustees in February 2011

³ The waiver request remains pending with the Internal Revenue Service ("IRS").

adopted a special “Distressed Employer Schedule” under the rehabilitation plan to avoid the withdrawal of one of the major Contributing Employers to the Plan, YRC, Inc. and its affiliates (“YRC”). YRC, which at that time had more than 14,000 active participants in the Plan, had suffered a severe financial decline and become severely delinquent in its contributions to the Plan. The Distressed Employer Schedule allowed YRC to continue to contribute to the Plan at a reduced contribution rate (25 percent of the previously-agreed rate) without contribution rate increases, in exchange for benefit reductions approximately equivalent to those required under the rehabilitation plan’s Default Schedule. The Trustees approved the Distressed Employer Schedule and applied it to YRC because they determined, based on rigorous financial and actuarial analysis, that (a) YRC would likely liquidate in bankruptcy (with minimal or no recovery of withdrawal liability by the Plan) unless the Trustees approved the application of the Distressed Employer Schedule, and (b) the Plan was better off financially with YRC’s continued participation in the Plan than under a scenario in which the Plan insisted on higher contribution rates that resulted in the dissolution and withdrawal of YRC.

Also in 2011, the Trustees took an additional innovative step designed to encourage continued participation in the Fund and increase withdrawal liability collections. In October, the Trustees obtained approval by the Pension Benefit Guaranty Corporation (“PBGC”) to use an alternative method of determining employer withdrawal liability. Under this alternative method, a current Contributing Employer can effectively limit its exposure to future withdrawal liability growth by paying the current withdrawal liability amount in a lump sum and then continuing to contribute to the Plan as a “New Employer.” An employer that is not currently contributing to the Plan and does not owe any outstanding withdrawal liability or other obligations to the Plan can also qualify as a New Employer and become eligible for the alternative withdrawal liability method. Under this alternative (or “hybrid”) method approved by the PBGC, the New Employers’ withdrawal liability is to be determined based on the benefits accrued by each New Employer’s employees, plus a proportionate share of any underfunding that develops among the New Employers as a whole (the “New Employer Pool”). However, because the New Employer Pool is fully funded (approximately 200% funded, in fact), and current contribution rates are more than sufficient to fund current benefits, the New Employers have a very low risk of incurring withdrawal liability in the future. The hybrid method helps to retain existing Contributing Employers and to attract new Contributing Employers by alleviating their concerns about potential growth in withdrawal liability exposure. Further, the Plan will not enter an agreement resolving a Contributing Employer’s withdrawal liability and deeming the employer to be a New Employer under the hybrid method unless the employer commits to continue to contribute to the Plan for an extended period (usually 5-10 years) and at a guaranteed level of participation. Approximately 80 employers have qualified as New Employers under the hybrid method to date, and these employers have paid approximately \$130 million in withdrawal liability while continuing to contribute to the Plan.

Between 2011 and 2014, the Plan remained in critical status, and the Trustees reviewed the rehabilitation plan annually to consider whether there existed any other reasonable measures they might take to avoid insolvency. Each year, the Trustees concluded that requiring additional contribution increases above those included in the 2010 rehabilitation plan update, or adopting additional benefit reductions, would not have a significant positive impact on the projected insolvency of the Plan, and instead would increase the likelihood of additional employer

withdrawals.⁴ For example, in a November 2014 Board Meeting, the Plan's actuary presented a variety of possible benefit reduction scenarios, including reducing the rate of future benefit accrual and further cutting adjustable benefits. As reflected in the chart below, none of these scenarios resulted in more than nine months of additional solvency, even disregarding the impact that the changes would have on employer withdrawals. In large part, the inability of additional measures available under PPA to materially improve the Plan's funding projections resulted from the fact that insolvency was expected to occur in the near future, leaving very little time for the changes to have a significant positive impact.⁵

⁴ In 2013, the Trustees determined that, under the Plan's rules permitting participants to contribute to the Plan on their own behalf ("self-contributions"), many participants were able to gain just enough Contributory Service Credit to enable them to improve their pension benefits significantly. Permitting self-contributions to increase pension benefits in this way was very costly to the Plan because the value of the benefits gained by the participants nearly always greatly exceeded the value of the self-contributions. In November 2013, the Trustees eliminated the ability of participants to make self-contributions on a prospective basis.

⁵ The proposed MPRA benefit suspensions, on the other hand, are accompanied by proposed increases in the rehabilitation plan contribution rate schedules and reductions in the rate of future benefit accruals because the proposed benefit suspensions extend solvency sufficiently to allow these changes to have a meaningful positive impact on the future funding levels.

Chart of Effect of Time Horizon on Plan Changes	Estimated year and month of insolvency and approximate number of months insolvency is forestalled/(accelerated)			
	Attrition Assumed to Vary by Change		Ignores Impact of Change on Attrition	
Current Rehabilitation Plan	2/26		2/26	
Hypothetical Changes to Primary Schedule Benefits:				
1. 1% benefit unreduced at age 65 effective 1/1/2015	4/26	2	4/26	1
2. 1% benefit unreduced at age 65 effective 1/1/2017	3/26	1	3/26	1
3. Future contribution increases not subject to benefit accruals	2/26	0	2/26	0
4. Actuarial equivalent reduction from unreduced age (see page...)	3/26	1	3/26	1
5. Maximum Red Zone cuts effective 1/1/2020	11/26	-3	3/26	1
6. Maximum Red Zone cuts effective 1/1/2015	10/25	-4	7/26	5
7. Future benefit accruals limited to \$100/year effective 1/1/2015	3/26	1	3/26	1
8. Total benefit capped at higher of \$3,000 or current active 1/1/2015	3/26	1	3/26	1
9. Benefit freeze effective 1/1/2015	1/26	-1	6/26	4
10. Maximum Red Zone cuts plus benefit freeze 1/1/2015	1/16	-1	11/26	9
11. All Withdrawals are Rehabilitation Plan Withdrawals	3/26	1	3/26	1
12. Minimum retirement age of 65 for future Rehabilitation Plan Withdrawals effective 1/1/2015	2/26	0	2/26	0
13. Minimum retirement age of 58 effective 1/1/2015	3/26	1	3/26	1
14. Minimum retirement age of 59 effective 1/1/2015	4/26	2	4/26	2
15. Minimum retirement age of 60 effective 1/1/2015	5/26	3	5/26	3
16. Maximum retirement age of 58 effective 1/1/2015, 59 effective 1/1/2017, and 60 effective 1/1/2019	4/26	2	4/26	2
17. Maximum Red Zone cuts to current and future terminated vested participants effective 1/1/2015	3/26	1	3/26	1
Mass withdrawal effective 12/31/2014; 20% of contributions continue as withdrawal liability payments	3/25	-11	3/25	-11

In sum, excluding the application of the distressed employer schedule to YRC, the average contribution rate at which employers contribute to the Plan increased 83.2% from 2005 to 2014. This figure represents an excess of 57.9% over inflation, during a period of great

economic challenge for both the Contributing Employers and the Plan. Also during this period, various early retirement benefits were frozen and the rate at which employees pension benefits were earned was reduced from 2% of contributions to 1% of contributions. This combination of the contribution rate increases and benefit cuts means that participants are now sacrificing far more out of their pay packages in order to fund the Plan, in return for far less in benefit accruals. The remaining Contributing Employers are shouldering the increased costs while struggling to maintain their competitiveness in the face of a variety of severe, industry-specific and economy-wide challenges.

Moreover, approximately \$0.50 of every dollar contributed to the Plan is now used to pay benefits for inactive participants whose employers withdrew as a result of bankruptcy or financial distress and did not satisfy their withdrawal liability obligation to the Plan. Both the active participants and the Contributing Employers are acutely aware that half of the money going into the Plan is used to support the benefits of inactive participants who worked for companies that did not pay for those benefits. As a result, the bargaining parties' willingness to withstand further contribution increases in order to remain in the Plan, the Trustees believe, is particularly low. Thus, the Trustees have concluded that, during the 10 years preceding the year of this application, the Trustees have taken all reasonable measures to avoid insolvency. Notwithstanding those measures, the Plan remains on that path and is projected to become insolvent in 2026.

EXHIBIT C

109TH CONGRESS }
1st Session } HOUSE OF REPRESENTATIVES { REPT. 109-232
Part 1

PENSION PROTECTION ACT OF 2005

SEPTEMBER 22, 2005.—Ordered to be printed

Mr. BOEHNER, from the Committee on Education and the
Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2830]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 2830) to amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to reform the pension funding rules, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Pension Protection Act of 2005”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title and table of contents.

TITLE I—REFORM OF FUNDING RULES FOR SINGLE-EMPLOYER DEFINED BENEFIT PENSION PLANS

Subtitle A—Amendments to Employee Retirement Income Security Act of 1974

- Sec. 101. Minimum funding standards.
- Sec. 102. Funding rules for single-employer defined benefit pension plans.
- Sec. 103. Benefit limitations under single-employer plans.
- Sec. 104. Technical and conforming amendments.

Subtitle B—Amendments to Internal Revenue Code of 1986

[See introduced bill, page 71, line 1 through page 140, line 13].

Subtitle C—Other provisions

- Sec. 121. Modification of transition rule to pension funding requirements.
- Sec. 122. Treatment of nonqualified deferred compensation plans when employer defined benefit plan in at-risk status [See introduced bill, page 142, line 3 through page 143, line 16].

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TITLE II—FUNDING RULES FOR MULTIEMPLOYER DEFINED BENEFIT PLANS

Subtitle A—Amendments to Employee Retirement Income Security Act of 1974

- Sec. 201. Funding rules for multiemployer defined benefit plans.
 Sec. 202. Additional funding rules for multiemployer plans in endangered or critical status.
 Sec. 203. Measures to forestall insolvency of multiemployer plans.
 Sec. 204. Withdrawal liability reforms.
 Sec. 205. Removal of restrictions with respect to procedures applicable to disputes involving withdrawal liability.

Subtitle B—Amendments to Internal Revenue Code of 1986

[See introduced bill, page 200, line 8 through page 251, line 15].

TITLE III—OTHER PROVISIONS

- Sec. 301. Interest rate assumption for determination of lump sum distributions.
 Sec. 302. Interest rate assumption for applying benefit limitations to lump sum distributions [See introduced bill, page 254, line 6 through page 255, line 7].
 Sec. 303. Distributions during working retirement.
 Sec. 304. Other amendments relating to prohibited transactions.
 Sec. 305. Correction period for certain transactions involving securities and commodities.
 Sec. 306. Government Accountability Office pension funding report.

TITLE IV—IMPROVEMENTS IN PBGC GUARANTEE PROVISIONS

- Sec. 401. Increases in PBGC premiums.

TITLE V—DISCLOSURE

- Sec. 501. Defined benefit plan funding notices.
 Sec. 502. Additional disclosure requirements.
 Sec. 503. Section 4010 filings with the PBGC.

TITLE VI—INVESTMENT ADVICE

- Sec. 601. Amendments to Employee Retirement Income Security Act of 1974 providing prohibited transaction exemption for provision of investment advice.
 Sec. 602. Amendments to Internal Revenue Code of 1986 providing prohibited transaction exemption for provision of investment advice [See introduced bill, page 287, line 15 through page 298, line 23].

TITLE VII—BENEFIT ACCRUAL STANDARDS

- Sec. 701. Improvements in benefit accrual standards.

TITLE VIII—DEDUCTION LIMITATIONS

[See introduced bill, page 299, line 1 through page 305, line 20].

TITLE I—REFORM OF FUNDING RULES FOR SINGLE-EMPLOYER DEFINED BENEFIT PENSION PLANS

Subtitle A—Amendments to Employee Retirement Income Security Act of 1974

SEC. 101. MINIMUM FUNDING STANDARDS.

(a) REPEAL OF EXISTING FUNDING RULES.—Sections 302 through 308 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1082 through 1086) are repealed.

(b) NEW MINIMUM FUNDING STANDARDS.—Part 3 of subtitle B of title I of such Act (as amended by subsection (a)) is amended further by inserting after section 301 the following new section:

“MINIMUM FUNDING STANDARDS

“SEC. 302. (a) REQUIREMENT TO MEET MINIMUM FUNDING STANDARD.—

“(1) IN GENERAL.—A plan to which this part applies shall satisfy the minimum funding standard applicable to the plan for any plan year.

“(2) MINIMUM FUNDING STANDARD.—For purposes of paragraph (1), a plan shall be treated as satisfying the minimum funding standard for a plan year if—

“(A) in the case of a defined benefit plan which is a single-employer plan, the employer makes contributions to or under the plan for the plan year which, in the aggregate, are not less than the minimum required contribution determined under section 303 for the plan for the plan year,

“(B) in the case of a money purchase plan which is a single-employer plan, the employer makes contributions to or under the plan for the plan year which are required under the terms of the plan, and

means of the application of a recognized index or methodology so as to protect the economic value of the benefit against inflation prior to distribution.”.

(2) DETERMINATIONS OF ACCRUED BENEFIT AS BALANCE OF BENEFIT ACCOUNT.—Section 203 of such Act (29 U.S.C. 1053) is amended by adding at the end the following new subsection:

“(f)(1) A defined benefit plan under which the accrued benefit payable under the plan upon distribution (or any portion thereof) is expressed as the balance of a hypothetical account maintained for the participant shall not be treated as failing to meet the requirements of subsection (a)(2) and section 205(g) solely because of the amount actually made available for such distribution under the terms of the plan, in any case in which the applicable interest rate that would be used under the terms of the plan to project the amount of the participant’s account balance to normal retirement age is not greater than a market rate of return.

“(2) The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of paragraph (1) and for permissible methods of crediting interest to the account (including variable interest rates) resulting in effective rates of return meeting the requirements of paragraph (1).”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to periods beginning on or after June 29, 2005.

TITLE VIII—DEDUCTION LIMITATIONS

SEC. 801. [SEE INTRODUCED BILL, PAGE 299, LINE 1 THROUGH PAGE 305, LINE 20].

PURPOSE

The purpose of H.R. 2830, the “Pension Protection Act of 2005” (PPA), is to ensure the health and future of the voluntary, employer-sponsored defined benefit pension system through comprehensive reforms intended to protect the interests of workers, retirees, and taxpayers. H.R. 2830 includes new funding requirements to ensure employers adequately and consistently fund their pension plans, provides workers with meaningful disclosure about the financial status of their benefits, and protects taxpayers from a potential multi-billion dollar bailout of the Pension Benefit Guaranty Corporation (PBGC).

COMMITTEE ACTION

On June 9, 2005, Committee on Education and the Workforce Chairman John A. Boehner, Subcommittee on Employer-Employee Relations Chairman Sam Johnson and Vice Chairman John Kline, and Committee on Ways and Means Chairman Bill Thomas introduced H.R. 2830, the Pension Protection Act of 2005. H.R. 2830 represents the culmination of legislative activity, begun in the 106th Congress and continuing through the 109th Congress, intended to fix outdated pension laws that threaten the fiscal well-being of taxpayers, workers, and retirees, and to improve the pension security of all American workers.

106TH CONGRESS

In the 106th Congress, the Committee on Education and the Workforce (the “Committee”) began a comprehensive review of the federal law governing private pensions, the Employee Retirement Income Security Act (“ERISA”), and its relevance to the needs of participants, beneficiaries, and employers in the 21st century.

On March 11, 1999, Representatives Rob Portman and Benjamin Cardin introduced H.R. 1102, the “Comprehensive Retirement Security and Pension Reform Act of 1999.” The bill was jointly re-

ferred to the Committee on Education and Workforce and the Committee on Ways and Means. On June 29, 1999, the Subcommittee on Employer-Employee Relations held a hearing entitled “Enhancing Retirement Security: A Hearing on H.R. 1102, the ‘Comprehensive Retirement Security and Pension Reform Act of 1999.’” Testimony was received from the bill’s sponsors, Representatives Portman and Cardin.

On July 14, 1999, the Committee discharged the Subcommittee on Employer-Employee Relations from consideration of the bill, approved H.R. 1102, and ordered it favorably reported to the House of Representatives by voice vote. On July 19, 2000, the House of Representatives passed the bill by a vote of 401 yeas to 25 nays.¹ The Senate did not complete consideration of H.R. 1102 prior to the adjournment of the 106th Congress.

On February 15, 2000, the Subcommittee on Employer-Employee Relations continued its examination of issues arising under ERISA at a hearing entitled “The Evolving Pension and Investment World After 25 Years of ERISA.” The following individuals testified before the Subcommittee: Professor John H. Langbein, Chancellor Kent Professor of Law and Legal History, Yale Law School; Michael S. Gordon, Esq., Law Offices of Michael S. Gordon; Dr. John B. Shoven, Charles R. Schwab Professor of Economics, Stanford University; and Dr. Teresa Ghilarducci, Associate Professor of Economics, University of Notre Dame.

On March 9th and 10th, 2000, the Subcommittee on Employer-Employee Relations held a two days of hearings entitled “More Secure Retirement for Workers: Proposals for ERISA Reform.” Testifying on March 9th were: W. Allen Reed, President, General Motors Investment Management Company, testifying on behalf of the Committee on Investment of Employee Benefit Assets (CIEBA) of the Financial Executives Institute; Daniel P. O’Connell, Corporate Director for Employee Benefits and HR Systems, United Technologies Corporation, testifying on behalf of the ERISA Industry Committee (ERIC); Damon Silvers, Esq., Associate General Counsel, AFL–CIO; Professor Joseph A. Grundfest, William A. Franke Professor of Law and Business, Stanford Law School, and co-founder of Financial Engines, Inc.; Eula Ossofsky, President, Board of Directors, Older Women’s League; and Margaret Raymond, Esq., Assistant General Counsel, Fidelity Investments, testifying on behalf of the Investment Company Institute. During the second day of hearings on March 10th, the Subcommittee heard testimony from Kenneth S. Cohen, Esq., Senior Vice President and Deputy General Counsel, Massachusetts Mutual Life Insurance Company, testifying on behalf of the American Council of Life Insurers; Marc E. Lackritz, President, Securities Industry Association; David Certner, Senior Coordinator, Department of Federal Affairs, American Association of Retired Persons; Louis Colosimo, Managing Director, Morgan Stanley Dean Witter & Company, Inc., testifying on

¹ Fifteen provisions of Title VI of H.R. 1102 subsequently were included in H.R. 2488, the “Taxpayer Refund and Relief Act of 1999,” which passed the House and Senate on August 5, 1999, but was vetoed by then-President Clinton. The following year, twenty-two ERISA provisions from H.R. 1102 were included in the “Retirement Savings and Pension Coverage Act of 2000,” which was included in H.R. 2614, the “Taxpayer Relief Act of 2000.” The conference report on H.R. 2614 was adopted by the House on October 26, 2000, by a vote of 237 yeas, 174 nays, and one present. The conference report was not adopted by the Senate prior to adjournment of the 106th Congress.

behalf of the Bond Market Association; John Hotz, Deputy Director, Pension Rights Center; and Deedra Walkey, Esq., Assistant General Counsel, Frank Russell Company.

On March 16, 2000, the Subcommittee on Employer-Employee Relations held a hearing entitled “The Wealth Through the Workplace Act: Worker Ownership in Today’s Economy.” The hearing focused on H.R. 3462, introduced by then-Subcommittee Chairman John A. Boehner, which made stock options more readily available to ERISA participants. Testifying before the Subcommittee were: Jane F. Greenman, Esq., Deputy General Counsel (Human Resources), Honeywell, Inc., testifying on behalf of the American Benefits Counsel; Tim Byland, Senior Sales Executive, INTERVU, Inc.; and Patrick Von Bargen, Executive Director, National Commission on Entrepreneurship.

On April 4, 2000, the Subcommittee on Employer-Employee Relations continued its examination of ERISA reform in a hearing entitled “Modernizing ERISA to Promote Retirement Security.” The following individuals testified at the hearing: the Honorable Leslie Kramerich, Acting Assistant Secretary of Labor for Pension and Welfare Benefits, U.S. Department of Labor; and David M. Strauss, Executive Director, Pension Benefit Guaranty Corporation.

On June 26, 2000, then-Subcommittee on Employer-Employee Relations Chairman Boehner introduced H.R. 4747, the Retirement Security Advice Act of 2000. On July 19, 2000, the Subcommittee on Employer-Employee Relations ordered H.R. 4747 favorably reported, as amended, by voice vote. There was no further action taken on the legislation prior to the conclusion of the 106th Congress.

Concluding its legislative activity for the 106th Congress, the Subcommittee held a hearing on September 14, 2000 entitled “How to Improve Pension Coverage for American Workers.” The Subcommittee heard testimony from Theodore Groom, Esq., Groom Law; Michael Calabrese, Director, Public Assets Program, New America Foundation; and Ed Tinsley, III, President and CEO, K-Bob’s Steakhouse.

107TH CONGRESS

Building upon the activity of the previous Congress, the Committee continued its efforts to examine and improve upon the private pension system. On March 14, 2001, Representatives Portman and Cardin introduced H.R. 10, which was very similar to the House passed H.R. 1102 of the previous Congress. The Subcommittee on Employer-Employee Relations held a legislative hearing on the bill on April 5, 2001. At the hearing, entitled “Enhancing Retirement Security: A Hearing on H.R. 10, The ‘Comprehensive Retirement Security and Pension Reform Act of 2001,’” testimony was received from the bill’s sponsors, Representatives Portman and Cardin, Nanci S. Palmintere, Director of Tax, Licensing and Customs, Intel Corporation, testifying on behalf of the American Benefits Council; Richard Turner, Esq., Associate General Counsel, American General Financial Group, testifying on behalf of the American Council of Life Insurers; Judith Mazo, Senior Vice President, Segal Co., testifying on behalf of the Building and Construction Trades Department, AFL-CIO and the National Co-

ordinating Committee for Multiemployer Plans; and Karen Ferguson, Director, Pension Rights Center.

On April 26, 2001, the Committee on Education and the Workforce approved H.R. 10, as amended, by voice vote and ordered the bill favorably reported to the House of Representatives. On May 5, 2001, the House of Representatives passed H.R. 10 by a vote of 407 yeas to 24 nays. On May 16, 2001, the provisions of H.R. 10 were included in H.R. 1836, the Economic Growth and Tax Relief Reconciliation Act, and passed by the House of Representatives on a vote of 230 yeas to 197 nays. The House passed the conference report on the measure on May 26, 2001, by a vote of 240 yeas to 154 nays. On December 5, 2001, the Senate adopted the conference report, as amended, by a vote of 90 yeas and nine nays. On December 11, 2001, the House agreed to the Senate amendments by a roll call vote of 369 yeas and 33 nays. The President signed the bill into law on December 21, 2001; it became public law 107–90.

On June 21, 2001, Committee on Education and the Workforce Chairman Boehner introduced H.R. 2269, the “Retirement Security Advice Act of 2001,” a bill to promote the provision of retirement investment advice to workers regarding the management of their retirement income assets. The bill was referred to the Committee on Education and the Workforce and the Committee on Ways and Means.

On July 17, 2001, the Subcommittee on Employer-Employee Relations held a hearing on H.R. 2269. Testifying before the Subcommittee were the Honorable Ann L. Combs, Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor; Betty Shepard, Human Resources Administrator, Mohawk Industries, Inc.; Damon Silvers, Esq., Associate General Counsel, AFL–CIO; Richard A. Hiller, Vice President, Western Division, TIAA–CREF; Joseph Perkins, Immediate Past President, American Association for Retired Persons; and Jon Breyfogle, Principal, Groom Law Group, testifying on behalf of the American Council of Life Insurers.

On August 2, 2001, the Subcommittee on Employer-Employee Relations approved H.R. 2269, without amendment, by voice vote and ordered the bill favorably reported to the full Committee. On October 3, 2001, the Committee approved H.R. 2269, as amended, and ordered the bill favorably reported to the House of Representatives by a roll call vote of 29 yeas to 17 nays. The Committee on Ways and Means considered and marked up the bill on November 7, 2001, and reported it to the House on November 13, 2001. The bill, as amended, passed the House of Representatives on November 15, 2001 by a roll call vote of 280 yeas to 144 nays. The Senate did not consider the measure prior to the adjournment of the 107th Congress.

On February 6th and 7th, 2002, the Committee held two days of hearings entitled “The Enron Collapse and Its Implications for Worker Retirement Security.” On February 6th, the sole witness was U.S. Secretary of Labor Elaine Chao. On the second day, the witnesses were Thomas O. Padgett, Senior Lab Analyst, EOTT; Cindy K. Olson, Executive Vice President, Human Resources and Community Relations and Building Services, Enron Corporation; Mikie Rath, Benefits Manager, Enron Corporation; Scott Peterson, Global Practice Leader for Defined Contribution Services, Hewitt

Associates; and Dr. Teresa Ghilarducci, Associate Professor, Department of Economics, University of Notre Dame.

The Subcommittee on Employer-Employee Relations held a hearing on February 13, 2002 entitled “Enron and Beyond: Enhancing Worker Retirement Security.” The Subcommittee heard testimony from Jack L. VanDerhei, Ph.D., CEBS, Professor, Department of Risk, Insurance, and Healthcare Management, Fox School of Business and Management, Temple University, testifying on behalf of the Employee Benefit Research Institute; Douglas Kruse, Ph.D., Professor, School of Management and Labor Relations, Rutgers University; Norman Stein, Douglas Arant Professor of Law, University of Alabama School of Law; and Rebecca Miller, CPA, Partner, McGladrey & Pullen, LLP.

On February 14, 2002, Chairman Boehner and Subcommittee on Employer-Employee Relations Chairman Sam Johnson introduced H.R. 3762, the “Pension Security Act.”

On February 27, 2002, the Subcommittee on Employer-Employee Relations held a hearing entitled “Enron and Beyond: Legislative Solutions.” The witnesses were Dave Evans, Vice President, Retirement and Financial Services, Independent Insurance Agents of America; Angela Reynolds, Director, International Pension and Benefits, NCR Corporation; Erik Olsen, Member, Board of Directors, American Association of Retired Persons; Dr. John H. Warner, Jr., Corporate Executive Vice President, Science Applications International Corp., testifying on behalf of the Profit Sharing Council of America; Richard Ferlauto, Director of Pensions and Benefits, American Federation of State County, and Municipal Employees (AFSCME), testifying on behalf of AFSCME and AFL-CIO; and John M. Vine, Esq., Partner, Covington and Burling, testifying on behalf of the ERISA Industry Committee.

On March 20, 2002, the Committee on the Education and the Workforce approved H.R. 3762, as amended, and ordered the bill favorably reported to the House of Representatives by a roll call vote of 28 yeas to 19 nays. On April 11, 2003 the House passed H.R. 3762 by a recorded vote of 255 yeas to 163 nays. No further action was taken on the measure prior to the adjournment of the 107th Congress.

108TH CONGRESS

Building on the success of corporate reform and the foundation of the pension reform principles established during the 107th Congress, the Subcommittee on Employer-Employee Relations held a hearing on February 13, 2003, “The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers.” Testifying before the Subcommittee were the Honorable Ann L. Combs, Assistant Secretary, Employee Benefits Security Administration, United States Department of Labor; Ed Rosic, Esq., Vice President and Managing Assistant General Counsel, Marriott International, Inc., testifying on behalf of the American Benefits Council; Nell Minow, Editor, The Corporate Library, testifying on behalf of Robert Monks, Lens Governance Advisors; and Scott Sleyster, Senior Vice President and President of Retirement Services and Guaranteed Products, Prudential Financial.

On February 27, 2003, Chairman Boehner and Subcommittee on Employer-Employee Relations Chairman Sam Johnson introduced

H.R. 1000, the “Pension Security Act of 2003.” This bill incorporated the provisions of H.R. 2269 from the previous Congress, and contained a number of ERISA provisions from H.R. 10 in the 107th Congress that were dropped prior to that bill’s final passage.

On March 5, 2003, the Committee on Education and the Workforce approved H.R. 1000, as amended, and ordered the bill favorably reported to the House of Representatives by a roll call vote of 29 yeas to 19 nays. On May 14, 2003, the House of Representatives passed H.R. 1000 by a roll call vote of 271 yeas to 157 nays. The Senate did not complete consideration of the bill before the adjournment of the 108th Congress.

On June 4, 2003, as part of a series of hearings that would focus on the challenges that faced the future of defined benefit plans, and highlight obstacles in federal law that discourage employers from offering these plans, the Subcommittee on Employer-Employee Relations held a hearing entitled “Strengthening Pension Security: Examining the Health and Future of the Defined Benefit Plan.” The Subcommittee heard testimony from Dr. Jack Van Derhei, Professor, Fox School of Business Management, Temple University, testifying on behalf of the Employee Benefits Research Institute; Dr. John Leary, Esq., Partner, O’Donoghue and O’Donoghue; Ron Gebhardttsbauer, Senior Pension Fellow, American Academy of Actuaries; and J. Mark Iwry, Esq., Non-Resident Senior Fellow, The Brookings Institution.

On July 15, 2003, the Subcommittee on Employer-Employee Relations and the Ways and Means Subcommittee on Select Revenue Measures held a joint hearing entitled “Examining Pension Security and Defined Benefit Plans: The Bush Administration’s Proposal to Replace the 30-Year Treasury Rate.” The following witnesses testified on the Bush Administration’s proposal to replace the discontinued 30-year Treasury interest rate that was used as the benchmark for defined benefit pension plan funding: The Honorable Ann Combs, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor; The Honorable Peter Fisher, Under Secretary for Domestic Finance, U.S. Department of Treasury; Kenneth Porter, Director of Corporate Insurance and Global Benefits Financial Planning, DuPont Company; Ashton Phelps, Publisher, The Times-Picayune; Kenneth Steiner, Resource Actuary, Watson Wyatt Worldwide; and Christian Weller, Economist, Economic Policy Institute.

On September 4, 2003, the Committee on Education and the Workforce held the third in a series of hearings to examine the future of defined benefit pension plans entitled “Strengthening Pension Security and Defined Benefit Plans: Examining the Financial Health of the Pension Benefit Guaranty Corporation.” The witnesses included David Walker, Comptroller General, General Accounting Office, and Steven Kandarian, Executive Director, Pension Benefit Guaranty Corporation.

On September 17, 2003, Chairman Boehner, joined by Senior Democrat Member George Miller, Subcommittee on Employer-Employee Relations Chairman Sam Johnson, Committee on Ways and Means Chairman Bill Thomas, Ways and Means Committee Senior Democrat Member Charles Rangel, and Representative Rob Portman introduced H.R. 3108, the “Pension Funding Equity Act of 2003.” On October 8, 2003, the House passed the bill, as amended,

by a vote of 397 yeas and two nays. On January 28, 2004, the Senate approved an amended version of H.R. 3108 by a roll call vote of 86 yeas and nine nays. The House adopted the conference report on the bill on April 2, 2004, by a vote of 336 yeas and 69 nays. On April 8, 2004, the Senate adopted the conference report by a vote of 78 yeas and 19 nays. On April 10, 2004 President Bush signed the bill into law; it became public law 108–218.

Immediately following House passage of H.R. 3108, Chairman Boehner and Employer-Employee Relations Subcommittee Chairman Sam Johnson announced that the Committee would proceed with its work to implement permanent, long-term solutions to the pension underfunding crisis. On October 29, 2003, the Committee held a hearing entitled “The Pension Underfunding Crisis: How Effective Have Reforms Been?” Testifying before the Committee were Barbara Bovbjerg, Director of Education, Workforce, and Income Security Issues, General Accounting Office; Robert Krinsky, Chairman, Segal Company; Michael S. Gordon, Esq., General Counsel, National Retiree Legislative Network, testifying on behalf of the American Benefits Council; J. Mark Iwry, Esq., Non-Resident Senior Fellow, Brookings Institution; and David John, Research Fellow, Thomas A. Roe Institute for Economic Policy Studies, Heritage Foundation.

On February 25, 2004, the Committee held a hearing entitled “Strengthening Pension Security for All Americans: Are Workers Prepared for a Safe and Secure Retirement?” Testifying before the Committee were Ben Stein, Honorary Chairperson, National Retirement Planning Coalition; Dan McCaw, Chairman and CEO, Mercer Human Resource Consulting; C. Robert Henrikson, President, U.S. Insurance and Financial Services, MetLife; and Peter R. Orszag, Joseph A. Pechman Senior Fellow, Brookings Institution.

On March 18, 2004, the Subcommittee on Employer-Employee Relations held a hearing entitled, “Reforming and Strengthening Defined Benefit Plans: Examining the Health of the Multiemployer Pension System.” Testifying before the Subcommittee were Barbara Bovbjerg, Director of Education, Workforce, and Income Security Issues, General Accounting Office; John McDevitt, Senior Vice President, United Parcel Service; Scott Weicht, Executive Vice President, Adolfson and Peterson Construction, testifying on behalf of the Associated General Contractors; and Randy G. DeFrehn, Executive Director, National Coordinating Committee for Multiemployer Plans.

On April 29, 2004, the Subcommittee on Employer-Employee Relations held a hearing entitled “Examining Long-Term Solutions to Reform and Strengthen the Defined Benefit Pension System.” Testifying before the Subcommittee were Kenneth A. Kent, Academy Vice President, Pension Issues, American Academy of Actuaries; Greg Heaslip, Vice President, Benefits, PepsiCo, Inc.; J. Mark Iwry, Esq., Non-Resident Senior Fellow, the Brookings Institution; Timothy Lynch, President and CEO, Motor Freight Carriers Association; John S. “Rocky” Miller, Esq., Partner, Cox, Castle & Nicholson, L.L.P.; and Dr. Teresa Ghilarducci, Ph.D., Associate Professor of Economics and Director of the Monsignor Higgins Labor Research Center, University of Notre Dame.

On July 7, 2004, the Committee held its eighth hearing in the 108th Congress, focusing on issues relating to cash balance pension

plans. The hearing was entitled “Examining Cash Balance Pension Plans: Separating Myth from Fact.” The Committee heard testimony from James Delaplane, Jr., Esq., Attorney, American Benefits Council; Ellen Collier, Director of Benefits, Eaton Corporation; Dr. Robert Clark, Professor, College of Management, North Carolina State University; Robert Hill, Esq., Partner, Hill & Robbins; and Nancy Pfotenhauer, President, Independent Women’s Forum.

109TH CONGRESS

In the 109th Congress, the Committee continued its efforts focusing on comprehensive reform of the defined benefit pension system. On March 2, 2005, the Committee held a hearing entitled “The Retirement Security Crisis: The Administration’s Proposal for Pension Reform and Its Implications for Workers and Taxpayers.” Testifying before the Committee were the Honorable Ann L. Combs, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor; the Honorable Mark Warshawsky, Assistant Secretary for Economic Policy, U.S. Department of Treasury; Bradley Belt, Executive Director, Pension Benefit Guaranty Corporation; Kenneth Porter, Director of Corporate Insurance and Global Benefits Financial Planning, the DuPont Company, testifying on behalf of the American Benefits Council; Norman Stein, Douglas Arant Professor, University of Alabama School of Law; and Dr. Janemarie Mulvey, Chief Economist, Employment Policy Foundation.

On June 9, 2005, Chairman Boehner, Employer-Employee Relations Subcommittee Chairman Sam Johnson, Employer-Employee Relations Vice-Chairman John Kline and Committee on Ways and Means Chairman Bill Thomas introduced H.R. 2830, the “Pension Protection Act of 2005.” On that same day, Chairman Boehner also introduced H.R. 2831, the “Pension Preservation and Portability Act of 2005.”

On June 15, 2005, the Committee held a legislative hearing on H.R. 2830. Testifying before the Committee were Lynn Franzoi, Vice President for Human Resources, Fox Entertainment Group, testifying on behalf of the U.S. Chamber of Commerce; Bart Pushaw, Actuary, Milliman, Inc.; Dr. Teresa Ghilarducci, Professor of Economics, University of Notre Dame; Timothy Lynch, President and CEO, Motor Freight Carriers Association; Judy Mazo, Senior Vice President/Director of Research, The Segal Company; and Andy Scoggin, Vice President for Labor Relations, Albertsons, Inc.

On June 22, 2005, the Subcommittee on Employer-Employee Relations approved H.R. 2830, as amended, and ordered the bill favorably reported to the full Committee, by voice vote. On June 30, 2005, the full Committee approved H.R. 2830, as amended, and ordered the bill favorably reported to the House of Representatives by a roll call vote of 27 yeas, 0 nays, and 22 present. H.R. 2830, as amended and reported to the House, included several provisions contained within H.R. 2831.

SUMMARY

TITLE I—SINGLE EMPLOYER REFORMS

The main component of H.R. 2830, the Pension Protection Act, changes the way plan sponsors calculate their plan liabilities,

which in turn determines the amount of minimum required contributions they must make to their plans. There are a number of technical features to the funding rule changes, including:

Determining Plan Liabilities with a Modified Yield Curve. H.R. 2830 includes a modified yield curve approach that provides a permanent interest rate for employers to calculate their pension contributions and more accurately measure current pension liabilities as they come due. This replaces the composite corporate bond interest rate which is currently scheduled to expire at the end of 2005.

Generally speaking, under H.R. 2830, each pension plan has a unique schedule of future benefit payments that depends on the characteristics of the plan's demographics. For example, plans with more retirees and older workers, more lump sum pension payments, and shrinking workforces will make a greater percentage of their pension payments in the near future, while plans with younger workers, fewer retirees, fewer lump sums, and growing workforces will make a greater percentage of payments in later years as these obligations come due. The comprehensive funding reforms included in H.R. 2830 recognize the different timing of various pension payments and require plan sponsors to fund for such payments accordingly. This change will ensure that employers progressively make more contributions to pension plans as participant demographics mature, so that they can meet their pension promises when workers retire. It also provides greater certainty and predictability for employers as they make financial decisions and budget to meet their future pension obligations.

The modified yield curve interest rate that employers will use under H.R. 2830 to calculate their required contributions is based on the future date at which a pension plan's benefit obligations come due, as defined in three categories or "segments:" liabilities due within five years, liabilities due between six and twenty years, and liabilities due after twenty years until the estimated end of the plan's obligations. For purposes of calculating a plan's total liabilities for a plan year, otherwise known as the plan's "funding target," employers will use the plan's effective interest rate. The effective interest rate of a plan is the rate of interest which, if used to determine the present value of the plan's liabilities, would result in an amount equal to the total plan liabilities of the plan each year.

For purposes of determining the plan's liabilities for short-term, mid-term, and long-term durations, the interest rates to be used are based on the three segment rates applied to a plan's liabilities for each duration segment. The segment rates are determined by the Secretary of the Treasury on the basis of the portion of the corporate bond yield curve for yields of bonds maturing in each short-term, mid-term, and long-term segment. The segment rates should reflect the average of all AAA, AA, and A bonds for each year on the yield curve. The Committee intends for the Secretary of the Treasury to develop one corporate bond yield curve based on a three-year weighted average of yields on investment grade corporate bonds reflecting AAA, AA, and A bonds.

The modified yield curve approach in H.R. 2830 is designed to ensure employers more accurately measure and fund their short-term, mid-term, and long-term pension obligations with greater predictability and certainty about their future pension costs. The

use of the modified yield curve for calculating plan liabilities is phased in over three years.

Special Rules For At-Risk Plans. Special funding rules apply to certain severely underfunded plans that are considered “at-risk,” which are plans that have a funding target of less than 60%. These plans not only represent a financial risk to the PBGC, but the retirement security of the participants and beneficiaries in these plans is also threatened. For at-risk plans, a plan’s actuary would have to assume that all participants would elect benefits at the earliest available time and in the forms that will result in the highest present value of liabilities. In other words, a plan’s at-risk funding target is the sum of the present value of all liabilities of participants and beneficiaries under the plan for the plan year determined using additional assumptions that assume all participants will elect benefits at the times and in the forms that will result in the highest possible present value of liabilities. At-risk plans are also subject to an additional “loading factor” equal to \$700 per participant plus 4 percent of at-risk liability. However, it is the Committee’s intent that once a plan’s funded status is at 60 percent or greater, it is no longer considered at-risk; therefore, all future shortfall amortization payments are based on the plan’s funding target liability shortfall.

The transition between a plan’s normal funding target and its at-risk funding target is five years. In other words, if a plan is less than 60 percent funded for a consecutive period of fewer than five plan years, the plan must pay 20 percent of its at-risk required contribution multiplied by the number of plan years that the plan is less than 60 percent funded. The purpose of the at-risk liability assumption changes and loading factor is to recognize that these plans pose a greater risk to the PBGC and that there is a greater likelihood the plan may have to pay benefits on an accelerated basis or terminate.

Ensuring Underfunded Pension Plans Make Up Shortfalls. Under current law, pension funding rules permit underfunded plans to make up funding shortfalls over too long a period of time, putting workers at risk of having their plans terminate without adequate funding. The current rules contain several amortization periods for making up a shortfall, which in some cases can be up to 30 plan years. Moreover, today’s rules generally only require plans to meet a 90 percent funded status target, or in some cases only 80 percent.²

It is the view of the Committee that extended amortization schedules increase the risk of plan termination because smaller payments are made to a plan each year. H.R. 2830 requires employers to make sufficient and consistent contributions to ensure that plans meet a 100 percent funding target. If a plan has a funding shortfall, the bill requires employers to make additional contributions to erase the shortfall over a seven-year period. A plan has a funding shortfall for a plan year if the plan’s funding target for the year exceeds the value of the plan’s assets. If a plan has established a funding shortfall in any year, the remaining present values of the amortization payments that are due are included in plan assets. Any new amortization shortfall, which is determined

² See ERISA § 302(d).

as of the valuation date of the plan, requires a new, seven-year level payment schedule to be established. The present value of any shortfall payment made to a plan is determined by using the appropriate segment rates for the plan year.

The minimum required contribution required under H.R. 2830 is the sum of a plan's target normal cost for the plan year, which is the present value of all benefits that a plan is expected to accrue or to be earned during the plan year, and any required shortfall amortization charge for a plan that is less than 100 percent funded. However, for plans that were not subject to the deficit reduction contribution for the 2005 plan year, the 100 percent funding target is phased in over a five-year period, and a plan is required to be 100 percent funded by 2010. These new funding requirements will ensure employers have strong incentives to properly and adequately fund their plans in a timely manner.

Making Smoothing More Effective for Plans and Participants. Under current law, interest rates used to calculate pension assets and liabilities are "smoothed," or averaged, over approximately five years for assets and four years for liabilities. Such smoothing is intended to reduce pension funding volatility and help make employer contribution requirements more predictable. However, some have expressed concern that this is too long a period to smooth these interest rates and assets. H.R. 2830 reduces the smoothing of interest rates to calculate liabilities using a weighted average of the three most recent plan years (50 percent from the most recent plan year, 35 percent from the second year, and 15 percent from the third year). Asset smoothing is also reduced to a maximum of three years; however, the smoothed value of plan assets may not vary more or less than 10 percent of the fair market value of such assets. The overall reduced smoothing method protects pension plans against market and funding volatility on an annual basis while providing plan sponsors the ability to predict and budget their pension contributions.

Prohibiting Underfunded Plans from Using Credit Balances. In general, a plan accumulates a credit balance if an employer contributes more than the minimum required contribution in any plan year. However, the credit balance rules under current law contribute to plan underfunding by allowing employers with underfunded plans to replace cash contributions with credit balances accrued in previous years. In addition, current law allows the credit balance to accrue additional interest based on a plan's rate of return regardless of the actual market performance of a plan's general assets. These provisions allow underfunded plans to skip pension payments, even if the plans are severely underfunded, by using artificially inflated credit balances that mask the true funded status of plans.

H.R. 2830 prohibits employers from using credit balances to offset minimum required contributions if their pension plans are funded at less than 80 percent of the plan's funding target. The bill further requires that old credit balances (funding standard carry-over balance) as well as any new credit balance (pre-funding balance, which is any credit balance accumulated after the 2005 plan year), reflect actual market gains and losses based on a plan's net asset gains and losses. In order to determine whether a plan is at least 80 percent funded, any credit balance accumulated prior to

plan year 2006 is not subtracted from plan assets; any new credit balance, however, is subtracted from plan assets. All credit balances may be used to determine whether a plan has a funding shortfall. If a plan does have a funding shortfall for any plan year, credit balances must be subtracted from plan assets in order to determine the actual shortfall. A plan may elect to reduce its credit balances and assume that such balance is part of the general plan assets for any reason; however, the credit balance may no longer be used to offset any minimum required contribution. With respect to ordering, any pre-funding balance may not be used to satisfy a minimum required contribution until all of the funding standard carryover balance is used. Finally, if a plan is 100 percent funded or more (including plan assets as well as any funding standard carryover balance and pre-funding balance), the benefit restriction provisions under the bill do not apply.

Restricting the use of credit balances for plans that are below 80 percent funded will ensure that plan sponsors are making actual cash contributions to their plans consistently. This provision will increase a plan's funded status as well as protect participants and beneficiaries in the future.

Mortality Table Changes. Under current law, plans are generally required to use the 1983 Group Annuity Mortality ("GAM") Table in calculating plan liabilities. The use of this table assumes that the actual mortality experience of a plan has not changed since 1983. The use of the 1983 GAM table to calculate plan liabilities is outdated and may cause certain plans to appear better funded with fewer liabilities. H.R. 2830 requires plans to use an updated mortality table, the RP-2000 Combined Mortality Table, using Scale AA, in order to calculate plan liabilities. The use of the RP-2000 Table should result in a more accurate measure of plan liabilities by reflecting an updated mortality experience and the projected trends for plans. H.R. 2830 directs that the Secretary of the Treasury update the table every 10 years. Additionally, H.R. 2830 allows a plan to apply to the Secretary of the Treasury to use a substitute mortality table if the Secretary determines that the substitute table reflects the actual experience and projected trends in experience of the plan and that the use of the RP-2000 Combined Mortality Table is inappropriate for the plan. The Department of the Treasury has 180 days to determine whether the substitute table is not appropriate and that, therefore, a plan must use the RP-2000 Combined Mortality Table. This provision includes a five-year phase-in. The use of the RP-2000 mortality table will ensure that pension plans are adequately funding for their liabilities based on reasonable and updated mortality assumptions which will result in better plan funding overall.

Timing of Plan Contribution and Valuation Date. Under current law, plans that have a current liability percentage of less than 100 percent are required to make quarterly contributions, which are due on the 15th day following the end of each quarter in a plan year. The amount of the quarterly contributions is 25 percent of the lesser of 90 percent of the plan's current year minimum funding requirements or 100 percent of the plan's minimum funding require-

ments for the preceding plan year.³ It is the Committee's intent that the required annual payment for plan year 2006 is to be based on 90 percent of the minimum funding requirements under H.R. 2830. Furthermore, it is the intent of the Committee that, for plan years beginning after 2006, the amount of quarterly contributions is 25 percent of the lesser of 90 percent of the plan year's current minimum funding requirements or 100 percent of the plan's minimum funding requirements for the preceding plan year.

H.R. 2830 requires plans to use the first day of the plan year for a plan's valuation date. However, plans with 500 or fewer participants may use any valuation date. Contributions made after the valuation date are to be credited against the minimum required contribution for the year based on its present value as of the valuation date, discounted from the date the contribution is actually made using a plan's effective interest rate.

Limits on Benefit Increases and Accruals for Underfunded Plans. Too often, employers and union leaders have negotiated benefit increases when plans are underfunded, which ultimately results in increasing plan underfunding. This, in turn, results in an even greater likelihood that the PBGC will be forced to assume responsibility for paying the benefits, often at reduced levels, of terminated plans. H.R. 2830 restricts the ability of employers and union leaders to promise additional benefits when a plan is underfunded. Specifically, the bill prohibits employers and union leaders from increasing benefits or providing lump sum distributions if a pension plan is less than 80 percent funded for the prior year, unless the plan sponsor immediately makes the necessary contribution to fund the entire increase. If a plan is greater than 80 percent funded, but adopts a plan amendment which results in a plan with a funded status of less than 80 percent, the plan sponsor must immediately make the necessary contribution to ensure that the plan's funded status is at least 80 percent. The restriction for lump sum distributions does not apply to plans that have previously adopted amendments that effectively freeze all future accruals. H.R. 2830 also prohibits future benefit accruals for severely underfunded plans, which effectively freezes the plan. Plan amendments are required in order to resume any lump sum distributions or plan accruals once the plan is above the respective thresholds.

In addition to these limitations, H.R. 2830 also prohibits the payment of shutdown benefit and other unpredictable contingent event benefits. The Committee believes that because such benefits are not funded and cannot reasonably be funded with any accuracy, these unfunded benefits are more similar to severance benefits than pension benefits. Shutdown benefits have increased PBGC's deficit when the agency assumes the liabilities of terminated plans that include such unfunded promises. It is the Committee's view that shutdown benefits and other unpredictable contingent event benefits should not be considered pension benefits and should not be payable from plan assets.

The effective date of the benefit restriction provisions set forth above is 2006. However, in the case of a collectively bargained plan, the effective date applies to any plan year beginning the earlier of: (1) the date on which the last collective bargaining agreement ex-

³ See ERISA § 302(e).

pires, or (2) 2009. This effective date ensures that any current collective bargaining agreements are not disrupted and that employees are given ample time to discuss the effects of the benefit restrictions with their respective unions and employers.

Prohibiting Executive Compensation Arrangements If Rank-and-File Plans Are Severely Underfunded. H.R. 2830 addresses a problem recently seen in the airline industry where executives of companies in financial difficulty are given generous nonqualified deferred compensation arrangements while the retirement security of rank-and-file workers is at risk due to poorly funded qualified plans. The Committee believes that it is inappropriate for companies with underfunded qualified defined benefit pension plans to fund nonqualified deferred compensation plans covering executives. While rank-and-file employees have little control over a company's decision to fund its pension plans, executives often have control in determining whether nonqualified deferred compensation plans will be funded. In addition, executives who are covered by a nonqualified deferred compensation plan may also be instrumental in deciding how much to contribute to the defined benefit pension plan, thus determining the funded status of the pension plan. The Committee believes that if any defined benefit pension plan of an employer is not sufficiently funded, executives should be required to recognize current income inclusion (*i.e.*, be taxed) upon the funding of their nonqualified deferred compensation plans.

H.R. 2830 provides that if an employer's defined benefit pension plan is in at-risk status and the employer sets aside amounts for purposes of paying deferred compensation under a nonqualified deferred compensation plan, the amounts set aside are treated as property transferred in connection with the performance of services. Thus, participants for whom such amounts are set aside would be subject to current income inclusion under the provision. In addition, interest and an additional 20 percent tax would apply.

H.R. 2830 specifically provides that if during any period in which a qualified defined benefit pension plan of an employer is below 60 percent funded, any assets that are set aside, directly or indirectly, in a trust or other arrangement as determined by the Secretary of the Treasury, or transferred to such a trust or other arrangement, for purposes of paying deferred compensation, such assets are treated as property transferred in connection with the performance of services, regardless of whether or not such assets are available to satisfy the claims of general creditors. Furthermore, if a nonqualified deferred compensation plan of an employer provides that assets will be restricted to the provision of benefits under the qualified plan, such assets are treated as property transferred in connection with the performance of services, regardless of whether or not such assets are available to satisfy the claims of general creditors. If the plan sponsor's qualified defined benefit plan is below 60 percent funded, any subsequent increases in the value of, or any earnings with respect to, transferred or restricted assets are treated as additional transfers of property to the individual. In addition to current income inclusion, interest at the underpayment rate plus one percentage point is imposed on the underpayments that would have occurred had the amounts been includible in income for the taxable year in which first deferred or, if later, the first taxable year not subject to a substantial risk of forfeiture. The amount re-

quired to be included in income is also subject to an additional 20 percent tax.

H.R. 2830 requires the plan administrator to provide notice to plan participants and beneficiaries within 30 days after the plan has become subject to any of the above benefit restrictions. Any failure to provide notice will automatically result in a civil penalty.

TITLE II—FUNDING RULES FOR MULTIEMPLOYER DEFINED BENEFIT PLANS

Multiemployer pension plans are defined benefit pension plans maintained by two or more employers in a particular trade or industry, such as trucking or construction, which are collectively bargained between an employer and a labor union. These plans are managed by a board of trustees, which must be comprised of an equal number of employer and union representatives. While multiemployer and single employer pension plans have some similarities, there are also fundamental differences. While single employer plan sponsors generally may adjust their pension contributions to meet funding requirements, the contributions of individual employers in multiemployer plans cannot be easily modified because their benefit contributions are fixed by the terms of a collective bargaining agreement.

Multiemployer contributions are tied directly to the total number of hours worked by active workers; thus, any reduction in the number of active participants results in lower contributions to multiemployer plans. One of the major challenges facing the multiemployer system is that these pension plans are funded by a declining number of employers making contributions on behalf of a declining number of active workers, while paying benefits to a rapidly growing number of retirees. This “risk pooling” pension funding concept was designed for a 1940s era workforce that expected the multiemployer labor base to continue to grow; in reality, it has not. Indeed, only five new multiemployer plans have been formed since 1992. This has resulted in funding problems the Committee believes must be immediately addressed.

Multiemployer Funding Reforms. H.R. 2830 establishes a structure for identifying troubled multiemployer pension plans by providing appropriate triggers for determining when plans are underfunded as well as quantifiable benchmarks for measuring a plan’s funding improvement. The bill quantifies the health of certain underfunded multiemployer pension plans and separates them into two broad categories: (1) endangered plans, which are plans that are not in immediate financial danger, but are not considered well-funded plans; and (2) critical plans, which are plans in serious financial trouble and are expected to experience an accumulated funding deficiency in the near future. Present-law reorganization and insolvency rules continue to apply.

H.R. 2830 provides that, in general, a plan’s actuary must certify to the Secretary of the Treasury, within 90 days after the first day of the plan year, whether the plan is in endangered or critical status. If the certification is not made within this period, the plan is presumed to be in critical status. In making the determination whether a plan is in endangered or critical status, the plan actuary must make projections for the current and succeeding plan years, using reasonable actuarial assumptions and methods, of the cur-

rent value of plan assets and the present value of liabilities, as set forth in the actuarial statement for the preceding plan year. If a plan is certified to be in endangered or critical status for the plan year or is presumed to be in critical status because no certification was made, notice must be provided within 30 days to participants, beneficiaries, bargaining parties, the PBGC, and the Secretaries of Labor and the Treasury.

Endangered Multiemployer Plans. H.R. 2830 requires that, if a plan is less than 80 percent funded or will experience a funding deficiency in the next seven years, the plan is considered to be in endangered status. The plan's trustees must design and adopt a program, within 240 days after a plan is certified as endangered, that will improve the health of the plan by one-third within 10 years, unless the plan's actuary certifies that the plan cannot meet that improvement benchmark. If the plan cannot meet the one-third improvement benchmark within 10 years, the plan must develop a program to improve the health of the plan by one-fifth within fifteen years; however, the plan's actuary must certify each year, until the expiration of the collective bargaining agreement, that the plan is unable to meet the $\frac{1}{3}$ improvement benchmark within 10 years.

For endangered plans that are funded between 65 and 70 percent, the trustees must create a program to improve the funded status of the plan by one-fifth within fifteen years. In addition, the bill prohibits trustees from increasing benefits if the increase would cause the plan to fall below 65 percent funded status. Plan trustees also must adopt certain other measures for increasing contributions and restricting benefit increases until the plan meets the one-third benchmark.

The funding improvement period for the plan to reach the required benchmarks is the 10 year period beginning on the earlier of: (1) the second anniversary of the date of adoption of the funding improvement plan, or (2) the first day of the first plan year following the year in which collective bargaining agreements covering at least 75 percent of active participants have expired.

Pending approval of the funding improvement plan, the plan sponsor must take all actions (consistent with the terms of the plan and present law) to ensure an increase in the plan's funded percentage and a postponement of an accumulated funding deficiency for at least one additional plan year. These applications include, but are not limited to, applications for extensions of amortization periods, use of the shortfall funding method in making funding standard account computations, amendments to the plan's benefit structure, and reductions in future benefit accruals.

Pending approval of a funding improvement plan, the plan may not be amended to provide for the following: (1) a reduction in the level of contributions for participants who are not in pay status; (2) a suspension of contributions with respect to any service; or (3) any new direct or indirect exclusion of younger or newly hired employees from plan participation.

Critical Multiemployer Plans. H.R. 2830 includes a series of requirements to address multiemployer plans that are severely underfunded and face significant and immediate funding problems. H.R. 2830 strengthens the funding requirements for critical plans and requires trustees to develop and adopt, within 240 days from

the plan's critical status certification, a rehabilitation plan to exit the critical zone within 10 years. A plan is considered to be in critical status if it meets one of the following tests: (1) as of the beginning of the plan year, the funded percentage of the plan is less than 65 percent and the sum of the market value of plan assets plus the present value of reasonably anticipated contributions for the current and six succeeding plan years is less than the present value of all nonforfeitable benefits for all participants and beneficiaries projected to be payable under the plan during the current and six succeeding plan years; (2) as of the beginning of the plan year, the sum of the market value of plan assets plus the present value of the reasonably anticipated contributions for the current and four succeeding plan years (assuming the same collective bargaining agreement is in effect) is less than the present value of all nonforfeitable benefits for participants and beneficiaries projected to be payable under the plan during the current and four succeeding plan years; (3) as of the beginning of the plan year, the funded percentage of the plan is less than 65 percent and the plan has an accumulated funding deficiency for the current or four succeeding plan years (taking into account any amortization extension); (4) the plan's normal cost for the year, plus interest (determined at the rate used for determining costs under the plan) for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last date of the preceding plan year exceeds the present value, as of the beginning of the plan year, of the reasonably anticipated contributions for the year plus the present value of the nonforfeitable benefits of the inactive participants is greater than the present value, as of the beginning of the plan year, of the nonforfeitable benefits of active participants, and the plan is projected to have an accumulated funding deficiency for the current or four succeeding plan years; or (5) the funded percentage of the plan is greater than 65 percent for the current plan year and the plan is projected to have an accumulated funding deficiency for the current or three succeeding plan years.

The rehabilitation period for the plan to reach the required benchmarks is the 10 year period beginning on the earlier of: (1) the second anniversary of the date of adoption of the rehabilitation plan, or (2) the first day of the first plan year following the year in which collective bargaining agreements covering at least 75 percent of active participants have expired.

H.R. 2830 requires that a rehabilitation plan for a critical plan must include a combination of employer contribution increases, expense reductions, funding relief measures, restrictions on future benefit accruals, and benefit reductions of certain ancillary benefits. These changes must be adopted by all bargaining parties. The bill also provides for a surcharge to the plan by employers until the parties adopt a rehabilitation plan and allows the trustees of the plan, in the most dire circumstances, to reduce certain ancillary benefits. If the plan cannot emerge from the critical zone within 10 years, the rehabilitation plan must describe alternatives, explain why emergence from the critical zone is not feasible, and develop actions that the trustees must take to postpone insolvency. Until a rehabilitation plan is adopted, a critical plan is subject to the same restrictions as an endangered plan; however, subject to certain exceptions, no amendment may be adopted which increases

the liabilities of the plan by reason of any increase in benefits, any change in accrual of benefits, or any change in the rate at which benefits become nonforfeitable.

Other Multiemployer Plan Reforms: In addition to the new funding reforms, H.R. 2830 includes new requirements for multiemployer pension plans irrespective of funding status. Specifically, the bill streamlines all amortization payments to a maximum of 15 years. However, the new amortization periods do not apply to amounts attributable to amortization schedules established for plan years beginning before 2006. H.R. 2830 increases the maximum deductible limit up to the excess of 140 percent of current liability, providing additional funding flexibility for plans each year in order to respond to different economic markets.

Amortization Extensions: H.R. 2830 provides that upon a plan's application, the Secretary of the Treasury shall grant an extension of the amortization period for up to five plan years for any unfunded past service liability, investment loss, or experience loss. An applicant must demonstrate to the satisfaction of the Secretary that the notice of the application has been provided to each organization representing employees covered by the plan and to the PBGC. The Secretary may also grant an amortization extension for an additional five years beyond the automatic extension. The standard for determining whether an additional extension may be granted is the same as under present law; however, the rate applicable to the waived funding deficiencies and extensions of amortization periods is the greater of: (1) 150 percent of the federal mid-term rate, or (2) the rate of interest used under the plan in determining costs.

Finally, H.R. 2830 also includes withdrawal liability reforms in order to strengthen and clarify current law withdrawal rules and provide certain privately-held, small employers with the ability to grow and/or modify their business to meet the needs of a dynamic economy. Such reforms may not, however, be made with any attempt to evade or avoid any obligations to contribute to a multiemployer plan. The Committee believes that withdrawal liability reforms are needed in order to ensure the future of these plans, and that employers continue to participate in the multiemployer pension system.

TITLE III—INTEREST RATE FOR LUMP SUM DISTRIBUTIONS

H.R. 2830 requires employers to use the three appropriate segment rates under the modified yield curve to calculate minimum lump sum distributions for participants. In other words, the modified yield curve must be applied to each projected annuity payment in converting to a lump sum.

In general, current law requires lump sum distributions to be calculated using the artificially-low 30-year Treasury rate; this has the effect of inflating lump sum distributions, which drains plan assets and represents a major source of systemic pension underfunding. Using the same interest rates to calculate both employer pension contributions and lump sum distributions will ensure that these benefits are calculated and funded properly and fairly without having an adverse impact on the remaining workers and retirees in the plan. It is the Committee's intent that employers use the RP-2000 Combined Mortality Table in calculating lump sum dis-

tributions and use the assumption that an equal number of men and women will take lump sum distributions. There is a five-year phase-in of the modified yield curve rate from the 30-year Treasury rate for the purpose of calculating lump sum distributions. If a plan offers lump sum distributions, however, the assumption regarding the probability of when payments will be made is required to be taken into account for funding purposes.

Amendment to the ERISA Prohibited Transaction Rules Adopted by the Committee: H.R. 2830 outlines eight prohibited transaction exemptions to facilitate easier, faster, and less expensive transactions between private pension plans and service providers. The purpose of this provision is to ensure that pension plans are not denied certain investment opportunities or overburdened by unnecessary or duplicative regulatory structures that result in higher administrative costs. The eight exemptions include the following:

Definition of “Amount Involved.” This provision clarifies the term “amount involved” with respect to certain types of investment which is used in calculating the civil penalties imposed and the appropriate amount for correcting a prohibited transaction. The “amount involved” in a transaction is clarified as the amount of money and the fair market value of property either given or received as of the date on which the prohibited transaction occurs.

Exemption for Block Trading. This provision allows pension assets to be included in block trades in order to achieve better execution and reduced costs and provides for more efficient plan asset transactions.

Bonding Relief. This provision amends ERISA’s bonding rules to reflect the regulation of broker-dealers and investment advisers under federal securities law.

Conforming ERISA’s Prohibited Transaction Provision to the Federal Employees’ Retirement System Act (FERSA). This provision exempts fair market value exchanges from the prohibited transaction requirements to reduce pension plan costs.

Relief for Foreign Exchange Transactions. This provision allows broker-dealers and affiliates to provide ancillary services to plans (such as currency conversions) which results in overall lower administrative costs and burdens.

Definition of Plan Asset Vehicle. This provision excludes the underlying assets of entities which hold less than 50 percent of plan assets from the fiduciary rules under ERISA to allow plans the flexibility to participate in greater investment opportunities.

Exemption for Electronic Communication Network. This provision allows plans to conduct transactions on electronic trading networks that are owned in part or whole by any plan service provider, which will result in reduced plan costs and enhanced efficiency.

Correction Period for Certain Transactions Involving Securities and Commodities. This provision provides a 14-day “correction” period for any transactions that occur by mistake between a plan and a party-in-interest or fiduciary.

TITLE IV—IMPROVEMENTS IN PBGC GUARANTEE PROVISIONS

Two important steps are essential to improving the financial condition of the PBGC and ensuring its long-term solvency: (1) reforming pension funding rules to ensure pensions are more adequately

and consistently funded; and (2) increasing premiums paid by employers to the PBGC in a responsible fashion. It is important to note that ensuring employers fund their plans appropriately will prove more helpful to the overall defined benefit system than additional premiums paid to the PBGC. However, Congress has not raised premiums since 1991, so a reasonable increase is both prudent and necessary.

Flat-Rate Premiums. The Pension Protection Act raises flat-rate, per participant premiums employers pay to the PBGC, but phases the increases in over time instead of increasing them immediately. For pension plans that are less than 80 percent funded, the bill raises the flat per-participant rate premium from the current \$19 to \$30 over three years. For plans funded at more than 80 percent, the premium increase is phased in over five years. The bill indexes the flat-rate premium annually to worker wage growth.

Variable Rate Premiums. Under H.R. 2830, variable rate premiums are charged to a plan based on the amount of plan underfunding below 100 percent. Employers are required to pay \$9 for every \$1000 dollars of unfunded vested benefits to the PBGC.

TITLE V—DISCLOSURE

While ERISA includes a number of reporting and disclosure requirements that provide workers with information about their benefits, the timeliness and usefulness of this information should be improved. Too often in recent years, participants have mistakenly believed that their pension plans were well funded, only to receive a shock when the plan is terminated. Without basic information, workers, contributing employers, lawmakers, and the federal agencies that oversee pension plans are left without the most complete and accurate information about the true funded status of these pension plans. This has troubling implications for workers who are relying on this information for their retirement, and taxpayers who ultimately face the risk of bailing out these plans. The Pension Protection Act provides workers, investors, and lawmakers more timely and useful information about the status of defined benefit pension plans to ensure greater transparency and accountability.

New Notice to Workers and Retirees. Within 90 days after the close of the plan year, H.R. 2830 requires both single and multiemployer pension plans to notify participants and beneficiaries of the actuarial value of assets and projected liabilities and the funded percentage of their plan. Such notice must also include the plan's funding policy and asset allocations based on a percentage of overall plan assets. This notice is due for plan years beginning after 2005.

For multiemployer plans already subject to this provision, such notice must also include a statement of the ratio of inactive participants to active participants in a plan, as of the end of the plan year to which the notice relates. Inactive participants are considered those participants who are not in covered service under the plan and are in pay status or have a nonforfeitable right to benefits under the plan. It is the Committee's intent that covered service includes a period of service of no less than 12 consecutive months.

With respect to multiemployer plan disclosure under current law, contributing employers of multiemployer plans have little access to any information regarding the health of the pension plan to which

they contribute. H.R. 2830 requires multiemployer plans to make available certain information within 30 days of a request by contributing employers or labor organizations, including: (1) copies of all actuarial reports received by the plan for a plan year; and (2) copies of all financial reports prepared by plan fiduciaries, including plan investment managers and advisors, and/or plan service providers.

Enhancing Form 5500 Notice Requirements. The principal source of information about private sector defined benefit plans is the Form 5500, the equivalent of a pension plan's federal tax return. H.R. 2830 requires both single and multiemployer plans to include more information on their Form 5500 filings. Specifically, if plans merge and file one Form 5500, the plan must provide the funded percentage for the preceding plan year and the new funded percentage after the plan merger. In addition, a plan's enrolled actuary must explain the basis for all plan retirement assumptions on the Schedule B, which is the actuarial statement filed along with Form 5500 that provides information on the plan's assets, and liabilities. Finally, H.R. 2830 requires multiemployer plans to include on Form 5500 filings the number of contributing employers in the plan as well as the number of employees in the plan that no longer have a contributing employer on their behalf.

Making Form 4010 Disclosure Publicly Available. Under current law, employers who sponsor single employer defined benefit plans that are underfunded, in the aggregate, by more than \$50 million must disclose to the PBGC certain information annually on Form 4010. H.R. 2830 provides for certain information included in a plan sponsor's Form 4010 filing to be disclosed to participants and beneficiaries.

Under the bill, if a plan is less than 60 percent funded, H.R. 2830 requires employers to provide certain additional information to workers and retirees within 90 days after Form 4010 is due. This new notice must include: (1) notice that a plan has made a Form 4010 filing for the year; (2) the aggregate amount of assets, liabilities, and funded ratio of the plan; (3) the number of plans maintained by the employer that are less than 60 percent funded ("at-risk" liability); and (4) the assets, liabilities, and funded ratio for those at-risk plans that are less than 60 percent funded.

The PBGC may also request that a plan sponsor file a 4010 and provide notice to its participants if a plan is less than 75 percent funded and such plan is sponsored by an employer in an industry that is experiencing substantial unemployment or underemployment and in which sales and profits are depressed or declining.

Multiemployer Withdrawal Liability Notice. H.R. 2830 requires a multiemployer plan to notify a contributing employer of its withdrawal liability amount within 180 days of a written request. The notice may only be provided once within a 12-month period and may be subject to a reasonable fee. The notice must also include the cost of all participants and beneficiaries in the plan without a contributing employer.

Summary Annual Report. The summary annual report (SAR) provides basic disclosure of information from the Form 5500 to workers and retirees. However, under current law, because this notice isn't required until 110 days after the Form 5500 is filed, the information is often out of date. The bill requires both single and

multiemployer pension plans to provide this notice within 15 days following the Form 5500 filing deadline. The bill also requires the Department of Labor to publish a model SAR notice for plans sponsors.

TITLE VI—INVESTMENT ADVICE

The Pension Protection Act includes a comprehensive investment advice proposal that has passed the House three times in the last several years with significant Democrat support (twice in the 107th Congress and once in the 108th Congress). It allows employers to provide rank-and-file workers with access to a qualified investment adviser who can inform them of the need to diversify and help them choose appropriate investments. The bill also includes tough fiduciary and disclosure safeguards to ensure that advice provided to employees is solely in their best interest.

Important Fiduciary Safeguards. H.R. 2830 includes important fiduciary safeguards and new disclosure protections to ensure that workers receive quality advice that is solely in their best interests. Under the bill, only qualified “fiduciary advisers” who are fully regulated by applicable banking, insurance, and securities laws may offer investment advice; this ensures that only qualified individuals may provide advice. Under the bill, investment advisers who breach their fiduciary duty are personally liable for any failure to act solely in the interest of the worker, and may be subject to civil and criminal penalties by the Labor Department and civil penalties by the worker, among other sanctions. In addition, existing federal and state laws that regulate individual industries will continue to apply.

Comprehensive Disclosure Protections. In order to provide advice under H.R. 2830, advice providers must disclose in plain, easy-to-understand language any fees or potential conflicts. The bill requires advisers to make these disclosures when advice is first given, at least annually thereafter, whenever the worker requests the information, and whenever there is a material change to the adviser’s fees or affiliations. The disclosure must also be reasonably contemporaneous with the advice so that employees can make informed decisions with the advice they receive.

Clarifies the Role of the Employer. H.R. 2830 clarifies that employers are not responsible for the individual advice given by professional advisers to individual participants; this liability is assumed by the individual adviser. Under current law, employers are discouraged from providing this benefit because liability issues are ambiguous and employers may be held liable for specific advice that is provided to their employees. Under the bill, employers will remain responsible under ERISA fiduciary rules for the prudent selection and periodic review of any investment adviser and the advice given to employees.

Voluntary Process. The bill does not require any employer to contract with an investment adviser nor is any employee under any obligation to accept or follow any advice. Workers, not the adviser, will have full control over their investment decisions.

TITLE VII—BENEFIT ACCRUAL STANDARDS

Hybrid pension plans generally combine the best features of both defined benefit and defined contribution plans by providing a

meaningful retirement benefit to all employees, regardless of age. Hybrid plans are similar to defined benefit plans because they are funded by employers and the benefits are protected by the PBGC. In addition, employers bear the responsibility for any market gains and losses. However, these plans are also similar to defined contribution plans, such as 401(k) plans, because benefits are provided through individual “hypothetical accounts.”

In recent years, the legality of these plans has been challenged as violating the age discrimination provisions in ERISA. H.R. 2830 ends the legal uncertainty surrounding cash balance pension plans and ensures that such plans remain a viable retirement security option for workers and employers. In general, the bill establishes a simple age discrimination standard for all defined benefit plans that clarifies current law with respect to age discrimination requirements under ERISA on a prospective basis. The age discrimination clarification in the bill specifies that if a participant’s entire accrued benefit, as of any date under the formula for determining benefits as set forth in the text of the plan documents, is equal to or greater than that of a similarly situated, younger employee, or provides for lump sum distributions equal to a participant’s hypothetical account, the plan is not considered age discriminatory under ERISA. Two employees are considered similarly situated if they are, and always have been, identical in every respect, including but not limited to, any period of service, compensation, position, date of hire, or work history, except for age.

In determining the entire accrued benefit of a participant, the subsidized portion of any early retirement benefit (including any early retirement subsidy that is fully or partially included or reflected in an employee’s opening account balance or other transition benefits, in the case of a hybrid pension plan) shall be disregarded.

As stated above, it is the intent of the Committee to confirm the legality of all defined benefit plans, including certain plans that index benefits for inflation. As such, H.R. 2830 provides that a plan formula does not fail to satisfy the requirements of this provision if the formula provides for the indexing of pre- or post-retirement benefits. For example, a plan may index benefits to protect the economic value of a participant’s benefit by providing for a cost-of-living adjustment. However, it is the intent of the Committee to prohibit any pre-retirement indexing which results in a cumulative negative adjustment in a participant’s benefit.

With respect to lump sum distributions, it is the Committee’s intent that if a defined benefit plan determines a participant’s benefit by reference to the balance in a hypothetical account (or by reference to a current value equal to an accumulated percentage of a participant’s final average of compensation), the plan does not fail to meet the requirements of this provision if a lump sum distribution is made equal to the participant’s nonforfeitable accrued benefit expressed as the value of a hypothetical account (or of the present value of the accumulated percentage of final average compensation).

TITLE VIII—INCREASING MAXIMUM DEDUCTIBLE CONTRIBUTIONS

Current pension funding rules often force employers into the difficult position of being unable to make additional contributions to

pension plans during good economic times, but then subject to accelerated contribution requirements during an economic downturn or market fluctuation. H.R. 2830 permits employers to make additional contributions up to a new higher maximum deductible amount equal to the greater of: (1) the excess of the sum of 150 percent of the plan's funding target plus the target normal cost over the value of plan assets, or (2) the excess of the sum of the plan's at-risk normal cost and at-risk funding target for the plan year over the value of plan assets. In determining the maximum deductible amount, plan assets are not reduced by any pre-funding balance or funding standard carryover balance. The Committee believes that giving employers more flexibility to make generous contributions during good economic times will help provide workers and retirees greater retirement security by increasing the assets available to finance retirement benefits.

In the case of a multiemployer defined benefit plan, the maximum deductible amount is not less than 140 percent of current liability over the value of plan assets.

COMMITTEE VIEWS

The defined benefit pension system is rapidly declining due to a complex statutory and regulatory structure, expensive administrative costs, and changing workforce demographics. The financial health of defined benefit plans is a critical issue for the millions of workers that participate in these plans. Moreover, the funding of these plans has become more challenging for many employers because of a climate of low interest rates, a lackluster economy, stock market losses, and an increasing number of retirees. As a result, the number of employers offering defined benefit pension plans has declined and some employers have frozen or terminated their traditional pension plans altogether.

The Committee believes that the defined benefit pension system must be strengthened in order to ensure a protected and reliable retirement system. Employees need greater pension security in order to prepare for retirement. Employers must have the ability to accurately measure and predict pension liabilities and other funding issues in order to properly determine their capital allocations and expenditures for business planning purposes. The Committee recognizes that pensions are voluntary benefits provided by employers and that Congress must take a balanced approach to reforming the system that addresses current failings without overburdening plan sponsors to the extent that it becomes impractical for them to provide such benefits to their employees. Peter R. Fisher, Under Secretary for Domestic Finance, U.S. Department of Treasury, testified on the need for a balanced approach to comprehensive reforms of the defined benefit pension system, and in particular, to funding reforms, in order to protect the interest of workers and retirees:

Americans have broadly shared interest in adequate funding of employer-provided defined benefit pensions. Without adequate funding, the retirement income of America's workers will be insecure. This by itself is a powerful reason to pursue improvements in our pension system. At the same time, we must remember that the defined benefit

pension system is a voluntary system. Firms offer defined benefit pensions to their workers as an employee benefit, as a form of compensation. Our pension rules should thus be structured in ways that encourage, rather than discourage, employer participation. Key aspects of the current system frustrate participating employers while also failing to produce adequate funding. We thus have multiple incentives to improve our pension system, and to thus better ensure both the availability and the viability of worker pensions. We owe it to the nation's workers, retirees, and companies to roll up our sleeves and to create a system that more clearly and effectively funds pension benefits.⁴

The Committee believes that the current defined benefit pension system does not contain appropriate rules, including funding and disclosure rules, to ensure that pension plans are properly funded and that participants and beneficiaries receive sufficient information. Maintaining the status quo is clearly unacceptable to the remaining 44 million workers and retirees participating in the defined benefit pension system. Ann L. Combs, Assistant Secretary of the Employee Benefits Security Administration (EBSA), U.S. Department of Labor, testified on the need for comprehensive reforms to the current defined benefit pension rules:

Defined benefit plans are intended to provide a secure source of retirement income that lasts a lifetime. Recent volatility in the stock market has reminded workers of the value of such plans where corporate plan sponsors bear investment risk. As our aging workforce begins to prepare for retirement and think about how to manage its savings wisely, there is a renewed interest in guaranteed annuity payouts that last a lifetime. If we do nothing but paper over the problems facing defined benefit plans and the companies and unions that sponsor them, we will ill-serve America's workers threatened by unfunded benefits and potentially broken promises.⁵

SINGLE EMPLOYER PENSION PLANS

Title I of ERISA addresses the rules and required conduct for the establishment, operation, and termination of qualified pension plans.⁶ The minimum funding requirements under ERISA permit an employer to fund defined benefit plans over a certain period of time, regardless of whether a plan is considered fully funded.⁷ As a result, pension plans may be terminated when plan assets are not sufficient to provide for all benefits accrued by employees under the plan. In order to protect participants from losing retirement benefits if a plan terminates without sufficient assets to pay vest-

⁴Joint Hearing on "Examining Pension Security and Defined Benefit Plans: The Bush Administration's Proposal to Replace the 30-Year Treasury Rate," before the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce and the Subcommittee on Select Revenue Measures of the Committee on Ways and Means, U.S. House of Representatives, 108th Congress, First Session, July 15, 2003, Serial No. 108-26.

⁵Id.

⁶See ERISA § 4(b). There are certain types of pension plans which are not covered under Title I of ERISA and thus are not qualified ERISA plans. For example, plans sponsored by a government or a church are not qualified ERISA plans.

⁷See ERISA § 302. In general, the funding requirements under ERISA provide that a plan is considered fully funded at 90 percent, and in some cases, 80 percent.

ed, accrued benefits, the PBGC, a corporation within the Department of Labor, was created in 1974 under ERISA to provide an insurance program for the payment of benefits from certain terminated pension plans maintained by private employers.⁸

The need for legislation

It is the view of the Committee that the role of the PBGC in protecting the retirement benefits of over 44 million Americans participating in both single employer and multiemployer defined benefit plans is crucial.⁹ However, the current system does not contain appropriate funding rules to ensure that pension plans are adequately funded. Over the past few years, the terminations of severely underfunded pension plans have threatened the retirement security of the participants and beneficiaries who earned these benefits. Furthermore, the recent terminations of several notable and chronically underfunded pension plans has placed an increasing financial strain on the PBGC single employer pension insurance program, and has threatened its long-term viability.

In fact, recent statistical evidence suggests that PBGC's long-term financial health may be in jeopardy. The Executive Director of the PBGC, Bradley D. Belt, testified on the financial condition of the PBGC:

The pension insurance programs administered by the PBGC have come under severe pressure in recent years due to an unprecedented wave of pension plan terminations with substantial levels of underfunding. This was starkly evident in 2004, as the PBGC's single employer insurance program posted its largest year-end shortfall in the agency's 30-year history. Losses from completed and probable pension plan terminations totals \$14.7 billion for the year, and the program ended with a deficit of \$23.3 billion. That is why the Government Accountability Office has once again placed the PBGC's single employer insurance program on its list of "high risk" government programs in need of attention.¹⁰

The latest plan sponsor filings with the PBGC reveal an unprecedented and systematic pension underfunding problem within the defined benefit pension system. On June 7, 2005, the PBGC issued a press release stating that companies with underfunded pension plans reported a record shortfall of \$353.7 billion in their filings with the PBGC, which represents a 27 percent increase from the previous year. The 2004 reports, filed with the PBGC by April 15, 2005, were submitted by 1,108 pension plans covering approximately 15 million workers and retirees. In total, the filings indicated that underfunded plans had only \$786.8 billion in assets to cover more than \$1.14 trillion in liabilities, for an average funded ratio of approximately 69 percent.

⁸ See ERISA § 4021(b)(13). Plans sponsored by professional service employers, such as physicians and lawyers, with 25 or fewer employees are not covered by the PBGC single-employer insurance program.

⁹ The PBGC currently guarantees payment of basic pension benefits of participants in approximately 31,000 defined benefit plans.

¹⁰ Hearing on "The Retirement Security Crisis: The Administration's Proposal for Pension Reform and Its Implications for Workers and Taxpayers," before the Committee on Education and the Workforce, U.S. House of Representatives, 109th Congress, First Session, March 2, 2005, Serial No. 109-3.

It is important to note that the PBGC has acknowledged that it has the adequate resources to continue paying benefits into the future; however, its financial condition will continue to deteriorate without comprehensive reforms made to the entire defined benefit pension system. Mr. Belt specifically testified on the current financial condition of the PBGC as well as its ability to pay benefits in the future:

Notwithstanding our record deficit, I want to make clear that the PBGC has sufficient assets on hand to continue paying benefits for a number of years. However, with \$62 billion in liabilities and only \$39 billion in assets as of the end of the past fiscal year, the single employer program lacks the resources to fully satisfy its benefit obligations.¹¹

The PBGC is required through statutory mandates to maintain premiums at the lowest levels consistent with carrying out the agency's statutory obligations. However, these premiums have not been increased in over fourteen years and are simply not adequate for the payment of guaranteed benefits. H.R. 2830 responsibly increases flat-rate premiums paid by plan sponsors maintaining certain qualified defined benefit pension plans by phasing-in the current \$19 per participant to \$30 over a maximum period of 5 years, depending upon the plan's funded status. This increase is needed in order to assist the PBGC in continuing to provide benefits to participants and beneficiaries in terminated pension plans.

It is the view of the Committee that comprehensive funding rule changes are needed in order to address the systematic pension underfunding crisis that continues to threaten the financial security of millions of participants. Ann Combs, Assistant Secretary of EBSA, testified this year on the need for funding reform changes:

The increasing PBGC deficit and high levels of plan underfunding are themselves a cause for concern. More importantly, they are symptomatic of serious structural problems in the private defined benefit system. It is important to strengthen the defined benefit pension system now.¹²

Assistant Secretary Combs also testified on the inadequacies of the current funding rules:

Under the current funding rules, financially weak companies can promise new benefits and make lump sum payments that the plan cannot afford. Workers, retirees, and their families who rely on these empty promises can face serious financial hardship if the pension plan is terminated.¹³

The need for pension reform has been echoed further by professional organizations that performs services for all defined benefit plans. Kenneth A. Kent, Academy Vice-President, American Academy of Actuaries, testified from the perspective of professional pension actuaries on the need for comprehensive reforms:

Do we need reform? The need is evident by the continuing decline in the number of defined benefit pension

¹¹ Id.

¹² Id.

¹³ Id.

plans. Defined benefit programs are a fundamental vehicle for providing financial security for millions of Americans. Unlike other programs, they provide lifetime benefits to retirees, no matter how long they live and regardless of how well they do on their individual investments. However, recent market conditions of low interest rates and low market returns have caused more dramatic declines in the number of covered employees. There are many contributing factors, including regulatory and administrative burdens derived from years of amendments to ERISA, which have had a long-term detrimental impact. These programs need your support through major reform of the current laws.¹⁴

In addition to the Administration, Congress, and professional associations, corporations, business groups, and trade associations also recognize the need for comprehensive pension reforms. Kenneth W. Porter, Director of Corporate Insurance and Global Benefits Financial Planning for the DuPont Company, testifying on behalf of the American Benefits Council, the American Council of Life Insurers, the Business Roundtable, the ERISA Industry Committee, the National Association of Manufacturers, and the U.S. Chamber of Commerce, testified on the need for overall comprehensive reforms to the single employer defined benefit pension system:

Not only do we agree that funding rules need to be strengthened, we also agree that broader, more timely disclosure to plan participants is needed, and the proposals to allow employers to make larger contributions during good economic times is long overdue.¹⁵

Modified yield curve

The Committee believes that in order to protect the retirement security interests of participants, beneficiaries, and retirees, comprehensive reforms must include permanent interest rate reforms that generally reflect the timing of when such liabilities are to be paid out. The general matching of discount rates of differing maturities to pension obligations is the most accurate and practical way to measure today's cost of meeting pension obligations. Therefore, a yield curve concept represents one of the most important reforms to the defined benefit pension system. Bart Pushaw, an actuary for Milliman, Inc., testified on the appropriateness of using a modified yield curve to measure pension liabilities:

The bill . . . updates ERISA greatly and simplifies relevant provisions and fixes some of these weaknesses. The yield curve is not a widely familiar concept, and it has only recently begun to enter into use by the pension industry. Thirty years after ERISA was enacted, pension plans now have a wide range of maturity from new plans with hordes

¹⁴ Hearing on "Examining Long-Term Solutions to Reform and Strengthen the Defined Benefit Pension System," before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, Second Session, April 29, 2004, Serial No. 108-55.

¹⁵ Hearing on "The Retirement Security Crisis: The Administration's Proposal for Pension Reform and Its Implications for Workers and Taxpayers," before the Committee on Education and the Workforce, U.S. House of Representatives, 109th Congress, First Session, March 2, 2005, Serial No. 109-3.

of new hires at young ages to plans which have retired populations and liabilities on their balance sheets which dwarf that of the plan sponsor. These vastly differing plan profiles have, in the past, all been treated identically for valuation purposes, grossly and materially erring relative to the market value. Erroneous, inaccurate valuations mean no money to pay benefits. Using yield curves is the right answer. The market, arguably, incorporates more information about expectations in the yield curve than any other single measure . . . leading to higher levels of benefit security for participants and thus strengthening the financial security of millions.¹⁶

Mr. Pushaw further testified on the simplicity of the modified yield curve approach:

The modified yield curve approach in this bill is a good simplification to ease administrative implementation by small plans but rigorous to develop market-based valuations for the largest of plans, reflective of their plan's liability profiles and, hence, emerging cash flow needs.¹⁷

It is the view of the Committee that the Secretary of the Treasury should construct one yield curve representing the three-year weighted average of AAA, AA, and A bond markets. The three segment rates, which are to be used for each of the three duration periods in the modified yield curve, should reflect the average of all AAA, AA, and A bonds for each year in each respective segment. The Committee believes these markets are interrelated; therefore, the modified yield curve should incorporate the interrelated connection between these markets.

Lump sum distribution rates

The Committee also believes that the modified yield curve should be used to calculate the value of lump sum distributions to participants, and the prevalence of lump sum distributions must be assumed when determining a plan's funding target. In addition, the mortality table that must be used for calculating lump sums is the same table required for minimum funding purposes (the RP-2000 Combined Mortality Table, as published by the Society of Actuaries). The mortality assumptions should also take into account an equal number of men and women receiving lump sums. Currently, lump sum distributions are calculated using the artificially-low 30-year Treasury rate; this has the effect of inflating lump sum distributions, which drains plan assets and represents a major source of systemic pension underfunding. Using the same interest rates to calculate both employer pension contributions and lump sum distributions will ensure these benefits are calculated and funded properly and fairly without having an adverse impact on the rest of the workers and retirees in the plan. Robert D. Krinsky, A.S.A., E.A., Chairman, The Segal Company, on behalf of the American Benefits Council, testified on the impact of the current rate used

¹⁶Hearing on "H.R. 2830, the Pension Protection Act," before the Committee on Education and the Workforce, U.S. House of Representatives, 109th Congress, First Session, June 15, 2005 (to be published).

¹⁷*Id.*

to determine lump sum distributions and the need for it to be changed:

[T]he payment of lump sum distributions to defined benefit plan participants exacerbates funding problems for many plans. In part, because lump sum calculations are currently based on the obsolete 30-year Treasury rate, lump sum payments are artificially inflated, and inappropriately drain plan assets. It is important to address the growing prevalence and use of the lump sum distribution option and determine whether this necessitates changes in the funding rules.¹⁸

Reducing volatility and ensuring predictability

The Committee understands that plan sponsors need the ability to predict and budget for pension contributions in order for defined benefit plans to remain a practical pension plan to offer to its employees. The Committee considered the need for contribution predictability with less volatility in the multiple hearings on defined benefit pension reform. As a result, the Committee believes that a modified yield curve concept which incorporates smoothing techniques¹⁹ is appropriate for calculating pension contributions and plan assets. Mr. Greg Heaslip, Vice President of Benefits, PepsiCo, Inc., testified on the need for companies to predict and budget for pension contributions:

Certainty, predictability, and stability are things that you'll hear me reiterate . . . At PepsiCo and at other plan sponsors, defined benefit pension plans have grown to a size where they have a material impact on the company's overall financial results. Our pension expense impacts our profits, our share price. Funding impacts our balance sheet and our credit rating. For any expense . . . companies have to know in advance for the next three to five years what costs and funding requirements will be with reasonable certainty . . . It is really not the cost of defined benefit pension plans that scares companies. We understand that and that's what we signed up for while we implemented them. It's the unpredictability, the volatility, and the uncertainty surrounding them that make them very, very difficult and challenging to sponsor.²⁰

Limiting the use of credit balances

In addition to implementing a permanent interest rate, the Committee believes that companies should be required to adequately and consistently fund their pension plans. Under current law, plan

¹⁸Hearing on "The Pension Underfunding Crisis: How Effective Have Reforms Been?" before the Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, October 29, 2003, Serial No. 108-40.

¹⁹In general, smoothing refers to averaging of interest rates used to calculate plan liabilities as well as the averaging of plan assets. Smoothing generally is used to allow plan fiduciaries to predict future pension contributions. It also is used to mitigate short-term market fluctuations. Since pension obligations are considered long-term obligations, it is the view of the Committee that such fluctuations need not be recognized as they occur. Under current law, interest rates are smoothed over four years and assets are generally smoothed over six years.

²⁰Hearing on "Examining Long-Term Solutions to Reform and Strengthen the Defined Benefit Pension System," before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, Second Session, April 29, 2004, Serial No. 108-55.

sponsors are allowed to take advantage of “contribution holidays” instead of making actual contributions to their plans by using a “credit balance.” A credit balance can be either actual assets or an accounting credit that is used to increase plan assets and offset future contributions. However, the use of credit balances has contributed greatly to the current funding problems. Bradley D. Belt, Executive Director of the Pension Benefit Guaranty Corporation, testified on how the current law use of credit balances negatively impacts the financial status of the PBGC as well as participants and beneficiaries:

The funding rules allow contribution holidays for seriously underfunded plans. Bethlehem Steel made no cash contributions to its plan for three years prior to termination, and US Airways made no cash contributions to its pilots’ plan for four years before termination. One reason for contribution holidays is that companies build up a “credit balance” for contributions above the minimum required amount. They can treat the credit balance as a payment of future required contributions, even if the assets in which the extra contributions were invested have lost much of their value. Indeed, some companies have avoided making cash contributions for several years through the use of credit balances, heedlessly ignoring the substantial contributions that may be required when the balances are used up.²¹

Limiting benefit increases

In addition to comprehensive reforms to the funding rules, it is the view of the Committee that plan sponsors should not be able to continue to increase benefits when a plan is underfunded. This practice perpetuates systematic underfunding and is a moral hazard which threatens the retirement security of the participants and beneficiaries as well as the future of the defined benefit pension system. David C. John, Research Fellow of the Thomas A. Roe Institute for Economic Policy Studies at the Heritage Foundation, testified on the negative effects of increasing benefits in underfunded plans:

Companies that are in severe financial trouble often try to keep their workers happy by promising them higher pension benefits. Similarly, companies in bankruptcy sometimes seek to improve pension benefits in return for salary concessions. In both cases, these higher pension promises often get passed on to the PBGC, and thus to the taxpayers, for payment when the company seeks to terminate its pension plan.²²

Ann Combs, Assistant Secretary of EBSA, also testified on the need for limitations on benefit increases, as well as the prohibition on lump sum distributions, for underfunded plans:

²¹ Hearing on “The Retirement Security Crisis: The Administration’s Proposal for Pension Reform and Its Implications for Workers and Taxpayers,” before the Committee on Education and the Workforce, U.S. House of Representatives, 109th Congress, First Session, March 2, 2005, Serial No. 109–3.

²² Hearing on “The Pension Underfunding Crisis: How Effective Have Funding Reforms Been?” before the Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, October 29, 2003, Serial No. 108–40.

The current rules encourage some plans to be chronically underfunded, in part, because they shift potential losses to third parties. This is what economists refer to as a “moral hazard.” Under current law, sponsors of underfunded plans can continue to provide for additional accruals and, in some situations, even make new benefit promises, while pushing the cost of paying for those benefits off into the future. For this reason, some companies have an incentive to provide generous pension benefits that they cannot currently finance, rather than increase wages. The company, its workers, and any union officials representing them know that at least some of the additional benefits will be paid, if not by their own plan, then by other plan sponsors in the form of PBGC guarantees . . . If a company’s plan is poorly funded, the company should be precluded from adopting further benefit increases unless it fully funds them, especially if it is in a weak financial position. If a plan is severely underfunded, retiring employees should not be able to elect lump sums and similar accelerated benefits. The payment of those benefits allows those participants to receive the full value of their benefits while depleting the plan assets for the remaining participants.²³

Prohibiting shutdown and unpredictable contingent event benefits

In addition to limitations on benefit increases and certain distributions, the Committee believes that shutdown benefits and other unpredictable contingent event benefits, should be eliminated. Unpredictable contingent event benefits are benefits that become payable under special circumstances relating to the closure of a plant, division or facility, or to layoffs of employees of a certain group or class; because they are a severance-type subsidy payment, they may trigger significantly disproportionate increases in plan liabilities. The PBGC guarantees all nonforfeitable benefits, other than benefits that become nonforfeitable solely on account of the termination of a plan. Shutdown benefits become nonforfeitable when the shutdown or layoff occurs, not when the plan terminates. As a result, shutdown benefits may be guaranteed by the PBGC if the shutdown occurs before the termination date, but they are not guaranteed if the shutdown occurs after plan termination.

Shutdown benefits are not funded. Indeed, precisely because a plant shutdown is inherently unpredictable, it is extremely difficult to recognize the costs of these benefits in advance so funding for shutdown benefits is nearly impossible. Thus, upon shutdown, a plan’s liabilities may be increased dramatically. The PBGC is responsible for paying these unfunded benefits, yet employers are not obligated to contribute money to pay for them.

Plant shutdown benefits increase plan terminations and impose unreasonable costs on the PBGC, and should not be permitted. A recurring problem in pension funding has been that a plan may provide special benefits that are only payable in the event that the location at which workers are employed ceases operations. Such

²³ Hearing on “The Retirement Security Crisis: The Administration’s Proposal for Pension Reform and Its Implications for Workers and Taxpayers,” before the Committee on Education and the Workforce, U.S. House of Representatives, 109th Congress, First Session, March 2, 2005, Serial No. 109–3.

events are inherently unpredictable, such that it is difficult to recognize the costs of these benefits in advance. Current law does not include in any current liability calculation the cost of benefits arising from future unpredictable contingent events. Yet these benefits can dramatically increase the level of underfunding in a plan and by themselves have been a considerable source of pension funding problems. Moreover, allowing and guaranteeing plant shutdown benefits raises fairness issues, since other participants and plan sponsors may bear the burden of paying for these unfunded benefits.

It is the view of the Committee that shutdown benefits are not similar to pension benefits. Shutdown benefits are not paid upon retirement from a plan. They are more like severance pay benefits provided to an employee upon termination from employment. Accordingly, HR 2830 prohibits a plan from providing benefits payable due to a plant shutdown or any other unpredictable contingent event. The bill defines “unpredictable contingent event” as an event other than the attainment of any age, the performance of any service, the receipt or derivation of any compensation, the occurrence of death or disability, or any other event which is reasonably and reliably predictable (as determined by the Secretary of Treasury).

Bradley D. Belt, Executive Director of the PBGC shares the Committee’s concerns, and testified on April 26, 2005, before the Subcommittee on Retirement Security and Aging, Committee on Health, Education, Labor, and Pensions, United States Senate. Mr. Belt stated:

The Administration believes that shutdown benefits are severance benefits that should not be paid by pension plans. These benefits generally are not funded until the shutdown occurs, by which time it is often too late, and no PBGC premiums are paid for them. However, despite the lack of funding, shutdown benefits may be guaranteed if the shutdown occurs before the plan termination date, often imposing large losses on the insurance program.

The Administration proposal would prospectively eliminate the guarantee of certain unfunded contingent liability benefits and prohibit such benefits under pension plans. These severance benefits generally are not funded and no PBGC premiums are paid for them. Such benefits could continue to be provided outside the pension plan.

Improving disclosure

Another crucial aspect of comprehensive pension reform is improved disclosure to participants and beneficiaries. The Committee believes that additional and timely disclosure of plan information is imperative for employees to have in order to understand the financial status of their pension plan for their retirement security. In general current law requires plan sponsors to disclose “current liability” to participants and beneficiaries, which is not an accurate proxy for the disclosure of the financial health of a plan.²⁴ Participants and beneficiaries should be provided information on the general health of their pension plan, including an estimate of plan as-

²⁴ Current liability means the present value of all accrued liabilities attributable to participants and beneficiaries under the plan.

sets, liabilities, and the funded ratio, on a timely basis. Barbara D. Bovbjerg, Director of Education, Workforce, and Income Security Issues, U.S. General Accounting Office, testified on the need for additional disclosure of pension plan information:

In addition, only participants in plans below a certain funding threshold receive annual notices of the funding status of their plans. As a result, many plan participants, including participants of the Bethlehem Steel pension plan, did not receive such notifications in the years immediately preceding the termination of their plans. Expanding the circumstances under which sponsors must notify participants of plan underfunding might give sponsors an additional incentive to increase plan funding and would enable more participants to better plan their retirement.²⁵

Increasing the maximum deductible amount

It is the view of the Committee that the rules relating to the maximum amount of deductible contributions that plan sponsors may make to a qualified pension plan must be reformed in order to encourage plan sponsors to make additional contributions. The current rules prohibit plan sponsors from making additional contributions to pension plans during good economic times, but impose accelerated contribution requirements on plan sponsors during an economic downturn or even a slight market fluctuation. Additionally, employers are generally subject to an excise tax for making contributions in excess of the maximum deductible amount.

H.R. 2830 permits employers to make additional contributions up to a new higher maximum deductible of up to the greater of: (1) the excess of the sum of 150 percent of a plan's funding target plus the normal cost for the plan year over the value of plan assets, or (2) the excess of the sum of the plan's at-risk funding target plus the at-risk normal cost for the plan year over the value of plan assets. Giving employers more flexibility to make generous contributions during good economic times will help provide workers and retirees greater retirement security by increasing the assets available to finance retirement benefits.

In a report released to the Committee on Education and the Workforce on October 29, 2003, the General Accounting Office indicated that raising the level of tax deductible contributions was one of the steps that could be taken to enhance incentives to increase funding of plans:

IRC and ERISA restrict tax-deductible contributions to prevent plan sponsors from contributing more to their plan than is necessary to cover accrued future benefits. This can prevent employers from making plan contributions during periods of strong profitability. Raising these limitations might result in pension plans being better funded, decreasing the likelihood that they will be underfunded should they terminate.²⁶

²⁵ Hearing on "The Pension Underfunding Crisis: How Effective Have Reforms Been?" before the Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, October 29, 2003, Serial No. 108-40.

²⁶ United States General Accounting Office, "Private Pensions: Changing Funding Rules and Enhancing Incentives Can Improve Plan Funding," No. GAO-04-176T.

In recent years, plan sponsors have also expressed their concern that market volatility limits their ability to make additional contributions. Increasing the level of maximum deductible contributions is an important incentive to encourage plan sponsors to make additional contributions to their plans, which will ultimately result in a system with plans that are better funded. Lynn Franzoi, Senior Vice President of Benefits for Fox Entertainment Group, recently testified on the need for increasing the maximum deductible amount of contributions to pension plans:

[I]ncreasing the maximum deductible contribution limit is long overdue. Employers should be able to contribute more to their plans in good times and not be forced to increase contributions during bad economic times. Some employers with plans that are now experiencing funding deficiencies would have liked to have increased contributions when they had cash on hand. However, they were limited by the maximum deductibility rules. Not only would their additional contributions have been nondeductible, but they would have had to pay a significant excise tax on the contributions. This cap on contributions works against companies and plan participants by requiring contributions when companies are financially strapped and prohibiting contributions when companies are prosperous. Thus, companies cannot insulate themselves and their plan participants against cyclical changes in the economy. Therefore, we fully support the increases to the maximum deductible contributions for defined benefit plans.²⁷

Ensuring the viability of hybrid pension plans

Recent statistics show that the traditional defined benefit pension system is declining. Although the PBGC provides insurance protection to approximately 29,000 single employer pension plans covering 34.6 million people, the percentage of private sector workers covered by a defined benefit pension plan has dropped from 39 percent in 1975 to 21 percent in 2004.²⁸ The Committee believes that hybrid pension plans, such as cash balance plans, may reverse this trend if the rules surrounding these plans are clarified. It is the view of the Committee that hybrid pension plans represent the future of the defined benefit pension system and are a valuable tool in providing benefits that are not subject to market fluctuations and guaranteed by the PBGC.

Under hybrid plans, participants earn portable benefits more evenly over a career span, not just at the very end of a participant's career. This can result in greater retirement savings for workers who do not remain with the same employer for their entire career. As a result, a broader group of participants, including lower-income employees and women, earn greater benefits with shorter service under hybrid plans than traditional plans. On June 22, 2004, the Committee released a fact sheet which shows the ben-

²⁷ Hearing on H.R. 2830, the "Pension Protection Act of 2005," before the Committee on Education and the Workforce, U.S. House of Representatives, 109th Congress, First Session, June 15, 2005 (to be published).

²⁸ "The Future of the Defined Benefit System and the Pension Benefit Guaranty Corporation," General Accounting Office, Report No. GAO-05-578SP.

efits of hybrid plans and dispels some of the myths surrounding these plans:

- “For example, if an employer wanted to offer employees a more portable retirement benefit through a cash balance formula that provides annual credits of five percent of pay, mandatory choice might lead the employer to instead freeze its defined benefit plan and adopt a 401(k) plan that provides contributions of five percent of pay. Under the 401(k) plan, employees would bear the entire risk of stock market declines.” Mitchell & Mulvey, Pension Research Council, Wharton School, University of Pennsylvania, Possible Implications of Mandating Choice in Corporate Defined Benefit Plans (2003).

Nancy M. Pfotenhauer, President, Independent Women’s Forum, testified on the impact of hybrid plans on the retirement security of women:

In the opinion of the Independent Women’s Forum, traditional retirement and pension approaches simply fail to meet the needs of our changing society. Succinctly, they do not reflect the work patterns and demographics of American women. Whether it’s the Wall Street Journal or Family Circle magazine, today’s commentators agree that movement in and out of the workforce for American mothers has become the “new normal.” In fact, many are noting a current trend of mothers going back home when their children become teenagers . . . Luckily, pension innovations in the private sector hold promise. Cash balance, pension equity, and other hybrid plans combine attractive features of a traditional defined benefit plan (employer funding, employer assumption of risk of poor investment, government insurance and spousal protections) with attractive features of a defined contribution plan (individual accounts, an easily understood benefit formula and portability).²⁹

It is the view of the Committee that the clarification of the current age discrimination rules under ERISA preserves the current ability of plan sponsors to amend or modify their pension plans prospectively in order to maximize plan sponsor flexibility and ensure the future of these valuable defined benefit plans for participants and beneficiaries. The private, employer-sponsored employee benefit system is voluntary; therefore, placing restrictions on plan sponsors regarding plan design or conversion approaches and mandating that plan sponsors guarantee a certain level of benefits, even benefits that have not been earned by participants, should be prohibited. Ms. Pfotenhauer also testified on the importance of maintaining a voluntary pension system:

[A]ny adoption of restrictions that effectively limit the ability of companies to transition to hybrid plans places the financial well-being of the relatively few employees who have had the luxury of staying with one company for a long period of time (decades), have had the luxury of taking early retirement, and have had the luxury of taking their pension benefits in the form of an annuity rather than as a lump sum, ahead of all the employees who do

²⁹ Hearing on “Examining Cash Balance Pension Plans: Separating Myth From Fact,” before the Committee on Education and the Workforce, U.S. House of Representatives, Second Session, July 7, 2004, Serial No. 108–67.

not have these options. Regardless of one's perspective, any discussion about transition is appropriately done within the context of a clear understanding that these plans are voluntarily sponsored by employers. As such, an employer currently could decide to freeze benefit accruals or completely terminate plans altogether if costs become too burdensome.³⁰

The need for clarification of the hybrid age discrimination issue is critical to the future of the defined benefit pension system. Congress must clarify the existing rules to ensure that companies continue to offer these valuable benefits. Ellen Collier, Director of Benefits, Eaton Corporation, testified on the issues and concerns that many plan sponsors face surrounding the uncertainty of sponsoring a hybrid pension plan:

Now that the basic hybrid designs have been called into question, employers facing a set of circumstances similar to ours would have far fewer options. One choice would be to stay with the traditional pension design, which tends to deliver meaningful retirement benefits to a relatively small number of career-long workers, has limited value as a recruitment device in today's marketplace, and makes integration of new employees difficult. The other alternative would be to exit the defined benefit system and provide only a defined contribution plan, which while an important and popular benefit offering, provides none of the security guarantees inherent in defined benefit plans. Clearly, it is employees that lose out as a result of today's uncertainty surrounding hybrid plans.³¹

Providing for personalized investment advice

In addition to comprehensive defined benefit reforms, the Committee believes that all defined contribution participants, regardless of their income, net worth, or position, should be afforded the opportunity to receive personalized investment advice in order to strengthen the retirement security of the millions of American workers participating in these plans. The ability to provide workers with individualized investment advice has passed the house three times with bipartisan support. Most recently, investment advice legislation passed the House of Representatives on May 14, 2003, by a vote of 271–157, including 49 Democrats, as part of H.R. 1000, the “Pension Security Act.”

Assistant Secretary of EBSA Ann Combs addressed the importance of the investment advice provisions in the Pension Security Act:

It's clear that people who participate in 401(k) plans want their employers and plans to provide more investment advice. According to a survey recently released by CIGNA Retirement and Investment Services, 89 percent of 401(k) investors want “specific information on investment decision-making.”

³⁰Id.

³¹Id.

Investment advice also encourages participation in employer-provided retirement plans. Studies conducted on behalf of the investment advisory firm Power show workers who receive advice are more likely to participate in savings plans and to save more than workers who never get any guidance . . . For many workers, investment advice decisions are intimidating. The Department is encouraged to see growing interest in the adoption of an alternative method sanctioned by the advisory opinion where workers turn over their decision making to the financial services firm who manages their accounts in accordance with the independent adviser's decisions.³²

Scott Sleyster, Senior Vice President and President of Retirement Services and Guaranteed Products, Prudential Financial, testified about the importance of investment advice and addressed the so-called "conflict" issue claimed by opponents of individualized investment advice:

[F]irst and foremost, you need to remember that the choices, the options that are being offered in DC [defined contribution] plans have already been reviewed by the plan sponsor. The industry has demanded open architecture for some time. So you typically have 11 to 15 choices and in most cases, our funds and any company's funds would probably only represent about a third of that. Second, the most important decision here isn't the individual fund or even fund manager. The most important issue in managing a portfolio is asset allocation. And models are built to design asset allocation, and that is really what designs the choices you have. So, that if you have 15 funds, you don't have 15 growth funds; you have some that are growth, some that are international, some that are small capped, some that are fixed income, [and] some that are stable value. And I think that what really drives this is asset allocation.

[T]he issue here is how are we going to get advice to people in a cost effective manner. While you can probably come up with more esoteric and elegant solutions that seem pure, if you are asking the company to fund that or you are asking the participant to pay an additional fee for that, then you are going to end up with what we have ended up with already, which is tools out there that aren't utilized or options that plan sponsors don't want to pay for. Any you know, quite frankly, that is really the issue: How do we get investment advice to the average employee—remember, the average 401(k) balance, 45 percent of plan participants have less than \$10,000. People aren't typically trying to go after those customers to sell them other products. The real question is, how do we get them

³²Hearing on "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers," before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, February 13, 2003, Serial No. 108-2.

advice that is as close to unbiased as possible, but also in a very cost efficient and simple manner.³³

Additional prohibited transaction reforms

In addition to investment advice, it is the view of the Committee that, in general, the prohibited transaction rules under ERISA, which were passed over 30 years ago, must be updated in order for pension plans to provide the best retirement benefits to participants and beneficiaries. America's financial markets are the most efficient, dynamic, and transparent in the world. The dynamic marketplace of today is extremely different than it was 30 years ago with the introduction of electronic trading, new financial products, and faster execution. Furthermore, the financial services industry has dramatically consolidated, which makes the current prohibited transaction rules onerous and detrimental to the entire employee benefits system. In order to improve the overall operation and maintenance of pension plans, which will ultimately result in greater efficiency and, therefore, lower costs and fees paid by these plans, while continuing to protect the interests of participants and beneficiaries, the prohibited transaction rules should be safely updated to ensure that all pension plans are able to function with ease and efficiency in our current marketplace. Representative John Kuhl (R-NY) addressed the need for specific changes to the current prohibited transaction system:

[T]hese are very targeted changes that will help solve many of the most pressing issues our financial markets are facing because of ERISA. They will benefit our pension plans and those who rely on efficient investment for their retirement security without undercutting important protections for investors.³⁴

Representative Rob Andrews (D-NJ) also addressed the need to reform the prohibited transaction exemption rules within the current framework of ERISA in order to ensure the protections currently afforded to participants and beneficiaries:

[T]hese changes will lower some transaction costs by eliminating redundant bonding; eliminating some other administrative responsibilities that really don't add any protection or value from the point of view of the pensioner, but do add costs, and therefore reduce return.³⁵

MULTIEMPLOYER REFORMS

There is considerable attention surrounding single employer defined benefit reforms because of the recent and notable terminations of several large, underfunded traditional defined benefit pension plans as well as the PBGC's \$23.3 billion deficit. However, it is the view of the Committee that the multiemployer pension system must also be reformed in order to ensure that all stakeholders, including participants, beneficiaries, and contributing employers, are protected from the possible negative consequences currently facing the system.

³³ Id.

³⁴ Consideration of H.R. 2830, the "Pension Protection Act of 2005," by the Committee on Education and the Workforce, U.S. House of Representatives, June 29, 2005.

³⁵ Id.

The need for legislation

There are currently 9.8 million workers and retirees participating in 1,587 multiemployer plans. Unfortunately, the major provisions in ERISA that govern multiemployer plans have not been amended since 1980. Until 2003, the PBGC's multiemployer insurance program had shown growing financial strength since enactment of the 1980 amendments. During 2003, however, the program (which is vulnerable to the same economic and demographic pressures that have threatened the single-employer program) sustained a net loss of \$419 million, the largest one-year drop in the program's history. As a result, the program reported a year-end deficit of \$261 million, the program's largest shortfall ever and its first year-end deficit in over 20 years. By the end of 2004, that deficit had declined to \$236 million as the program reported net income of \$25 million.

Since 1980, PBGC has received requests for financial assistance from 39 multiemployer plans. During 2004, 27 of these plans received assistance. At the end of fiscal year 2004, the multiemployer program had assets of \$1.07 billion and total liabilities of \$1.306 billion. Most of these liabilities—\$1.295 billion—represent non-recoverable future financial assistance to the 27 plans currently receiving financial assistance and to other plans expected to receive such assistance in the future.

A March 2004 GAO report to the Subcommittee on Employer-Employee Relations discussed problems in multiemployer pension system:

Following two decades of relative financial stability, multiemployer plans as a group appeared to have suffered recent and significant funding losses, while long-term declines in participation and new plan formation continued unabated. At the close of the 1990s, the majority of multiemployer plans reported assets exceeding 90 percent of total liabilities. Recently, however, stock market declines, coupled with low interest rates and poor economic conditions, appear to have reduced assets and increased liabilities for many plans. PBGC reported an accumulated net deficit of \$261 million for its multiemployer program in 2003, the first since 1981. Meanwhile, since 1980, the number of plans has declined from over 2,200 to fewer than 1,700 plans, and there has been a long-term decline in the total number of active workers. PBGC monitors those multiemployer plans, which may, in PBGC's view, present a risk of financial insolvency.³⁶

The PBGC does not trustee the administration of insolvent multiemployer plans as it does with single-employer plans; however, it provides technical and financial assistance to troubled plans and guarantees a minimum level of benefits to participants in insolvent plans. PBGC loans have been rare, with loans to only 33 plans totaling \$167 million since 1980.

³⁶ "Private Pensions: Multiemployer Plans Face Short- and Long-Term Challenges," General Accounting Office, Report No. GAO-04-423.

Challenges facing the multiemployer pension system

The GAO report revealed several factors that pose challenges to the long-term prospects of the multiemployer system. Some are inherent to the multiemployer regulatory framework, such as the greater perceived financial risk and reduced flexibility for employers compared to other plan designs, which suggest that fewer employers will find these plans attractive. Furthermore, the long-term decline of collective bargaining results in fewer new participants to expand or create new multiemployer plans. Other factors threaten all defined benefit plans, including multiemployer plans: the growing trend among employers to choose defined contribution plans; the increasing life expectancy of workers, which raises the cost of plans; and continuing increases in employer health insurance costs, which compete with pensions for employer funding.³⁷

It is the Committee's view that the multiemployer system has had a history of financial stability due to the fact that these plans pool their risk and that retiree benefits are not generally dependent upon the economic viability of one company. However, despite these facts, the multiemployer system faces some serious long-term structural issues. It is the Committee's view that the multiemployer pension system must be self sustaining for the long-term on behalf of workers and employers.

Barbara D. Bovbjerg, Director of Education, Workforce, and Income Security Issues at the General Accounting Office, echoed those concerns, citing the facts that individual employers in multiemployer plans cannot easily adjust their plan contributions in response to the firm's own financial circumstances, the long-term decline in collective bargaining growth, and an increasing number of retirees in comparison to active workers in the system:

Although available evidence suggests that multiemployer plans are not experiencing anywhere near the magnitude of the problems that have recently afflicted the single employer plans, there is cause for concern . . . a number of factors pose challenges to the multiemployer plan system over the long term.³⁸

John McDevitt, Senior Vice President, United Parcel Service, noted the need for long-term reform:

It is important to understand that the underlying problems are not simply caused by economic swings in the stock markets, which could be cured by "waiting out" the downturn. The problems are structural to the trucking industry, to the labor market in general, and to the past management of multiemployer pension plans. Short-term fixes dependent on market changes will not correct the financial solvency problems of multiemployer pension plans; therefore a need for real multiemployer pension plan reform is urgently needed. Doing nothing is not an option.³⁹

³⁷ See *id.*

³⁸ Hearing on "Reforming and Strengthening Defined Benefit Plans: Examining the Health of the Multiemployer Pension System," before the Subcommittee on Employer-Employee Relations, U.S. House of Representatives, 108th Congress, Second Session, March 18, 2004, Serial No. 108-49.

³⁹ *Id.*

Scott Weicht, Executive Vice President of Adolfson and Peterson Construction, talked about the importance of strengthening multi-employer plans on behalf of workers:

I believe that these plans are a secure and viable way . . . to provide pension benefits to workers. In the construction arena, workers follow the job, not necessarily the company, and these plans provide the proverbial third leg of the retirement stool for people who would otherwise be left with only Social Security and whatever savings that they could muster. I know that Congress is extremely interested in retirement security, and I believe that these plans are an essential part of that discussion.⁴⁰

Improving and preserving the multiemployer pension system

The Committee believes that the multiemployer pension funding and benefit structure needs to be reformed as soon as possible, including the addition of quantifiable measures of improvement and adjustments to the benefit structures for severely underfunded plans, in order to maintain the health of the plans that are in existence. Timothy Lynch, President and CEO of the Motor Freight Carriers Association, testified on the need for overall reforms which plan trustees should consider in order to improve the financial health of multiemployer plans:

As multiemployer legislation is considered, serious consideration should be given to whether additional procedural or legal controls over the management of the plans could prevent serious funding issues. Something as simple as imposing funding policy guidelines that mandate clear targets for the plan's unfunded liability. The Teamsters Western Pension Fund has long had a funding policy that established the funding levels and requires the trustees to adjust benefits based on the levels. Plan modifications are virtually automatic.

Additionally, consideration should be given to requiring that the level of plan benefits be more closely tied to the level of plan contributions and available assets. This may require a hard look at anti-cutback provisions. If trustees want to increase benefits during good times, there should be less restriction on their ability to reduce benefits during bad times.⁴¹

It is the Committee's view that H.R. 2830 includes the much-needed reforms for multiemployer pension plans. As noted previously, the bill provides for quantifiable measures of improvement for plans that are underfunded at certain levels. A wide-ranging coalition of employer and labor groups have made significant progress in reaching consensus on proposals for reforms, and the H.R. 2830 includes many of these reforms. Andy Scoggin, Vice President for Labor Relations at supermarket retailer Albertsons, Inc., praised the Committee for addressing the problem:

⁴⁰ Id.

⁴¹ Hearing on "Examining Long-Term Solutions to Reform and Strengthen the Defined Benefit Pension System," before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, Second Session, April 29th, 2004, Serial No. 108-55.

We believe that it provides a reasonable and rational framework for multiemployer pension plans to work through the problems now facing all pension plans. The reforms in H.R. 2830 are not a government bailout . . . instead, the proposed legislation will provide the tools which will allow multiemployer plans to solve our own pension problems without direct government intervention and without putting additional financial pressure on the Pension Benefit Guaranty Corporation . . . we believe, if Congress acts now, multiemployer plans can solve their own problems so that they do not become a burden on the federal government or the taxpayer.⁴²

Timothy Lynch, President and CEO of the Motor Freight Carriers Association, agreed and testified on the need for Congress to act on reforming the multiemployer pension system in order to protect the pension benefits of workers and retirees could be at risk:

[E]mployers are concerned about the current framework for multiemployer pension plans and strongly believe that if not properly addressed, the problems will increase and possibly jeopardize the ability of contributing employers to finance the pension plans. The end result could put at risk the pension benefits of their employees and retirees . . . we believe that H.R. 2830 meets the overall objective of alleviating the short-term consequences of funding deficits while promoting long-term funding reform for multiemployer pension plans.⁴³

Judy Mazo, Senior Vice President and Director of Research for The Segal Company provides consulting services for many of the nation's multiemployer plans, said the status quo was unacceptable:

Our aim is to make sure that, in the end, the environment for multiemployer plans will be improved, so that they, their contributing employers and their participants are all well-served . . . the alternative is not the continuation of the status quo, but a much worse fate that includes: the loss not only of accrued ancillary benefits, but a substantial portion of a participant's normal retirement benefit as plans are assumed by the PBGC; the demise of potentially large numbers of small businesses and the loss, not only of pension benefits, but the jobs from which such benefits stem; and an increase in taxpayer exposure at the PBGC, an agency that is already overburdened.⁴⁴

It is the view of the Committee that multiemployer plans provide valuable, guaranteed benefits to union workers and retirees. The reforms included in H.R. 2830 will help to ensure the continuation of these plans by providing much-needed restrictions for underfunded plans and additional requirements for all parties with a vested interest in the health and future of these plans.

⁴²Hearing on H.R. 2830, the "Pension Protection Act of 2005," before the Committee on Education and the Workforce, U.S. House of Representatives, 109th Congress, First Session, June 15, 2005 (to be published).

⁴³Id.

⁴⁴Id.

PRESENT LAW

SINGLE EMPLOYER PENSION PLANS

Minimum Funding Rules. Single employer defined benefit pension plans are subject to minimum funding requirements under ERISA and the Internal Revenue Code (“IRC”).⁴⁵ In general, the amount of contributions required for a plan year under the minimum funding rules is the amount needed to fund benefits earned during a plan year, which is considered a plan’s “normal cost” for the year, plus that year’s portion of other liabilities that are amortized over a period of years, such as investment losses or increased benefits related to past service credit.⁴⁶ The amount of required annual contributions is determined under one of a number of acceptable actuarial cost methods. Additional contributions are required under the deficit reduction contribution rules in the case of certain underfunded plans (described below). No contribution is required under the minimum funding rules in excess of the full funding limit (described below).

Funding Standard Account. As an administrative aid in the application of the funding requirements, a defined benefit pension plan is required to maintain a special account called a “funding standard account” to which specified charges and credits are made for each plan year, including a charge for normal cost and credits for contributions to the plan. Other credits or charges may apply as a result of increases or decreases in past service liability as a result of plan amendments, experience gains or losses, gains or losses resulting from a change in actuarial assumptions, or a waiver of minimum required contributions.

In determining plan funding under an actuarial cost method, a plan’s actuary generally makes certain assumptions regarding the future experience of a plan. These assumptions typically involve rates of interest, mortality, disability, salary increases, and other factors affecting the value of assets and liabilities. If the plan’s actual unfunded liabilities are less than those anticipated by the actuary on the basis of these assumptions, then the excess is an experience gain. If the actual unfunded liabilities are greater than those anticipated, then the difference is an experience loss. Experience gains and losses for a year are generally amortized as credits or charges to the funding standard account over five years. If the actuarial assumptions used for funding a plan are revised and, under the new assumptions, the accrued liability of a plan is less than the accrued liability computed under the previous assumptions, the decrease is a gain from changes in actuarial assumptions. If the new assumptions result in an increase in the accrued liability, the plan has a loss from changes in actuarial assumptions. The accrued liability of a plan is the actuarial present value of projected pension benefits under the plan, including projected future benefit increases, which will not be funded by enough future contributions to meet the plan’s normal cost. The gain or loss for a year from

⁴⁵ See ERISA § 301–308 and IRC § 412. Under section four of ERISA, certain plans are not subject to the minimum funding rules, including governmental plans, certain church plans, foreign plans, excess benefit plans, and certain plans maintained for the purpose of complying with applicable workers’ compensation, unemployment compensation, or disability insurance laws.

⁴⁶ See ERISA § 3(28). The term “normal cost” is defined as the annual cost of future pension benefits and administrative expenses assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a plan.

changes in actuarial assumptions is amortized as credits or charges to the funding standard account over ten years.

If minimum required contributions are waived, in accordance with the waiver rules and procedures established by the Secretary of the Treasury, the waived amount (referred to as a “waived funding deficiency”) is credited to the funding standard account. The waived funding deficiency is then amortized over a period of five years, beginning with the year following the year in which the waiver is granted. Each year, the funding standard account is charged with the amortization amount for that year unless the plan becomes fully funded. If, as of the close of the plan year, charges to the funding standard account exceed credits to the account, then the excess is referred to as an “accumulated funding deficiency.”

If, as of the close of a plan year, the funding standard account reflects credits at least equal to charges, the plan is generally treated as meeting the minimum funding standard for the year and there is no required contribution.

In applying the funding rules, all costs, liabilities, interest rates, and other factors are required to be determined on the basis of actuarial assumptions and methods, each of which is reasonable (taking into account the experience of the plan and reasonable expectations), or which, in the aggregate, result in a total plan contribution equivalent to a contribution that would be obtained if each assumption and method were reasonable. In addition, the assumptions are required to offer the actuary’s best estimate of anticipated experience under the plan.

Normal costs and other required amortization payments under a plan are determined on the basis of an actuarial valuation of the assets and liabilities of a plan. An actuarial valuation of plan assets and liabilities is required annually and is made as of a date within the plan year or within one month before the beginning of the plan year. However, a valuation date within the preceding plan year may be used if, as of that date, the value of a plan’s assets is at least 100 percent of a plan’s current liability.⁴⁷ For funding purposes, the actuarial value of plan assets may be used, rather than fair market value. The actuarial value of plan assets is the value determined under a reasonable actuarial valuation method that takes into account fair market value and is permitted under Department of Treasury regulations. However, any actuarial valuation method used must result in a value of plan assets that is not less than 80 percent of the fair market value of the assets and not more than 120 percent of the fair market value. In addition, if the valuation uses the average value of the plan assets, the values may not be averaged for more than the five most recent plan years, including the current year.

Credit Balances. If credits to the funding standard account exceed charges, the plan is considered to have a “credit balance.” Typically, a plan maintains a credit balance if contributions are made in excess of minimum required contributions or a plan experiences significant investment gains. The amount of the credit balance increases each year with interest at the rate used under the

⁴⁷ Current liability is generally defined as the present value of all liabilities attributable to participants and beneficiaries accrued to date under the plan.

plan to determine costs, regardless of whether other plan assets experience investment losses. Credit balances can be used to reduce future required contributions.

Additional Contributions for Underfunded Plans. Under special funding rules known as the deficit reduction contribution rules, an additional charge to a plan's funding standard account is generally required for a plan year if the plan's funded current liability percentage for the plan year is less than 90 percent.⁴⁸ A plan's funded current liability percentage is generally the actuarial value of plan assets as a percentage of the plan's current liability.⁴⁹ As stated above, a plan's current liability means the present value of all liabilities to employees and their beneficiaries under the plan.

The deficit reduction contribution is the sum of: (1) the "unfunded old liability amount;" (2) the "unfunded new liability amount;" and (3) the expected increase in current liability due to benefits accruing during the plan year. The "unfunded old liability amount" is the amount needed to amortize certain unfunded liabilities under 1987 and 1994 transition rules.⁵⁰ The "unfunded new liability amount" is the applicable percentage of the plan's unfunded new current liability, which is the amount by which the plan's current liability exceeds the actuarial value of plan assets. The applicable percentage is generally 30 percent, but decreases by .4 of one percentage point for each percentage point by which the plan's funded current liability percentage exceeds 60 percent.⁵¹ A plan may provide for unpredictable contingent event benefits, which are benefits that depend on contingencies that are not reliably and reasonably predictable, such as facility shutdowns or reductions in workforce due to company layoffs. The value of any unpredictable contingent event benefit is not considered in determining additional contributions until the event has occurred. As a result, plan sponsors are not able or required to fund for these benefits.

The amount of the additional charge required under the deficit reduction contribution rules is the sum of two amounts: (1) the excess, if any, of (a) the deficit reduction contribution over (b) the contribution required under the normal funding rules; and (2) the amount (if any) required with respect to unpredictable contingent event benefits. The amount of the additional charge cannot exceed the amount needed to increase the plan's funded current liability percentage to 100 percent, taking into account any expected in-

⁴⁸ Under an alternative test, a plan is not subject to the deficit reduction contribution rules for a plan year if: (1) the plan's funded current liability percentage for the plan year is at least 80 percent, and (2) the plan's funded current liability percentage was at least 90 percent for each of the two immediately preceding plan years or each of the second and third immediately preceding plan years. The deficit reduction contribution rules apply to single employer plans, other than single employer plans with no more than 100 participants on any day in the preceding plan year. Single employer plans with more than 100 but not more than 150 participants are generally subject to lower contribution requirements under these rules.

⁴⁹ In determining a plan's funded current liability percentage for a plan year, the value of the plan's assets is generally reduced by the amount of any credit balance under the plan's funding standard account. However, this reduction does not apply in determining the plan's funded current liability percentage for purposes of whether an additional charge is required under the deficit reduction contribution rules.

⁵⁰ The transition rules were included in the 1987 Pension Protection Act and the 1994 Retirement Protection Act.

⁵¹ For example, if a plan's funded current liability percentage is 85 percent (i.e., it exceeds 60 percent by 25 percentage points), the applicable percentage is 20 percent (30 percent minus 10 percentage points (25 multiplied by .4)). Under this calculation, the value of the plan's assets is reduced by the amount of any credit balance accumulated in the plan's funding standard account.

crease in current liability due to benefits accruing during the plan year.

Required Interest Rate and Mortality Table. Specific interest rate and mortality assumptions must be used in determining a plan's current liability for purposes of the special funding rule. For plan years beginning before January 1, 2004, the interest rate used to determine a plan's current liability must be within a permissible range of the weighted average of the interest rates on 30-year Treasury securities for the four-year period ending on the last day before the plan year begins.⁵² The permissible range is generally from 90 percent to 105 percent (120 percent for plan years beginning in 2002 or 2003).⁵³ The interest rate used under the plan generally must be consistent with the assumptions which reflect the group annuity purchase rates which would be used by insurance companies to satisfy the liabilities under the plan.⁵⁴

Under the Pension Funding Equity Act of 2004 ("PFEA"), a special interest rate applies in determining current liability for plan years beginning in 2004 or 2005.⁵⁵ For these plan years, the interest rate used must be within a permissible range of the weighted average of the rates of interest on amounts invested conservatively in long-term investment-grade corporate bonds during the four-year period ending on the last day before the plan year begins. The permissible range for these years is from 90 percent to 100 percent. The interest rate is to be determined by the Secretary of the Treasury on the basis of two or more indices that are selected periodically by the Secretary and are in the top three quality levels available. The Secretary of the Treasury is required to prescribe mortality tables and to periodically review, at least every five years, and update such tables to reflect the actuarial experience of pension plans and projected trends in such experience.⁵⁶ The Secretary of the Treasury has required the use of the 1983 Group Annuity Mortality Table.⁵⁷

Deduction Limit. Contributions to single employer pension plans are deductible up to certain limits. In general, a plan sponsor may deduct the greater of: (1) the amount necessary to satisfy the minimum funding requirement for the plan year; or (2) the amount of the plan's normal cost for the year plus the amount necessary to amortize certain unfunded liabilities over 10 years, subject to the full funding limitation for the year (see explanation of a plan's full funding limitation below). The maximum deductible amount is not less than the present value of the plan's unfunded current liability.⁵⁸

⁵²The weighting used for this purpose is 40 percent, 30 percent, 20 percent and 10 percent, starting with the most recent year in the four-year period. Notice 88-73, 1988-2 C.B. 383.

⁵³If the Secretary of the Treasury determines that the lowest permissible interest rate in this range is unreasonably high, the Secretary may prescribe a lower rate, but not less than 80 percent of the weighted average of the 30-year Treasury rate.

⁵⁴See ERISA § 302(b)(5)(B)(iii)(II).

⁵⁵Pub. L. No. 108-218. In addition, if certain requirements are met, reduced contributions under the deficit reduction contribution rules apply for plan years beginning after December 27, 2003, and before December 28, 2005, for plans maintained by commercial passenger airlines, employers primarily engaged in the production or manufacture of a steel mill product or in the processing of iron ore pellets, or a certain labor organization.

⁵⁶See ERISA § 302(d)(7)(C)(ii).

⁵⁷Rev. Rul. 95-28.

⁵⁸In general, single employer plans are subject to a maximum deductible amount of not less than 120 percent of current liability over the value of plan assets.

If an employer sponsors both a defined benefit and a defined contribution plan that includes the same participants, the total deduction allowable for the employer in a year is the greater of: (1) 25 percent of employee compensation; or (2) the contribution necessary to meet the defined benefit plan's minimum funding requirement.

In general, employers are subject to a 10 percent excise tax for the amount of any nondeductible contributions made to a plan in a plan year.

Full Funding Limitation. Under ERISA, no contributions are required under the minimum funding rules in excess of the full funding limitation. The full funding limitation is the excess, if any, of the accrued liability under the plan, including normal cost, over the lesser of (a) the market value of plan assets, or (b) the actuarial value of plan assets. However, the full funding limitation may not be less than the excess, if any, of 90 percent of the plan's current liability over the actuarial value of plan assets.

Timing of Plan Contributions. In general, plan contributions required to satisfy the funding rules must be made within 8½ months after the end of the plan year. If the contribution is made by such due date, the contribution is treated as if it were made on the last day of the plan year. In the case of a plan with a funded current liability percentage of less than 100 percent for the preceding plan year, estimated contributions for the current plan year must be made in quarterly installments during the current plan year.⁵⁹ As stated above, the amount of each required installment is 25 percent of the lesser of 90 percent of the amount required to be contributed for the current plan year or 100 percent of the amount required to be contributed for the preceding plan year.

Failure to Make Required Contributions. An employer is generally subject to an excise tax of 10 percent of the amount of the funding deficiency if it fails to make minimum required contributions and fails to obtain a waiver from the Internal Revenue Service.⁶⁰ In addition, a tax of 100 percent may be imposed if the funding deficiency is not corrected within a certain period. If the total of the contributions the employer fails to make, with interest, exceeds one million dollars and the plan's funded current liability percentage is less than 100 percent, a lien arises in favor of the plan with respect to all property of the employer and the members of the employer's controlled group. The amount of the lien is the total amount of the missed contributions, including interest.

Limitations on Benefit Increases, Distributions, and Accruals. ERISA provides that a defined benefit plan may not adopt an amendment which results in an increase in the plan's current liability if the funded current liability percentage of a plan is less than 60 percent, including any amendment that would cause a plan's current liability percentage to fall below 60 percent, unless the plan sponsor provides security, such as real property or equities.⁶¹ Other than the above limitation, ERISA only provides for a prohibition on benefit increases if a plan is involved in a bankruptcy proceeding. ERISA also limits certain benefit payments if a

⁵⁹ See ERISA § 302(e).

⁶⁰ See ERISA § 303. In general, the Secretary of the Treasury is permitted to waive all or a portion of a plan's minimum required contributions or extend the amortization periods applicable to any net experience loss.

⁶¹ See ERISA § 307.

plan has a liquidity shortfall, which occurs if a plan's liquid assets are less than the disbursements from the plan in the preceding plan year.

Under current law, plans are not permitted to provide severance benefits; however, plans may provide for subsidized early retirement benefits and unpredictable contingent event benefits. Unpredictable contingent event benefits are benefits that depend on certain events or other contingencies that are not reasonably predictable, such as a facility shutdown. These benefits are considered protected benefits under ERISA and may not be eliminated.

Disclosure. ERISA requires plan administrators/fiduciaries to file an annual report with the Secretary of Labor, known as a Form 5500. This report includes certain plan information, including an actuarial report containing plan asset and liability information, information regarding participant distributions, and plan contributions. This form is due on the last day of the seventh month after the end of the plan year. The summary of this report, otherwise known as a plan's summary annual report, must be provided to participants within two months after the due date of the annual report.

Single employer defined benefit plan participants have the right to certain notices regarding their plan's funded status. In general, if an employer is subject to a variable rate premium (discussed below) because the plan is underfunded, participants are entitled to receive a notice regarding the plan's funded status and PBGC benefit guarantee limits.⁶² The employer is also required to notify plan participants if it fails to make the required contributions.⁶³ In addition, the PFEA requires multiemployer plans to provide an annual funding notice to participants, contributing employers, labor organizations, and the PBGC regarding the plan's funded status.⁶⁴

Executive Compensation. Amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includable in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income, unless certain requirements are satisfied.⁶⁵ For example, distributions from a nonqualified deferred compensation plan may be allowed only at certain times and upon certain events. Rules also apply for the timing of elections. If the requirements are not satisfied, in addition to current income inclusion, interest at the underpayment rate plus one percentage point is imposed on the underpayments that would have occurred had the compensation been includable in income when first deferred, or if later, when not subject to a substantial risk of forfeiture. The amount required to be included in income is also subject to a 20 percent additional tax.

In the case of assets set aside in a trust (or other arrangement) for purposes of paying nonqualified deferred compensation, such assets are treated as property transferred in connection with the performance of services under Internal Revenue Code section 83 at the time set aside if such assets (or trust or other arrangement) are located outside of the United States or at the time transferred if such assets (or trust or other arrangement) are subsequently transferred

⁶² See ERISA § 4011.

⁶³ See ERISA § 101(d).

⁶⁴ See ERISA § 101(f).

⁶⁵ See IRC § 409A.

outside of the United States. A transfer of property in connection with the performance of services under Code section 83 also occurs with respect to compensation deferred under a nonqualified deferred compensation plan if the plan provides that upon a change in the employer's financial health, assets will be restricted to the payment of nonqualified deferred compensation. In addition to current income inclusion, interest at the underpayment rate plus one percentage point is imposed on the underpayments that would have occurred had the compensation been includable in income when first deferred, or if later, when not subject to a substantial risk of forfeiture. The amount required to be included in income is also subject to a 20 percent additional tax.

Benefit Accruals. ERISA provides that benefit accruals may not decrease on account of the attainment of any age. Under a defined benefit plan, an employee's benefit accrual may not cease or be reduced because of the attainment of any age.⁶⁶ Furthermore, accrued benefits may not decrease on account of increasing age or service.⁶⁷ However, a plan does not fail to satisfy the benefit accrual rules by imposing a limitation on the amount of benefits that a plan provides or a limitation on the number of years of service or participation that are taken into account in determining accrued benefits. Furthermore, a plan does not fail the benefit accrual rules because the subsidized portion of an early retirement benefit is disregarded in determining benefit accruals. Finally, ERISA does not prohibit the modification of any benefit formula on a prospective basis. In other words, ERISA does not require a plan to provide a minimum benefit level or vest participants in benefits that have not been earned under the plan's formula.

PBGC Premiums. ERISA requires all single employer plans covered by the PBGC insurance program to pay flat-rate premiums. Flat-rate premiums are based on the number of plan participants. Under current law, the premium is set at \$19 per participant. ERISA also requires certain underfunded plans to pay a variable rate premium. The amount of the variable rate premium is also set by statute and is \$9 per \$1000 of unfunded vested benefits; however, there is an exemption from this requirement if the plan meets its full funding limit. In determining the amount of unfunded vested benefits, the interest rate used is 85 percent of the annual rate of interest of the corporate bond rate provided under the PFEA.⁶⁸

MULTIEMPLOYER PENSION PLANS

As stated above, multiemployer pension plans are defined benefit pension plans maintained by two or more employers in a particular trade or industry, such as trucking or construction, that are collectively bargained between an employer and a labor union. While single employer plan sponsors generally may adjust their pension contributions to meet funding requirements, the contributions of individual employers in multiemployer plans cannot be easily modified because level of contributions to such plans is generally set as part of the bargaining process, and the level of benefits is determined by the plan trustees.

⁶⁶ See ERISA § 204(b)(1)(H).

⁶⁷ See ERISA § 204(b)(1)(G).

⁶⁸ The PFEA rate will expire on December 31, 2005. The interest rate to be used after the expiration of the PFEA is 85 percent of the interest rate on 30-year Treasury bonds.

Multiemployer plans have certain characteristics that are different from single employer plans. While multiemployer plans are subject to many of the same rules as single employer plans, present law also applies special rules to such plans in recognition of their differing features.

Multiemployer Funding Rules. In general, multiemployer plans are subject to the same general minimum funding rules as single employer plans. However, special rules apply to multiemployer plans in some instances. For example, the amortization of a plan's experience gains and losses is extended over a longer period of time. Furthermore, multiemployer plans are not subject to the additional deficit reduction contribution rules if a plan becomes underfunded by a certain percentage.

Like single employer plans, multiemployer plans are required to maintain a funding standard account to which specified charges and credits are made for each plan year, including a charge for normal cost and credits for contributions to the plan as well as charges and credits for any decreases or increases in past service liability⁶⁹ as a result of plan amendments or experience gains or losses, gains or losses resulting from a change in actuarial assumptions, or a waiver of minimum required contributions.

A multiemployer pension plan is required to use an acceptable actuarial cost method to determine the above factors included in the plan's funding standard account each year. Generally, an actuarial cost method divides the cost of benefits under the plan into annual charges consisting of two elements for each plan year which include the plan's normal cost and the amortized portions of any additional costs of the plan. The plan's normal cost for a plan year represents the cost of current and future benefits allocated to the year by the funding method used by the plan for active and inactive employees. The amortized portions of any additional costs of the plan for a plan year are the cost of future benefits that would not be met by future normal costs, including any costs that may be attributable to net experience losses, changes in actuarial assumptions, and amounts necessary to make up funding deficiencies for which a waiver was obtained.

In general, the portion of the cost of a plan that is required to be paid for a particular year depends upon the nature of the cost. The normal cost for a year is generally required to be funded currently; however, many plans today cannot afford to do this. The other costs associated with the plan are amortized over a period of years. In the case of a multiemployer plan, past service liability is amortized over 40 or 30 years depending on how the liability arose, experience gains and losses⁷⁰ are amortized over 15 years, gains and losses from changes in actuarial assumptions⁷¹ are amortized

⁶⁹ Past service liability is a term used to describe different amortization charges to the funding standard account. For plans in existence on January 1, 1974, past service liability is amortized over 40 years. For plans in existence after January 1, 1974, past service liability is amortized over 30 years. Any plan amendments which result in past service liabilities to a plan are amortized over 30 years.

⁷⁰ Experience gains and losses are determined by a plan actuary's assumptions regarding the future experience of a plan. These assumptions generally include interest rates, mortality, disability, salary increases, and other factors affecting the value of assets and liabilities.

⁷¹ Gains and losses from changes in actuarial assumptions generally arise if the plan's assumptions are modified. A plan will have a gain if the accrued liability of a plan using the new assumptions is less than the accrued liability calculated using the previous assumptions. A plan will have a loss if the accrued liability of a plan using the new assumptions is greater than the accrued liability calculated using the previous assumptions. Accrued liabilities are the excess

over 30 years, and waived funding deficiencies are amortized over 15 years. The above plan costs, which are charged to the funding standard account, require an offsetting credit by employer contributions.

As with single employer plans, if, as of the close of the plan year, charges to the funding standard account exceed credits to the account, then the excess is referred to as an accumulated funding deficiency. If credits to the funding standard account exceed charges, the plan has a credit balance which can be used to reduce future required contributions.

Similar to single employer plans, the actuarial value of plan assets may be used, rather than fair market value, with the same applicable valuation methods that must result in a value of plan assets that is not less than 80 percent of the fair market value of the assets and not more than 120 percent of the fair market value or an average value that may not be averaged over more than the five most recent plan years, including the current year. In applying the funding rules to a multiemployer plan, all costs, liabilities, interest rates, and other factors are required to be determined on the basis of actuarial assumptions and methods, which in the aggregate, are reasonable (taking into account the experiences of the plan and reasonable expectations). In addition, the assumptions are required to offer the actuary's best estimate of anticipated experience under the plan.

Funding waivers and amortization of waived funding deficiencies

In general, the Secretary of the Treasury is permitted to waive all or a portion of the contributions required under the minimum funding standard for the year. In the case of a multiemployer plan, a waiver may be granted if 10 percent or more of the contributing employers cannot make the required contribution without substantial business hardship and if requiring the contribution would be adverse to the interests of plan participants in the aggregate. The minimum funding requirements may not be waived with respect to a multiemployer plan for more than five out of any 15 consecutive years.

If a funding deficiency is waived for a multiemployer plan, the waived amount is credited to the funding standard account and amortized over a period of 15 years. Each year, the funding standard account is charged with the amortization amount for that year unless the plan becomes fully funded.⁷²

Extension of Amortization Periods. The Secretary of the Treasury may extend any amortization periods for up to 10 years if the Secretary finds that the extension would carry out the purposes of ERISA and would provide adequate protection for participants under the plan and if such Secretary determines that the failure to permit such an extension would: (1) result in a substantial risk to the voluntary continuation of the plan or a substantial curtail-

of the present value of all projected future benefits cost and administrative expenses for all plan participants and beneficiaries over the present value of all future contributions for the normal cost to a plan.

⁷² See IRC § 1274. The rate used to determine the amortization on the waived amount is 150 percent of the federal mid-term rate.

ment of pension benefit levels or employee compensation; and (2) be adverse to the interests of plan participants in the aggregate.⁷³

Withdrawal Liability. The Multiemployer Pension Plan Amendments Act of 1980 (“MEPPA”) amended ERISA to require that employers pay withdrawal liability to a multiemployer plan if the employer withdraws from the plan.⁷⁴ Prior to the enactment of the withdrawal liability rules, employers who had an obligation to contribute to the plan within five years of the plan’s termination were liable to the PBGC for a share of unfunded benefits; however, certain employer withdrawals from a multiemployer plan would not necessarily impair the financial health of the plan if the industry was stable and the contributing employer was replaced by a new employer or by an expansion of covered employment by other contributing employers. However, concerns were raised that the withdrawal of larger contributing employers may result in increased financial burdens on remaining contributing employers. Therefore, the withdrawal liability rules included in MEPPA were designed to address these concerns and help promote the financial health of multiemployer plans by requiring certain withdrawing employers to pay a portion of unfunded benefits for their employees that exist at the time of withdrawal.

Determination of Withdrawal Liability. In general, contributing employers may withdraw from a multiemployer plan either by a “complete” or a “partial” withdrawal liability. Current law requires that certain employers who withdraw from a multiemployer plan in a complete or partial withdrawal are liable to the plan in the amount determined to be the employer’s withdrawal liability.⁷⁵ In general, a “complete withdrawal” occurs when the contributing employer has permanently ceased operations under the plan or has permanently ceased to have an obligation to contribute.⁷⁶ In determining if there is a complete withdrawal, special rules apply in the case of the building and construction industry, the entertainment industry, and employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.⁷⁷

A “partial withdrawal” occurs if, on the last day of a plan year, there is a 70 percent contribution decline by contributing employers for such plan year or there is a partial cessation of an individual employer’s contribution obligation.⁷⁸ A partial cessation of the employer’s obligation occurs if: (1) the employer permanently ceases to have an obligation to contribute under one or more, but fewer than all, collective bargaining agreements under which obligated to contribute, but the employer continues to perform work in the jurisdiction of the collective bargaining agreement; or (2) an employer permanently ceases to have an obligation to contribute under the plan

⁷³The interest rate with respect to extensions of amortization periods is the same as that used with respect to waived funding deficiencies.

⁷⁴See Public Law No. 96–364.

⁷⁵See ERISA § 4201.

⁷⁶ERISA § 4203.

⁷⁷In the case of employers engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry, a complete withdrawal occurs only if: (1) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan; and (2) the PBGC determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or the employer fails to furnish a bond or amount held in escrow in an amount equal to 50 percent of the withdrawal liability of the employer.

⁷⁸See ERISA § 4205(a).

with respect to work performed at one or more, but fewer than all, of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.⁷⁹

When a contributing employer withdraws from a multiemployer plan, the plan sponsor is required to calculate the amount of the employer's withdrawal liability, notify the employer of the amount of the withdrawal liability, and collect the amount of the withdrawal liability from the employer. The contributing employer's withdrawal liability is based on the plan's unfunded vested benefits for the plan years preceding the withdrawal. After the withdrawal, the plan sponsor must notify the contributing employer of the amount of liability and schedule of payments. In general, amounts are required to be paid over the period of years necessary to amortize the amounts in level annual payments; however, in certain instances where the amortization period exceeds 20 years, the employer's liability is limited to the first 20 annual payments.⁸⁰

Current law provides rules limiting withdrawal liability in certain instances. The amount of unfunded vested benefits allocable to an employer is limited in the case of certain sales of all or substantially all of the employer's assets and in the case of an insolvent employer undergoing liquidation or dissolution.⁸¹ A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may adopt a rule that an employer who withdraws from the plan is not subject to withdrawal liability if: (1) the employer first had an obligation to contribute to the plan after the date of enactment of MEPPA; (2) contributed to the plan for no more than the lesser of six plan years or the number of years required for vesting under the plan; (3) was required to make contributions to the plan for each year in an amount equal to less than two percent of all employer contributions for the year; and (4) never avoided withdrawal liability because of the special rule.⁸²

Under ERISA, the plan sponsor's assessment of withdrawal liability is presumed correct unless the employer shows by a preponderance of the evidence that the plan sponsor's determination of withdrawal liability was unreasonable or erroneous. In other words, the employer has the burden of proof to show that his withdrawal from the plan was not to evade or avoid withdrawal liability.⁸³ Disputes between an employer and plan sponsor concerning withdrawal liability are resolved through arbitration, which can be initiated by either party. The first payment of withdrawal liability determined by the plan sponsor is generally due no later than 60 days after demand, even if the employer contests the determination of liability. If the employer contests the determination, payments of withdrawal liability must be made by the employer until the arbitrator issues a final decision with respect to the determination submitted for arbitration.⁸⁴

⁷⁹ See ERISA § 4205(b)(2).

⁸⁰ See ERISA § 4219(c).

⁸¹ See ERISA § 4225.

⁸² See ERISA § 4210.

⁸³ See ERISA § 4212(c).

⁸⁴ See ERISA § 4221(f). The plan sponsor has the burden of proof that the principal purpose of a transaction that occurred before January 1, 1999, was to evade or avoid withdrawal liability if the transaction occurred at least 5 years before the date of withdrawal. Employers are not obligated to make withdrawal liability payments until a final decision is rendered.

Multiemployer Plan Reorganization and Insolvency. If a multiemployer plan experiences severe financial problems, certain modifications to the single-employer plan funding rules apply and these plans are considered to be in “reorganization status.” A plan is in reorganization status if contributions needed to equal the charges and credits to its funding standard account exceed the amount of a plan’s vested benefits charge.⁸⁵ The plan’s vested benefits charge is generally the amount needed to amortize, in equal annual installments, unfunded vested benefits under the plan over: (1) 10 years in the case of obligations attributable to participants in pay status; and (2) 25 years in the case of obligations attributable to other participants. A plan in reorganization status must increase funding to specified levels and may reduce benefits to the level guaranteed by the PBGC. A cap on year-to-year contribution increases and other relief is available to employers that continue to contribute to the plan. Any failure to make the required contributions results in a funding deficiency.

The plan sponsor must provide notice that the plan is in reorganization status and that, if contributions to the plan are not increased, accrued benefits under the plan may be reduced and/or an excise tax may be imposed.⁸⁶ Notice must be provided to every employer who has an obligation to contribute under the plan and to each employee organization representing plan participants.

Benefit limitations and adjustments also apply to plans in reorganization status including limitations on lump sum distributions⁸⁷ and adjustments in accrued benefits.⁸⁸

In addition, the law presumes there is an increased likelihood that a plan in reorganization will become insolvent.⁸⁹ In general, insolvent plans do not have sufficient resources to pay benefits under the plan when they are due. If a multiemployer plan is insolvent, benefit payments must be reduced to level of benefits that the plan can pay with its available resources.

PBGC’s Role. PBGC’s insurance programs were created as part of ERISA in 1974 to assure retirees pension benefit protection. In 1980, MEPPA strengthened the pension protection program for multiemployer plans. As stated above, the amendments established mandatory requirements for financially weak multiemployer plans in reorganization and imposed new financial requirements on employers withdrawing from multiemployer plans.

PBGC’s multiemployer program is funded and maintained separately from the single employer program. Each multiemployer plan pays an annual insurance premium of \$2.60 per participant to the PBGC. Under the multiemployer program, PBGC provides financial assistance through loans to plans that are insolvent. Before a plan receives financial assistance from PBGC, it must suspend payment of all benefits in excess of the guaranteed level.

MEPPA established a benefit guarantee limit for participants in multiemployer plans equal to the participant’s years of service multiplied by the sum of: (1) 100 percent of the first five dollars of the monthly benefit accrual rate; and (2) 75 percent of the next fifteen

⁸⁵ See ERISA § 4241.

⁸⁶ See id.

⁸⁷ See ERISA § 4241(c).

⁸⁸ See ERISA § 4244A.

⁸⁹ See ERISA § 4245.

dollars of the accrual rate. For a participant with 30 years of service under the plan, the maximum PBGC-guaranteed benefit was \$5,850 per year. This benefit guarantee formula remains in effect for participants in multiemployer plans that received financial assistance from PBGC at any time during the period from December 22, 1999, to December 21, 2000. The Consolidated Appropriations Act of 2001,⁹⁰ signed into law on December 21, 2000, increased the benefit guarantee in multiemployer plans to the product of a participant's years of service multiplied by the sum of: (1) 100 percent of the first \$11 of the monthly benefit accrual rate; and (2) 75 percent of the next \$33 of the accrual rate. For someone with 30 years of service, this raised the guaranteed limit to approximately \$13,000.

ERISA's Prohibited Transaction Rules. ERISA prohibits certain transactions between a qualified plan and a party-in-interest.⁹¹ Under current law, a party-in-interest to a plan includes plan fiduciaries, plan service providers, an employer, employee organizations with members participating in a plan, and certain persons with an ownership interest in the plan sponsor.

In general, for a party-in-interest, the transaction rules prohibit: (1) the sale, exchange, or leasing of property; (2) the lending of money or extension of credit; (3) the furnishing of goods, services, or facilities; and (4) the transfer to or use by or for the benefit of the income or assets of the plan.⁹² Fiduciaries are also subject to additional rules which include: (1) any self-dealing with the plan's assets in his own interest or account; (2) any transactions for himself or on behalf of another party whose interests are adverse to the interest of the plan or its participants and beneficiaries; or (3) the receipt of any consideration for his own personal account from any party dealing with the plan.

An excise tax and, in certain instances, a civil penalty is assessed against any person who engages in a prohibited transaction.

SECTION-BY-SECTION

Sec. 1. Short title and table of contents

This Act may be cited as the Pension Protection Act of 2005.

TITLE I—REFORM OF FUNDING RULES FOR SINGLE EMPLOYER DEFINED BENEFIT PENSION PLANS

SUBTITLE A—AMENDMENTS TO EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Sec. 101. Minimum funding standards

Section 101 repeals sections 302–308 of the Employee Retirement Income Security Act of 1974 and establishes new minimum funding standards that single employer defined benefit plans must meet. Minimum required contributions must be paid by the employer(s) responsible for making contributions to the plan. The bill also provides for waivers to the minimum funding standards in the case of business hardship when an employer is operating at an economic

⁹⁰ Public Law No. 106–554.

⁹¹ See ERISA § 3(14).

⁹² See ERISA § 406(a).

MINORITY VIEWS

During Committee consideration of H.R. 2830, we voted “present” because neither the proponents of the bill nor the Pension Benefit Guaranty Corporation (PBGC) was able to provide any information on the effect the legislation would have on corporate sponsors, employees, or the PBGC. As we file this report, we still are awaiting information on the effect of this bill.

The defined benefit pension system, which protects the retirement security of over 44 million workers, retirees, and their families, is at a critical moment. The number of defined benefit plans has declined precipitously from over 100,000 in 1985 to under 32,000 in 2004.¹ While the number of active workers covered by such plans has dropped from over 40 million to under 20 million, an additional 20 million retirees depend on defined benefit plans for their retirement security.²

The funding levels of these plans have dropped dramatically in recent years, with the fall of both the stock market and interest rates, from over 100% to approximately 85% on average (for an ongoing plan).³ Approximately 1200 plans have terminated and shifted unfunded liabilities onto the PBGC leaving it with a \$23–27.5 billion deficit.⁴ The PBGC estimates that it faces additional possible liabilities of \$100 billion; the Congressional Budget Office believes the market value of PBGC’s liabilities could be as high as \$146 billion.⁵ The PBGC reports that total pension underfunding by pension plans exceeds \$450 billion.⁶

Given these dynamics, the challenge for the Congress is how to address pension underfunding in a way that does not lead to additional pension plan terminations, or jeopardize the retirement security of the 44 million individuals who depend on these retirement plans.

Congress was first alerted to the severity of this problem in 2002 when the PBGC first, reported its shift from a \$10 billion surplus to an \$11 billion deficit in less than 2 years.⁷ Throughout this period, Democratic members of the Committee repeatedly called for action by the Bush Administration and the Majority to act on pension reform. Unfortunately, years passed before they took the crisis seriously; since those warnings pension underfunding has doubled,

¹ PBGC Annual Report, 2004.

² U.S. Department of Labor, preliminary Private Pension Plan Bulletin Abstract of 2000 Form 5500 Annual Report, July 2005.

³ Watson Wyatt Worldwide, Pension Fund Finances and Business Risk, July 2005.

⁴ PBGC Annual Report, 2004; PBGC letter to the Honorable George Miller dated July 29, 2005.

⁵ Congressional Budget Office, The Risk Exposure of the Pension Benefit Guaranty Corporation, September 2005.

⁶ PBGC Annual Report, 2004.

⁷ PBGC Annual Report, 2002.

and the problem now puts taxpayers and employees at risk for billions of dollars.

When the Administration finally responded to the pension crisis, it proposed a measure that would have given a jolt to already struggling pension plans by increasing contributions by \$430 billion over 7 years: such an action would create a strong disincentive for many employers to continue to offer plans.⁸ We want to encourage employers to stay in the system, not force them out. All major groups representing pension plans and employers have expressed serious concerns with the Administration's legislation.

Chairman Boehner introduced H.R. 2830 on July 9, and the bill was ordered reported out of the full committee within three weeks. During the Committee's one hearing on the bill both the employer and worker representative witnesses expressed serious reservations as to the effects on employers, workers, and the defined benefit system. Democratic members repeatedly asked Chairman Boehner to share with the Minority any analysis his office had undertaken in preparation of the bill, but no information was provided. Democratic members also asked the Administration for its analysis of the effects of H.R. 2830, but no information has been provided.

Retirement security is one of the foremost issues facing this country. The overwhelming majority of workers and retirees depend on Social Security, private pensions, and personal savings to support them in retirement and live out their non-working years in dignity and comfort. Without private pensions, millions of older workers will not be able to retire or will be forced to live in poverty. The financial pressures on Social Security will only be made greater. Congress has a responsibility to know the consequences of its actions on the retirement security of the nation. Our comments, below, focus on the provisions of the bill for which we have insufficient information on the effects on employers and workers, or in which we believe the bill does not sufficiently protect workers' retirement security.

H.R. 2830 SINGLE EMPLOYER FUNDING REFORM IMPACTS UNKNOWN

The centerpiece of H.R. 2830 is its pension funding reforms for single employer defined benefit pension plans. Under current law, employers generally are permitted to fund their pension promises over a 30 year period. Employers are permitted to value the assets and liabilities of the plan using what are known as smoothing techniques and to vary funding within certain permissible ranges. Employers also are permitted to earn credit balances for making more than a minimum contribution in a given year.

H.R. 2830 would generally reduce the funding period for unfunded pension liabilities to 7 years based upon an interest rate calculation that is tied to what is being called a "modified yield curve". The Department of Treasury would issue 3 monthly interest rates based upon liabilities due within 0–5, 5–20, and 20+ years, but would continue to permit smoothing over a 3-year period. Pension plans less than 80% funded would not be able to use credit balances, and credit balances could not be used for purposes of determining pension funding levels. If a pension plan is deter-

⁸ PBGC letter to the Honorable George Miller dated July 29, 2005.

mined to be less than 80% funded during the prior year, then in the following year the plan cannot provide benefit or salary increases to the participants in the plan. If a pension plan is determined to be less than 60% funded during the prior year, then participants cannot accrue any additional benefits under the plan which effectively freezes the plan.

Neither Chairman Boehner nor the Administration has provided any analysis of the effects on these funding rule changes on employers or workers. We do not know how many employers will face increased pension contributions. We do not know how much contributions will increase at the average, median or aggregate. We do not know how many plans would be funded under 60 or 80% and thus, how many workers would face frozen pension benefits. We do not know how many plans could be expected to freeze or terminate should these contribution increases be enacted. [Again, subsequent to our mark-up we did receive an analysis by the PBGC of 369 plans that found that 163 would face benefit reductions and 28 would be forced to be frozen (based on 2002 data).⁹]

In addition, certain aspects of H.R. 2830 unfairly change the rules at the end of the game. The bill's adoption of a modified yield curve will more negatively impact employers with older workforces than those with younger ones. Similarly, the eventual use of a modified yield curve to calculate the present value of lump sum distributions will reduce workers' retirement benefits based on an imperfect and overly aggressive interest rate measure. The bill's changes in the treatment of credit balances also will negatively impact workers through benefit reductions and freezes. Under H.R. 2830, many plans that are well funded will be treated as severely underfunded and forced to freeze benefits. This occurs because H.R. 2830 treats plan assets as reduced by the amount of the plan's credit balance. Thus, for example, a plan that is 95% funded based on actual assets is treated as 55% funded if it has a credit balance equal to 40% of plan liabilities. Such a plan must be frozen under H.R. 2830.

Because of the modified yield curve's unnecessary complexity and volatility at a time when employers are in need of predictable contribution rates, Representatives McCarthy and Wu offered an amendment to H.R. 2830 which would strike the yield curve language from the bill and replace it with current law. Both employer and worker advocates have urged Congress to adopt a rate that is easily understood, predictable, stable, and transparent. The Majority rejected the McCarthy-Wu amendment on a voice vote.

H.R. 2830 provides new reporting and disclosure requirements for single-employer plans. While these new requirements generally are a step forward, out of concerns that the reporting and disclosure schedule is such that small employers with limited resources may face dramatic increases in administrative costs to comply with the new annual funding notice, 90 days after the end of a plan year, in addition to the Summary Annual Report and Form 5500 filings 7 months later, Subcommittee on Employer-Employee Relations Ranking Member Andrews offered an amendment that would allow small employers to provide the new annual funding notice at

⁹ PBGC letter to the Honorable George Miller dated August 9, 2005.

the same time that the Summary Annual Report is provided to participants. With the Chairman's assertion that he would work with Subcommittee Ranking Member Andrews on dealing with the issue of administrative burdens on small employers as this bill proceeds, the amendment was withdrawn. The Minority strongly supports reporting and disclosure that is timely, accurate, and public.

H.R. 2830 CONTAINS NO PROVISIONS TO PREVENT OR ENCOURAGE
ALTERNATIVES TO TERMINATION

In addition to not knowing the effects of H.R. 2830, the bill fails to address the rising problem of runaway pension plan terminations. Provisions to deal with unfair pension plan terminations must be included in any serious pension reform. The Congress has failed to pass meaningful pension funding reform for several years, allowing industrywide plan underfunding to fester while more and more companies have filed for bankruptcy, particularly in the airline and steel industries. As we have seen from the recent plan terminations at United Airlines, there are grave shortcomings in the Employee Retirement Income Security Act's (ERISA) provisions governing involuntary terminations. Indeed, rather than stopping unfair terminations, H.R. 2830 invariably speeds up terminations. The bill increases funding requirements on companies precisely at a time when they are at their weakest, undoubtedly encouraging some number of companies on the margin—the breadth and depth of which no one knows—to terminate their pension plans sooner rather than later. Under H.R. 2830, the way for companies to dump their plans onto the PBGC in bankruptcy remains free and clear.

Unfortunately, United Airlines has become a poster child for the need to reform ERISA's plan termination provisions. The company entered bankruptcy in December 2002 and soon sought to terminate its four pension plans, covering flight attendants, pilots, mechanics, and public contact employees.¹⁰ Because the plans were collectively bargained, the company could not initiate a termination without first exhausting goodfaith bargaining over the plans. Also, because the company—not the PBGC—sought to terminate the plans, pursuant to ERISA Section 4041, it would ultimately have to show the bankruptcy court that it could not continue in business without terminating the plans. Throughout bargaining, rather than offering alternatives to termination, the company insisted that the plans must be terminated. The unions offered alternatives which were rejected again and again. The PBGC maintained, after commissioning an independent analysis of United's financial situation, that the company could afford to keep one or more of its plans and successfully exit bankruptcy. Nevertheless, at a time when at least two of the employees' unions continued to bargain with the company to save their plans and were legally challenging the company's claim that it needed to terminate its plans, the PBGC sud-

¹⁰For accounts of the bankruptcy and termination process used by United Airlines, see generally "Broken Promises: The United Airlines Pension Crisis," E-Hearing by Rep. George Miller and Rep. Jan Schakowsky, June 13, 2005 (available at <http://edworkforce.house.gov/democrats/unitedhearing.html>); Testimony of Patricia A. Friend, Hearing on "Preventing the Next Pension Collapse: Lessons from the United Airlines Case," Committee on Finance, U.S. Senate, June 7, 2005.

denly reversed course and struck a deal with United to terminate all four of its plans pursuant to the PBGC's authority under ERISA Section 4042. Because PBGC initiated terminations do not provide plan participants with the same protections as employer-initiated terminations, this deal effectively ended any bargaining to save the plans. It spared United from having to prove that the terminations were financially necessary. It denied employees and retirees their day in court to challenge the companies' claims of necessity, and it came at a time when the company still had not filed any business reorganization plan with the bankruptcy court.

If the termination of all four plans at United Airlines is allowed to stand, the Congress will have stood by while over a hundred thousand American families saw their retirement nest eggs unfairly ripped from under them. In the first-ever e-hearing, sponsored by the Committee's ranking Democrat, we received over 2,000 witness statements from United employees, retirees, and their families revealing the deep impact these terminations would have on their lives, forcing retirees to return to work in their golden years, sell their home, or struggle anew to pay for a child's college tuition or elderly parent's health care.¹¹ The economic devastation caused by this termination is wide and deep. United employees and retirees will lose over \$3 billion in promised benefits—deferred wages which they earned with years of hard work and loyalty.

Moreover, the termination of all four plans at United Airlines marks the single largest pension liability imposed on the PBGC in the nation's history. Underfunded by over \$9 billion, the plans impose over \$6 billion in new liabilities on the PBGC.¹² Shortly after the PBGC's deal with United was announced, the Ranking Member Miller introduced a bill, H.R. 2327, to put a halt to the terminations for six months to give the parties and the Congress an opportunity to craft alternative solutions to the crisis. It has been referred to this Committee. The Committee, however, has failed to act on H.R. 2327, even though a clear majority of the House (219–185) rejected the PBGC deal with United, with the passage of the Miller Amendment to the Labor-HHS Appropriations bill, H.R. 3010, on June 24, 2005.¹³

At markup of H.R. 2830, the Democratic Minority supported an amendment offered by, Representatives Tierney and Miller to reform the provisions of ERISA Sections 4041 and 4042 to strengthen protections against abuse of the bankruptcy and termination process. Current law does not sufficiently protect against the termination of plan which may in fact be affordable. The Tierney-Miller Amendment would have required—in both employer-initiated and PBGC-initiated terminations—that the parties make reasonable efforts to consider alternatives to termination, and it provided a non-exhaustive list of such alternatives. The Amendment also would have provided a greater voice for participants and their representatives in ensuring that all reasonable efforts to find alternatives to dumping have been explored. It would have established a presump-

¹¹The e-hearing record is available at <http://edworkforce.house.gov/democrats/unitedhearing.html>

¹²PBGC, "PBGC Reaches Pension Settlement with United Airlines," Press Release, April 22, 2005.

¹³H. Amdt. 352 to H.R. 3010, Roll Call No. 309, 109th Cong., June 24, 2005.

tion against PBGC-initiated terminations where a company can continue in Business without terminating a pension plan. The Majority rejected this Amendment. As a result, H.R. 2830 has left the bankruptcy and termination process open to the kind abuse we have seen in the United Airlines case. Since the mark-up, Delta and Northwest Airlines have followed United's example. Congress must act to discourage further terminations.

H.R. 2830 DOES NOT PROVIDE FAIR TREATMENT OF WORKERS AND EXECUTIVES

H.R. 2830 is remarkably inequitable in its treatment of retirement benefits for executives and rank-and-file employees. The bill imposes restrictions on rank-and-file employee benefits when a plan is underfunded. The initial restrictions, ranging from no new benefit increases to no lump sums, are triggered when the plan is less than 80% funded. No similar restriction is imposed on executives. Instead, restrictions on executive benefits are not triggered until the plan is less than 60% funded. Only at 60%, are employers prohibited from transferring funds to executive deferred compensation plans. Meanwhile, if the employer does not fund above 60%, then the workers' plan must be frozen with no new benefits allowed to accrue. If the plan ultimately fails, workers lose their pension plan and are relegated to PBGC guarantees while any restrictions on executive benefits would be lifted.

This scheme is patently unfair. Employees have no control over single employer plans. Executives make the critical decisions on whether and how much to fund a plan—yet they do not share the pain in those decisions. Any fair pension reform legislation must repeal special protections for executive pension plans that allow CEO's golden parachutes at the same time employees are suffering deep cuts in their promised retirement benefits.

In practice, extensive executive packages are often increased at the very same time their employees' pensions are cut. As employees are asked to give back benefits they have earned, executives are often padding their own retirement packages. A 2003 Executive Excess report by United for a Fair Economy and the Institute for Policy Studies found that the median pay for executives at the 30 companies with the most underfunded pension plans in 2002 was \$5.9 million, or 59 percent higher than the median pay for executives at the typical large company. These 30 companies had a combined \$131 billion pension deficit in 2002, but paid their executives a combined \$352 million. While the underfunding threatened employee pensions, nineteen of these executives saw their pay rise, and ten saw their pay more than double in 2002.¹⁴

The executive pensions themselves are exorbitant. A review of 2004 proxy statements from 500 large companies by Corporate Library for the New York Times revealed that 113 chief executives could expect retirement benefits more than \$1 million per year. At least 31 would see \$2 million or more per year.¹⁵

¹⁴ Sarah Anderson, John Cavanagh, Chris Hartman, and Scott Klinger, "Executive Excess Report 2003: CEOs Win, Workers and Taxpayers Lose," Tenth Annual CEO Compensation Survey, Institute for Policy Studies & United for a Fair Economy, August 26, 2003.

¹⁵ Eric Dash, "The New Executive Bonanza: Retirement," New York Times, April 3, 2005.

The business press is rife with stories of outrageous executive retirement schemes, even in the very industries with the most underfunded rank-and-file retirement plans. For example, in 2002, US Airways CEO Stephen Wolf took his pension in a lump sum of \$15 million (calculated with 24 years of service Wolf never performed), just six months before the company filed for Chapter 11 bankruptcy. The bankruptcy resulted in the termination of the pilots' pension plan, along with other major worker concessions.¹⁶ In November 1999, the steel company LTV Corp. established trusts for executive retirement plans. At the end of 2000, LTV filed for bankruptcy. Four months later, the company promised an executive that it would transfer assets in those trusts to a new one in the executive's name. Less than a year after this executive agreement was reached, the LTV workers' pension plan was dumped onto the PBGC, with many of the 82,000 covered workers seeing their earned benefits cut as a result.¹⁷

Members Woolsey and Bishop offered an amendment to provide for parity in the bill's treatment of executive and rank-and-file retirement benefits. Under their amendment, when restrictions on rank-and-file benefits are triggered, that is, when the rank-and-file defined benefit plan is less than 80% funded, similar restrictions are triggered for executives. Specifically, during such time rank-and-file workers may not receive new retirement benefits, neither would executives. Unfortunately, the Woolsey-Bishop amendment was defeated on a party-line vote.

Additional amendments to deal with the unfair restrictions on workers' benefits were offered by the Minority. Members Wu, Van Hollen, and Kucinich offered an amendment to make fairer the benefit restrictions imposed on workers when employers do not make certain pension contributions. Their amendment would have modified H.R. 2830's provisions that eliminate plant shut down benefits, prohibit recognition of salary increases, prohibit workers within five years of retirement from receiving lump sum payments, and freeze accruals of new benefits. Member Van Hollen offered an amendment to provide comparable treatment between salary and flat benefit provided pension plans. Both amendments were defeated by the Majority.

MULTIEMPLOYER FUNDING REFORMS NEEDED

The Democratic Minority strongly supports efforts to strengthen the multiemployer pension system. As of 2004, the PBGC covered more than 9.8 million participants in the nation's 1,600 multiemployer pension plans.¹⁸ These plans are the product of collective bargaining and are governed by joint trusteeships composed of rep-

¹⁶Janice Revell et al., "CEO Pensions: The Latest Way to Hide Millions," *Fortune*, April 28, 2003; John Crawley, "US Airways in Tentative Giveback Deal with Pilots (Update 1), Reuters, October 1, 2004.

¹⁷Theo Francis and Ellen E. Schultz, "Employers Spare Execs from Pension-Cut Pain," *Wall Street Journal Online*, April 7, 2003. For additional press reports on executives receiving excessive new retirement benefits while cutting rank-and-file benefits, see, e.g., Lisa Yoon, "Former CFO Now CEO at American Airlines," *CFO.com*, April 28, 2003; "Corporate Books Hide Another Ticking Time Bomb: Deferred Compensation—Tab for Executive 'Top Hat' Plans Rises Yearly, Usually Isn't Disclosed," *Wall Street Journal Europe*, October 11, 2002; Ellen E. Schultz, "While Executives See Their Pensions Grow, Regular Workers See Their Pensions Shrink," *Wall Street Journal*, June 20, 2001.

¹⁸PBGC, *Pension Insurance Data Book 2004*, Number 9 (Spring 2005) at 20, 87.

representatives from both labor and management. Such design lends itself to cooperative problem-solving among the plans' stakeholders. The plans' pooling of risk among employers has ensured a remarkably stable system for decades. In the past 25 years, only 38 multiemployer plans have required PBGC assistance.¹⁹ In the plans' design also enables small employers, which could not administer a plan on their own, to offer defined benefits to their employees. Out of an estimated 65,000 employers which contribute to multiemployer plans, approximately 90% are small businesses employing fewer than 20 workers.²⁰ Particularly in industries where employment is seasonal and tenure with any one firm is short, multiemployer plans provide workers with a guaranteed retirement benefit that accrues even as these workers move from one participating employer to another. In short, these plans set an example for how retirement security can be ensured in the private sector through the cooperative efforts of labor and management.

Multiemployer plans, however, have experienced many of the same financial shocks as single employer plans from unexpected declines in investment returns and interest rates. The multiemployer plan funding rules prevent these plans from building a cushion against future losses so surpluses in the 1990's necessitated benefit increases to avoid excise taxes on overfunding. Employer attacks on the right to organize and strong labor laws have severely depressed the number of newly unionized employers and employees to help support these plans.

For these reasons, it is critical that the Congress pass reform to give plans the flexibility to employ their greatest strengths—collective bargaining and joint trusteeships—to formulate their own solutions to funding problems. Unfairly denied meaningful relief in last year's temporary pension reform legislation, many multiemployer pension plans remain in trouble, facing funding obligation triggers which pose a risk to the viability of both the plans and their participating employers. According to the Segal Company consulting firm, approximately 30% of multiemployer plans are facing a funding deficiency by the end of the decade.²¹

The multiemployer pension reform provisions of H.R. 2830 are crafted from proposals offered by a coalition of labor and management representatives in the multiemployer plan community. These proposals are the result of good-faith negotiations by the stakeholders of this system. They come from the plans, the businesses, and the unions which are best situated to understand the problems they face and the real-world consequences of any changes in the law. The adoption of proposals from such a deliberative, cooperative process is markedly different from H.R. 2830's approach to single employer pension funding reform, the economic impact of which remains unknown. The multiemployer provisions reflect an approach based on shared commitments and sacrifices and are designed to

¹⁹Id. at 85.

²⁰Testimony of Randy G. DeFrehn, Executive Director, National Coordinating Committee for Multiemployer Plans, Hearing on "A Pension Doubleheader: Reforming Hybrid and Multiemployer Pension Plans," U.S. Senate Committee on Health, Education, Labor, and Pensions Subcommittee on Retirement Security and Aging, June 7, 2005.

²¹Testimony of Judith Mazo, Senior Vice President and Director of Research, The Segal Company, "Hearing on H.R. 2830, The Pension Protection Act", U.S. House of Representatives Committee on Education & the Workforce, June 15, 2005.

empower labor and management with the tools necessary to return their plans to sound financial footing.

H.R. 2830's multiemployer pension reform is a step in the right direction which the Democratic Minority supports. The Minority urges Congress to continue working with the stakeholders of the multiemployer community as the bill proceeds through the legislative process and take care not to create unintended problems for well-functioning plans. We support adjustments and improvements where necessary to ensure the continued viability of multiemployer pension plans and delivery of promised benefits.

H.R. 2830 REDUCES OLDER WORKERS' PENSIONS UNDER CASH BALANCE PLANS

The Chairman's mark to H.R. 2830 added provisions that effectively legalize what are known as "cash balance pension plans" without protecting the millions of older workers who have and would have their pension benefits reduced by such plans. Under H.R. 2830, as ordered reported out of Committee, cash balance plans would be legal, under ERISA and the Internal Revenue Code (IRC), if younger and older workers with identical characteristics of wages and service are provided the same accrued benefit. The provision requires cash balance plans to comply with all of the defined benefit pension plan rules except for the rule on accrual of benefits where they could use the 401(k) rule. This change permits cash balance plans to freeze older workers benefits under the traditional plan and replace it with a lower benefit. The change would permit employers to change the rules at the end of the game when older workers have no time or bargaining power to protect their retirement benefits. The privatization of Social Security, attack on defined benefit plans, and legalization of cash balance plans are all part of a systematic attack on and effort to reduce the retirement security of middle class workers.

Cash balance plans were created by the consulting industry during the 1980s to compete with the growth of 401(k) plans. Congress did not know much about these plans, and neither ERISA nor the Code recognizes them. The Internal Revenue Service (IRS) gave informal approval to some aspects of these plans, but did not alert Congress to the legal issues that were brought to its attention in the early 1990's. Cash balance plans grew slowly, but their adoption sped up rapidly during the mid-to-late 1990's. The strong stock market had created overfunded pension plans and employers were interested in reaping the surplus funds without being subject to existing excise taxes on overfunded pension plan terminations.

In 1999, IBM sought to convert its defined benefit plan to cash balance and its workers appealed to the media and Congress to oppose the conversion. The Wall Street Journal ran a detailed series of articles on how cash balance plans could harm workers' retirement benefits. Congress held hearings and several members of Congress asked the General Accounting Office (GAO) to investigate.²² The Clinton Administration also responded to the public outcry and imposed a moratorium on IRS approval of conversions. In 2000, the GAO reported that older workers could lose up to 50%

²² U.S. Senate Committee on Finance, Hearing on Pension Reform Legislation, June 30, 1999.

of their benefits under a cash balance conversion.²³ In response, Reps. Sanders and Miller and Senator Harkin introduced legislation to require plans to protect workers over age 40 or with 10 or more years of service a choice between the old and new plans.²⁴

One of the reasons the cash balance controversy was so explosive was the way these plans were marketed and publicized. Employees were often led to believe that the change was either a neutral change or an improvement in the pension plan. Because the old plan expressed benefits in the form of a monthly payment at age 65 and the cash balance plan expressed benefits as a current bank account amount, workers did not know, and employers intentionally did not tell them, which benefit was greater. Many employers never clearly explained to workers that early retirement subsidies were being eliminated or benefits frozen through a practice known as “wearaway”. When some workers did figure out that their benefits were being cut, they felt deeply betrayed. Congress did amend the law in 2001 to require employers to explain to workers the relative value of a change in benefits, but this change occurred only after the moratorium on cash balance approvals was imposed.²⁵

In 2001, the Bush Administration issued proposed regulations that would have legalized the plans, but a bipartisan majority of Congress pressured the Administration to withdraw the proposed regulations through a series of letters, meetings and riders to the Treasury Department appropriations acts. Secretary of the Treasury John Snow promised that the Treasury Department would reconsider the issue and protect older workers. On several occasions, Secretary Snow recalled his own experience at the CSX Corp, where the company gave its workers a choice of plans. In its FY2005 budget proposal, the Administration asked Congress to pass legislation to protect all workers for 5 years after a conversion.

Cash balance plans hurt older workers in several ways. First, they lose benefits under the old plan because the traditional plan is frozen at a lower rate of salary and years of service. Under the traditional plan, older workers earn the bulk of their benefits at the end of their work service. Second, under the cash balance plan workers earn benefits at a flatter rate yet older workers do not have time to earn significant benefits under the new plan. Some cash balance plans prevent older workers from earning any new benefits by offsetting their new benefits by their old earned benefits (known as “wearaway”). Finally, cash balance plans may eliminate early retirement options to which older workers otherwise would have been eligible.

A new GAO report to be issued in the coming weeks will further report on the losses to older workers under cash balance plans. The GAO surveyed over 100 actual plans and workers and found that workers of almost all ages lose benefits under a cash balance plan. Over 80% of 30 year-olds and almost all workers over age 40 lose benefits under a converted cash balance plan unless they are

²³ GAO, Implications of Conversions to Cash Balance Plans, September 2000.

²⁴ H.R. 2902, the Pension Benefits Protection and Preservation Act of 1999; S. 1300 and S. 1600, The Older Workers' Pension Protection Act, 106th Congress.

²⁵ Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16.

grandfathered into the former plan. Despite employer claims that cash balance plans benefit younger workers, the GAO found that 40% of younger workers never vest a right to benefits under the plan. The GAO report also documents the weaknesses and biases of the so-called “independent” research on cash balance plans promoted by the Majority and employers.

Numerous lawsuits are pending in the courts. Workers lost several cases and settled others, but won the largest case against IBM at the district court level.²⁶ The IBM case is pending appeal in the 7th circuit. Other cases are awaiting trial.

Committee Ranking Member Miller offered an amendment in Committee to provide basic protections for older workers who are unfairly impacted when employers convert their traditional defined benefit plan to a cash balance plan. Under the Miller amendment, workers who are at least 40 years old and who have at least 10 years of service must be given a choice between the benefits of the traditional plan or the benefits of the cash balance plan. This rule would not require employers to maintain two separate plans—but only two formulas for calculating benefits. Hundreds of companies have offered their workers a similar choice, including the Federal Government, CSX, Honeywell, Eaton and others. The Miller amendment reflected the best practices of the industry in this relatively uncharted area for ERISA. The Committee rejected the Miller amendment on a party-line vote.

H.R. 2830, as amended, would simply deny all of these concerns and effectively legalize the plans without any protections for older workers. The provision would permit employers to reduce older workers’ pensions without any requirements that protect their promised pensions; millions of older workers would lose needed retirement benefits if this provision were to be enacted. The Minority believes the law can be modified to recognize cash balance plans in a way that is fair to all employees. Both the Senate Committees on Health, Education, Labor and Pensions and Finance have passed provisions, on a bipartisan basis, which would establish minimum protections for older workers and minimum standards for cash balance plans. This Committee should do no less.

H.R. 2830 ENCOURAGES CONFLICTED PENSION INVESTMENT ADVICE

Many of the Democratic members of the Committee have concerns about H.R. 2830’s provision to amend ERISA’s longstanding prohibition on conflicts of interest and permit certain “fiduciary advisors” to provide self-interested investment advice to pension plan participants when selecting among investment options for their retirement savings.²⁷

The private pension system is changing—defined benefit plans now cover 20 million active participants and defined contribution, primarily 401(k) plans, cover almost 50 million active participants.²⁸ As 401(k) plans emerge as the dominant form of retirement savings for workers, it is becoming clearer that 401(k) plans

²⁶ *Cooper v. IBM*, 274 F. Supp.2d 1010 (S.D. Ill. 2003).

²⁷ Members S. Davis, Holt, Kind, McCarthy, and Wu voted in Committee to retain the provisions on investment advice.

²⁸ U.S. Department of Labor, Preliminary Private Pension Plan Bulletin Abstract of 2000 Form 5500 Annual Report, July 2005.

need to be restructured to meet workers' long term retirement needs. There is a growing consensus that the 401(k) plan rules need to be updated to encourage automatic enrollment (to get more workers in plans), automatic escalation of contributions (to get workers saving at adequate levels), automatic default investment options (to get workers in well managed investments), and automatic rollover (to retain workers' savings until retirement).

Automatic enrollment is a key example. 401(k) plans generally require individuals to affirmatively elect to join the plan. Because of the affirmative election requirement, over $\frac{1}{4}$ of workers fail to elect, often simply due to inertia. Several reports have documented studies showing that when workers are automatically enrolled in a 401(k) plan, participation jumps from an average of 75% to 85–95%.²⁹

Similar behavior patterns exist with respect to 401(k) investment behavior. Almost all employer sponsored 401(k) plans select a variety of investment options amongst which participants must allocate their and usually their employer's contributions. The average 401(k) plan provides more than 10 investment options.³⁰ Numerous studies have concluded that both financially and not-financially knowledgeable participants do not know how or want to be solely responsible for the investment of their retirement savings. Studies also have shown that excessive investment choices actually negatively affect investment returns.³¹ When participants are offered automatic default investments or are offered automatic investment as a plan investment option, again participants overwhelmingly select or retain automatic investment.³²

In the 109th Congress a number of bills have been introduced by Democrats and Republicans that would improve the way 401(k) plans are offered and structured by encouraging automatic enrollment and investment. These bills represent the best opportunity to address 401(k) investment issues.³³

Under H.R. 2830, pension plan administrators would be able to contract with "fiduciary advisors" to provide investment advice to pension plan participants. The definition of investment advisor includes not only certified securities investment brokers, but also insurance agents who need not be licensed investment advisors. Many advisors would entice plans to offer investment advice by not charging a separate fee for advice, thus making it appear "free". Advisors would then be free to contact participants by email, phone, in writing or in person and offer them investment advice. The advisor would be required to notify the participant "at the time advice is selected" that the advisor receives a fee or other compensation for his or her advice. This notice need not be provided in advance so the participant has time to think about it and possibly decide not to receive the advice. The disclosure can be buried

²⁹ W. Gale, J.M. Iwry, P. Orszag, "Automatic 401 (k): A Simple Way to Strengthen Retirement Savings", The Retirement Security Project, 2005.

³⁰ Defined Contribution Survey, Plan Sponsor, 2004.

³¹ J. Brown and S. Weisbenner, "What are the effects of Portfolio Choice on Retirement Wealth Outcomes?", presented at the 2005 Annual Retirement Research Center Conference, August 11, 2005.

³² W. Gale, J.M. Iwry, P. Orszag, "Automatic 401(k): A Simple Way to Strengthen Retirement Savings", The Retirement Security Project, 2005.

³³ S. 875, the Save More for Retirement Act; H.R. 1508, the 401(k) Automatic Enrollment Act of 2005 (109th Cong.).

in voluminous documents. There is no requirement that the disclosure be prominently displayed or that the participant signifies, in writing, that he or she has read and agreed to the disclosure. Once a participant receives advice, he or she would have limited recourse to show improper advice.

Further, H.R. 2830's investment advice provisions have been superseded by market actions. Every major investment firm has contracted with an independent advice firm to offer advice services.

We also have learned much in the past few years about the dangers of conflicts of interest in the investment markets. Almost all of New York Attorney General Elliott Spitzer's litigation was against investment firms for conflicts of interest that harmed investors. Notably, in 2003, Attorney General Spitzer reached a \$1.4 billion settlement against 10 investment houses in which they agreed to prevent future conflicts, in 2004, settled conflict charges with 2 financial service firms for \$675 million and in 2005, settled similar charges for \$850 million.³⁴

A 2005 Securities and Exchange Commission report found rampant conflicts in the pension consulting industry. One of the major findings of the SEC was that "[m]oney managers appear to have relationships with multiple consultants, appear to purchase overlapping products from more than one consultant, and are recommended by those consultants to plan sponsors. It appears that many money managers do not disclose their relationships with consultants to their pension plan clients to whom they are recommended . . ." The SEC recommended several changes in pension industry policies and procedures to "eliminate or mitigate conflicts of interest".³⁵

For these reasons, many believe the investment advice provisions of the bill should be reconsidered. Two amendments were offered to amend HR 2830's rollback of worker protections against conflicted investment advice. First, Member Tierney offered an amendment to strike the investment advice language from the bill. Second, Subcommittee on Employer-Employee Relations Ranking Member Andrews offered a compromise amendment that would have permitted self-interested investment advice provided that an independent advice option also was provided so that participants have a choice. The Majority opposed both amendments.

In conclusion, our private pension system is in crisis and the bill passed by the Majority in many ways represents a missed opportunity to stabilize and revitalize the system. If we want to encourage employers to maintain defined benefit plans, then the law must recognize and support their ability to do so in a way that is fair to both employers and workers. Millions of workers are depending on employer provided benefits for their retirement security. Congress must protect this promise.

George Miller, Bobby Scott, Timothy Bishop, Dale E. Kildee, Ruben Hinojosa, Chris Van Hollen, Major R. Owens, Lynn Woolsey, Donald M. Payne, David Wu, Robert Andrews, John F. Tierney, Tim Ryan, Raul

³⁴ Press Releases, Office of New York State Attorney General, April 28, 2003, March 15, 2004, January 31, 2005.

³⁵ SEC, Staff Report on Current Examinations of Select Pension Consultants, p. 7, May 16, 2005.

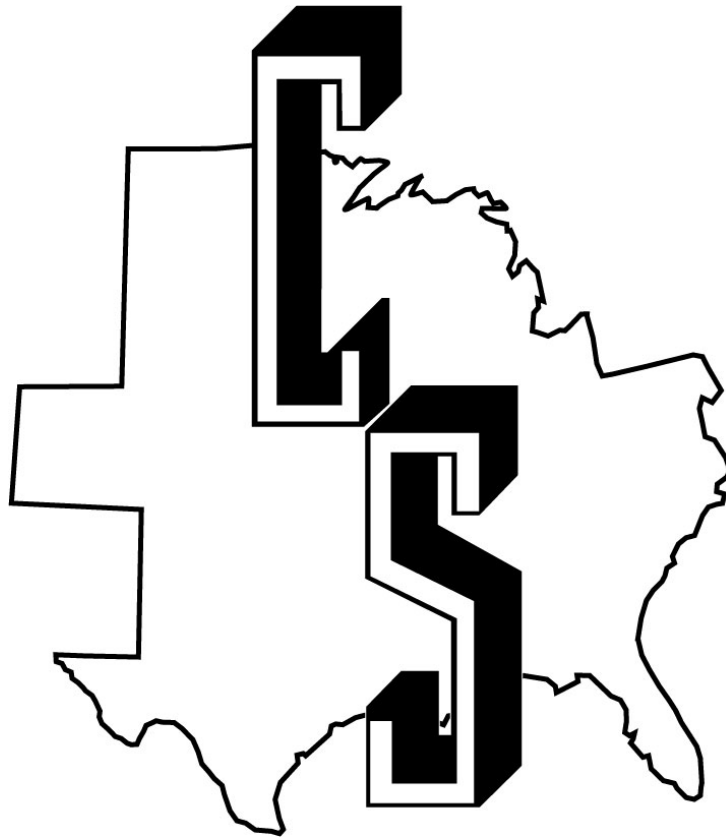
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M. Grijalva, Betty McCollum, Danny K. Davis, Dennis J. Kucinich, Susan Davis, Carolyn McCarthy, Ron Kind, Rush Holt.

○

EXHIBIT D

Central States, Southeast and Southwest Areas Pension Plan



RESTATED PLAN EFFECTIVE JANUARY 1, 1985
AS AMENDED THROUGH JANUARY 1, 2022

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a jointly administered, defined benefit employee benefit plan

ADDRESS OF ADMINISTRATIVE OFFICE

8647 West Higgins Road
Chicago, Illinois 60631

TELEPHONE NUMBER

(847) 518-9800
1-800-323-5000 (Toll-Free)

EMPLOYER IDENTIFICATION NUMBER

36-6044243

PLAN NUMBER

001

BOARD OF TRUSTEES

UNION

Charles A. Whobrey
George J. Westley
Gary Dunham
Trevor Lawrence

EMPLOYER

Gary F. Caldwell
Robert Whitaker
Mark Angerame
Richard K. Ellis

EXECUTIVE DIRECTOR

(also Agent for Service of Legal Process)
Thomas C. Nyhan

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ARTICLE I DEFINITIONS

Section 1.01 ACCRUED BENEFIT

- (a) The Accrued Benefit of a Participant who is eligible for a Vested Pension (as defined in Section 4.07) is the greater of either the maximum Twenty-Year Service Pension or 30-and-Out Pension payable from his Benefit Class multiplied by the sum of the following:
- (1) 1½% of the Contributory Service Credit earned by the Participant before January 1, 1976,
 - (2) 3% of the Contributory Service Credit earned by the Participant on and after January 1, 1976,
 - (3) the product of (1) and (2), above.
- (b) The Accrued Benefit of a Participant who is eligible for a Contribution-Based Pension (as defined in Section 4.03) is:
- (1) The greater of either the Twenty-Year Service Pension or 30-And-Out Pension payable from his Benefit Class, as of December 31, 1985, multiplied by the sum of the following:
 - (A) 1½% of the Contributory Service Credit he earned before January 1, 1976,
 - (B) 3% of the Contributory Service Credit he earned from January 1, 1976 through December 31, 1985,
 - (C) the product of (A) and (B), above, plus
 - (2) For each calendar year from 1986 through 2003, inclusive, the greater of:
 - (A) 2% of all Contributions made on his behalf during the calendar year or, if he is at Benefit Class 15(C) or 16,
 - (B) the minimum benefit below, corresponding to his Benefit Class as of the date of the last Contribution made on his behalf during the calendar year, multiplied by the Contributory Service Credit he earned during the calendar year:

<u>Benefit Class</u>	<u>Minimum Benefit</u>
15	
(C)	\$66
16	
(A)	77
(B)	81
(C)	83, <u>plus</u>

- (3) For calendar year 2004 and for each subsequent calendar year, 1% of all Contributions made on his behalf during the calendar year.
- (c) The Accrued Benefit calculated in (a) or (b)(1), above, shall not exceed the 30-And-Out Pension amount for the Benefit Class of the Participant.

- (d) The Accrued Benefit calculated in (a) or (b), above, shall never be less than the Accrued Benefit determined at the end of any preceding calendar year.
- (e) All Non-Contributory Service Credit and any calendar year for which no Contributory Service Credit is earned shall be excluded in determining a Participant's Accrued Benefit in (a) and (b)(1), above.

Section 1.02 ACTIVE PARTICIPANT

- (a) A Participant becomes an Active Participant if:
 - (1) he has a Year of Participation; or
 - (2) he has not had a One-Year Break-in-Service during any calendar year since he last became an Active Participant.
- (b) A Disabled Participant becomes an Active Participant during the calendar year in which he recovers from his disability.
- (c) A Participant becomes an Active Participant immediately upon having a Year of Participation.

Section 1.03 BARGAINING UNIT means, all Employees who are covered by and whose terms and conditions of employment are specified in a particular Collective Bargaining Agreement.

Section 1.04 BOARD OF TRUSTEES means, the Union Trustees and the Employer Trustees collectively as appointed according to the Trust Agreement to administer the Pension Fund and the Pension Plan.

Section 1.05 BREAK-IN-SERVICE

- (a) A Break-in-Service is sustained when consecutive One-Year Breaks-in-Service accumulate as follows:
 - (1) If the Participant stopped working in Covered Service between February 1, 1955 and March 31, 1969, inclusive, he shall sustain a Break-in-Service if he has at least 5 consecutive One-Year Breaks-in-Service.
 - (2) If the Participant stopped working in Covered Service between April 1, 1969 and December 31, 1975, inclusive, he shall sustain a Break-in-Service if he has at least 3 consecutive One-Year Breaks-in-Service.
 - (3) If the Participant stopped working in Covered Service after December 31, 1975, he shall sustain a Break-in-Service if he has the greater of:
 - (A) 5 consecutive One-Year Breaks-in-Service; or
 - (B) a number of consecutive One-Year Breaks in Service equaling or exceeding the number of years of Vesting Service he earned prior to the first of his consecutive One-Year Breaks-in-Service.
- (b) A Vested Participant cannot sustain a Break-in-Service.

EXHIBIT E



Pension Benefit
Guaranty Corporation

Benefit Provisions in Multiemployer Defined Benefit Pension Plans

2016 Plan Year Reporting
October 2020

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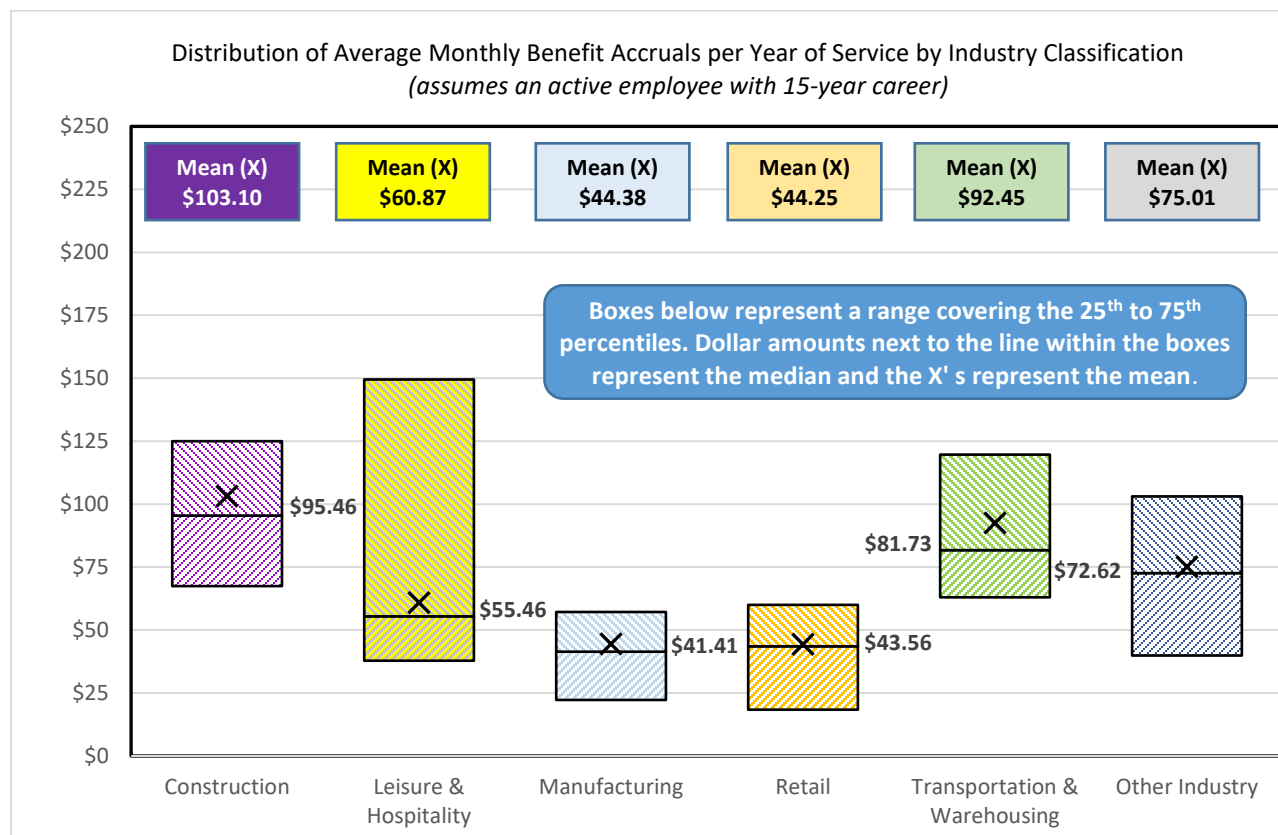
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SUMMARY

This supplement to PBGC's Databook provides a detailed study of the plan provisions available to active workers in multiemployer defined benefit pension plans based on data compiled from Form 5500 filings for 582 multiemployer defined benefit pension plans which, in aggregate, cover approximately 90% of the total universe of active workers covered by all multiemployer defined benefit plans. The plan provision data used was obtained from plan provision summaries prepared by plan actuaries and filed with Form 5500 as documentation for determining reported plan liabilities.

This study analyzes benefit provisions along three categories – by industry classification, by plan funding “zone status” and by amount of current liability. The primary focus is on the structure and amount of the plans' main benefit accrual formula. Figure 1 below illustrates the relative level of estimated average monthly benefit accruals per year of service provided by all multiemployer plans studied, broken down by industry classification, based on the plans that with reasonably reliable information. Further details can be found in Table 18.

Figure 1 - Predominant Accrual Rates for Active Participants by Industry



Source: 2016 Plan Year Form 5500 filings

For purposes of this study, the level of benefits was determined as of normal retirement age for a hypothetical participant with 15 years of service and expressed as a monthly benefit accrual per year of service. Please see the Appendix for details about the methodologies employed for this survey.

In addition to looking at the primary benefit formulae, this supplement also reviews the prevalence of various normal retirement provisions, early retirement provisions, ancillary benefits, and optional benefit payment forms.

STUDY RESULTS AND CONCLUSIONS

Multiemployer plans offer a wide variety of plan formulas and features. A summary of some of the significant findings of the multiemployer pension benefit provisions studied are:

- The most common formulas provide for a flat dollar monthly benefit for each year of credited service (see Table 1).
- The average monthly accrual rate for the flat dollar plans is about \$102 per month per year of service (see Tables 9 and 10).
- The average benefit accrual rate across all plan types that were included in the study is estimated to be comparable to a \$99 per month per year of service benefit; the median benefit across all plans is estimated to be \$83 per year of service (see Tables 17 and 18).
- The construction industry covers by far the highest share of plans (55%) and the highest share of active participants (42%). See Table 4 for more details.
- Pension accruals are generally lower for Critical and Critical & Declining plans than for healthier plans (see Table 17). These Critical and Critical & Declining plans also have lower incidence of disability benefit provisions (see Tables 35 and 36).
- Accrued pension benefits are higher than average in Construction and Transportation/Warehousing industries and lower than average in Retail and Manufacturing industries (see Table 18).
- Normal retirement date is overwhelmingly age 65 (with or without a service requirement), although a significant number of Construction industry plans use age 62. Construction industry plans, along with Transportation and Warehousing industry plans, have the highest incidence of subsidized early retirement benefits. “Subsidized” is defined as a 5% per year or less benefit reduction for early retirement. See Tables 26 and 38, and the Appendix for details.

Please refer to the Appendix at the end of this report for details on methodologies and assumptions.

BACKGROUND

MULTIEMPLOYER PLANS

A multiemployer plan is a pension plan created through a collective bargaining agreement between employers and a union. The employers are typically in the same or related industries, such as transportation, construction, or hospitality. Each employer contributes to the plan at an agreed upon rate to fund the aggregate plan liabilities. This contribution rate is typically reset, as needed, during subsequent collective bargaining negotiations to meet the statutory minimum funding requirements or other funding objectives established by the plan. Contribution rates for most plans are set as a rate per hour worked or similar amount per measure of work inputs (e.g., shifts worked) by active participants.

REGULATORY ENVIRONMENT

Under the Employee Retirement Income Security Act of 1974 (ERISA), multiemployer pension plans are regulated by three primary agencies:

- Department of Labor (DOL),
- Department of the Treasury/Internal Revenue Service (IRS), and
- Pension Benefit Guaranty Corporation (PBGC).

These three regulators are referred to as the ERISA agencies in this study. Under the Multiemployer Pension Plan Amendments Act of 1980, the PBGC's insurance program for multiemployer plans was separated from the insurance program for other covered plans. As a result, PBGC operates two legally and financially separate insurance programs with different levels of guarantees, premiums, and regulatory requirements.

ERISA requires plans to comply with various reporting requirements several items to the ERISA agencies who collect much of this information jointly, through the filing of Form 5500 and its attachments.

DATA SOURCE

Plan provision data was captured from publicly available Form 5500 filings available on <https://www.efast.dol.gov/welcome.html>.

A significant portion of all ongoing multiemployer defined benefit pension plans were analyzed, and sample data was chosen from the list of all plans that filed their 2014 Schedule MB by the time of the selection. The data was sorted by each plan's total current liability and a sample was selected that included the largest 300 plans and a random sample of the remaining plans. The original sample data included information for 599 multiemployer plans. Subsequently, plans that did not file a 2016 Schedule MB due to insolvency, termination or a merger were eliminated from the sample data. The resulting final sample data contained information for 582 plans.

The plans selected for the study cover about 90% of both the active participant counts and the corresponding active participant current liabilities of the multiemployer defined benefit pension plan universe based on the 2016 Schedule MB filings. The tables in this study are based on the data collected for the 582 sample plans, not on the complete multiemployer defined benefit pension plan universe. Plans with compensation-based accrued benefit formulas or multiple formulas with a wide range of accrual rates, depending on a participant's employee group, were not included in the monthly benefit tables.

Summaries of the main statistics for the sampled pension plans versus all multiemployer pension plans is outlined in the Tables A through D below. The comparison of data between Tables A and B as well as Tables C and D shows that the studied sample is representative of the entire multiemployer pension plan universe, both in terms of the level of benefit accruals as well as the distribution by industry and funded status.

Note that on all Tables in this study, individual percentages may not add up to 100% due to rounding of individual entries.

Table A - Studied Multiemployer Pension Plans by 2016 Zone Status

2016 Zone Status	Plan Count		Active Current Liability (millions, \$)		Active Participant Count (thousands)	
	No.	% Total	Amount	% Total	No.	% Total
Critical & Declining	47	8%	\$25,648	7%	199	6%
Critical	108	19%	52,485	14%	624	19%
Seriously Endangered	5	1%	1,200	1%	13	1%
Endangered	66	11%	47,465	13%	359	11%
"Green"	356	61%	235,243	65%	2,065	63%
Studied Plans Total	582	100%	\$362,041	100%	3,260	100%
Studied Plans as a percentage of Total	47%		90%		87%	

Table B - All Multiemployer Pension Plans by 2016 Zone Status

2016 Zone Status	Plan Count		Active Current Liability (millions, \$)		Active Participant Count (thousands)	
	No.	% Total	Amount	% Total	No.	% Total
Critical & Declining	115	9%	\$26,846	7%	211	6%
Critical	216	17%	57,035	14%	688	18%
Seriously Endangered	6	1%	1,263	1%	14	1%
Endangered	135	11%	55,805	13%	402	11%
"Green"	769	62%	262,941	65%	2,449	64%
All Plans Total	1,241	100%	\$403,890	100%	3,764	100%

Table C - Studied Multiemployer Pension Plans by Industry Classification

Industry Classification	Plan Count		Active Current Liability (millions, \$)		Active Participant Count (thousands)	
	No.	% Total	Amount	% Total	No.	% Total
Construction	323	55%	\$189,289	52%	1,372	42%
Leisure & Hospitality	24	4%	17,253	5%	246	7%
Manufacturing	34	6%	15,317	4%	168	5%
Retail	40	7%	22,065	6%	502	15%
Transportation & Warehousing	67	12%	67,761	18%	419	13%
Other Industry	94	16%	50,356	15%	553	18%
Studied Plans Total	582	100%	\$362,041	100%	3,260	100%

Table D - All Multiemployer Pension Plans by Industry Classification

Industry Classification	Plan Count		Active Current Liability (millions, \$)		Active Participant Count (thousands)	
	No.	% Total	Amount	% Total	No.	% Total
Construction	692	56%	\$218,309	54%	1,571	42%
Leisure & Hospitality	51	4%	18,385	5%	280	7%
Manufacturing	97	8%	17,215	4%	200	5%
Retail	66	5%	24,023	6%	537	14%
Transportation & Warehousing	125	10%	70,376	17%	441	12%
Other Industry	210	17%	55,582	14%	735	20%
All Plans Total	1,241	100%	\$403,890	100%	3,764	100%

REPORTING ON MULTIEMPLOYER PLAN PROVISIONS

BENEFIT ACCRUAL FORMULAS AND GENERAL CATEGORY DISTRIBUTIONS

Benefit formulas were classified into four major types:

- i. Flat dollar per year of service,
- ii. Percent of contribution (POC),
- iii. Percent of final average pay, and
- iv. Percent of career average pay.

Where a plan has more than one benefit formula, the benefit provisions of the predominant participant group was used, if determinable. If different provisions applied to employees hired before and after a certain date, the set of provisions applicable to the most recent hires was recorded. Otherwise, the provisions of the first participant group listed in the plan provisions attachment to Schedule MB was used. Tables 1 through 7 below summarize the types of benefit accrual formulas and current liabilities based on various categories for all studied plans.

Table 1 - Plans by Type of Benefit Accrual Formula

Benefit Formula Type	% of Plans	% of Active Current Liability	% of Active Participants
Flat Dollar per Year of Service	59%	46%	50%
Percent of Contributions	34%	44%	39%
Percent of Final Average Pay	5%	7%	6%
Percent of Career Average Pay	2%	3%	5%
Total	100%	100%	100%

Table 2 - Plans by Amount of Active Current Liability

Active Current Liability	% of Plans	% of Active Current Liability	% of Active Participants
Less than \$100M	40%	2%	3%
Between \$100M and \$500M	35%	15%	15%
More than \$500M	25%	83%	82%
Total	100%	100%	100%

Table 3 - Plans by 2016 Zone Status

Zone Status	% of Plans	% of Active Current Liability	% of Active Participants
Critical & Declining	8%	7%	6%
Critical	19%	14%	19%
Seriously Endangered	1%	< 0.5%	< 0.5%
Endangered	11%	13%	11%
"Green"	61%	65%	63%
Total	100%	100%	100%

Table 4 - Plans by Industry Classification

Industry Classification	% of Plans	% of Active Current Liability	% of Active Participants
Construction	55%	52%	42%
Leisure & Hospitality	4%	5%	8%
Manufacturing	6%	4%	5%
Retail	7%	6%	15%
Transportation & Warehousing	12%	19%	13%
Other Industry	16%	14%	17%
Total	100%	100%	100%

Table 5 – Percent of Active Participants by Amount of Active Current Liability and Type of Benefit Accrual Formula

Active Current Liability	Flat Dollar per Year of Service	Percent of Contributions	Percent of Final Average Pay	Percent of Career Average Pay	% of Active Participants
Less than \$100M	2%	1%	< 0.5%	< 0.5%	3%
Between \$100M and \$500M	10%	5%	1%	< 0.5%	15%
More than \$500M	39%	33%	5%	5%	82%
% of Active Participants	50%	39%	6%	5%	100%

Table 6 – Percent of Active Participants by 2016 Zone Status and Type of Benefit Accrual Formula

2016 Zone Status	Flat Dollar per Year of Service	Percent of Contributions	Percent of Final Average Pay	Percent of Career Average Pay	% of Active Participants
Critical & Declining	2%	4%	0%	0%	6%
Critical	11%	8%	< 0.5%	0%	19%
Seriously Endangered	< 0.5%	< 0.5%	0%	0%	< 0.5%
Endangered	3%	8%	< 0.5%	0%	11%
"Green"	34%	19%	6%	5%	63%
% of Active Participants	50%	39%	6%	5%	100%

Table 7 – Percent of Active Participants by Industry Classification and Type of Benefit Accrual Formula

Industry Classification	Flat Dollar per Year of Service	Percent of Contributions	Percent of Final Average Pay	Percent of Career Average Pay	% of Active Participants
Construction	21%	21%	< 0.5%	< 0.5%	42%
Leisure & Hospitality	6%	1%	< 0.5%	1%	8%
Manufacturing	4%	2%	0%	0%	5%
Retail	10%	3%	< 0.5%	2%	15%
Transportation & Warehousing	3%	10%	< 0.5%	0%	13%
Other Industry	7%	3%	5%	2%	17%
% of Active Participants	50%	39%	6%	5%	100%

BENEFIT ACCRUAL RATES

Tables 8 through 15 depict the average estimated monthly benefit accrual rates per year of service for a hypothetical active participant with 15 years of benefit service under various breakdowns for all studied plans. Note that if a plan's benefit accruals are frozen, the average benefit accrual rate was calculated based on the years that the formula was still in effect, up through January 1, 2016.

Table 8 - Benefit Accrual Rates for Plans with Dollar-Per-Year of Service Formula

Current Monthly Benefit Accrual Rate	% of Subtotal Plan Count	% of Subtotal Active Current Liability	% of Subtotal Active Count
Less than \$11.00	1%	< 0.5%	5%
\$11.00 - \$24.99	5%	1%	3%
\$25.00 - \$34.99	4%	15%	30%
\$35.00 - \$44.99	7%	8%	16%
\$45.00 - \$59.99	12%	8%	9%
\$60.00 - \$74.99	17%	12%	11%
\$75.00 - \$99.99	20%	14%	8%
\$100.00 - \$124.99	18%	26%	12%
\$125.00 - \$149.99	5%	7%	4%
\$150.00 - \$199.99	6%	6%	2%
\$200.00 - \$249.99	1%	1%	1%
\$250.00 or more	2%	2%	1%
Total	100%	100%	100%

Table 9 - Benefit Accrual Rates for Plans with Dollar-Per-Year of Service Formula by 2016 Zone Status

Current Monthly Benefit Accrual Rate	Critical & Declining	Critical	Seriously Endangered	Endangered	"Green"	% of Subtotal Plan Count
Less than \$11.00	0%	3%	0%	0%	2%	1%
\$11.00 - \$24.99	21%	9%	0%	7%	2%	5%
\$25.00 - \$34.99	7%	3%	0%	0%	6%	4%
\$35.00 - \$44.99	7%	3%	0%	3%	9%	7%
\$45.00 - \$59.99	14%	20%	0%	17%	9%	12%
\$60.00 - \$74.99	29%	23%	0%	7%	17%	17%
\$75.00 - \$99.99	7%	20%	0%	21%	22%	20%
\$100.00 - \$124.99	14%	11%	100%	28%	18%	18%
\$125.00 - \$149.99	0%	3%	0%	7%	6%	5%
\$150.00 - \$199.99	0%	6%	0%	0%	8%	6%
\$200.00 - \$249.99	0%	0%	0%	3%	1%	1%
\$250.00 or more	0%	0%	0%	7%	2%	2%
Total	100%	100%	100%	100%	100%	100%
Plan-Weighted Average Accrual Rate	\$59.04	\$72.38	\$102.00	\$117.13	\$111.06	\$101.62

Table 10 - Benefit Accrual Rates for Plans with Dollar-Per-Year of Service Formula by Industry Classification

Current Monthly Benefit Accrual Rate	Construction	Leisure & Hospitality	Manufacturing	Retail	Transportation & Warehousing	Other Industry	% of Subtotal Studied Plan Count
Less than \$11.00	1%	0%	0%	0%	0%	6%	1%
\$11.00 - \$24.99	1%	8%	50%	10%	0%	12%	5%
\$25.00 - \$34.99	2%	17%	0%	10%	0%	9%	4%
\$35.00 - \$44.99	3%	25%	13%	0%	6%	15%	7%
\$45.00 - \$59.99	13%	8%	25%	40%	12%	0%	12%
\$60.00 - \$74.99	20%	0%	0%	30%	12%	18%	17%
\$75.00 - \$99.99	26%	0%	0%	10%	24%	12%	20%
\$100.00 - \$124.99	22%	8%	13%	0%	6%	21%	18%
\$125.00 - \$149.99	6%	0%	0%	0%	12%	3%	5%
\$150.00 - \$199.99	6%	0%	0%	0%	24%	3%	6%
\$200.00 - \$249.99	1%	0%	0%	0%	6%	0%	1%
\$250.00 or more	0%	33%	0%	0%	0%	0%	2%
Plan-Weighted Average Accrual Rate	\$87.75	\$319.42	\$40.08	\$41.25	\$101.38	\$67.71	\$101.62

Table 11 - Benefit Accrual Rates for Plans with Percent of Contribution Formula

Current Monthly Benefit Accrual Rate	% of Subtotal Plan Count	% of Subtotal Active Current Liability	% of Subtotal Active Count
Less than 0.25%	1%	< 0.5%	< 0.5%
0.25% - 0.49%	3%	1%	1%
0.50% - 0.74%	8%	5%	5%
0.75% - 0.99%	7%	3%	2%
1.00% - 1.24%	44%	56%	52%
1.25% - 1.49%	7%	15%	14%
1.50% - 1.74%	10%	4%	5%
1.75% - 1.99%	7%	6%	10%
2.00% - 2.49%	8%	4%	4%
2.50% - 2.99%	1%	< 0.5%	< 0.5%
3.00% - 3.49%	4%	3%	5%
3.50% - 3.99%	0%	0%	0%
4.00% - 4.49%	1%	< 0.5%	< 0.5%
4.50% - 4.99%	1%	2%	2%
Total	100%	100%	100%

Table 12 - Benefit Accrual Rates for Plans with Percent of Contribution Formula by 2016 Zone Status

Current Monthly Benefit Accrual Rate	Critical & Declining	Critical	Seriously Endangered	Endangered	"Green"	% of Subtotal Plan Count
Less than 0.25%	0%	0%	0%	0%	1%	1%
0.25% - 0.49%	5%	5%	0%	4%	2%	3%
0.50% - 0.74%	9%	7%	0%	23%	4%	8%
0.75% - 0.99%	9%	0%	0%	11%	9%	7%
1.00% - 1.24%	73%	55%	100%	38%	33%	44%
1.25% – 1.49%	5%	5%	0%	8%	9%	7%
1.50% – 1.74%	0%	9%	0%	0%	15%	10%
1.75% – 1.99%	0%	7%	0%	4%	9%	7%
2.00% – 2.49%	0%	9%	0%	12%	9%	8%
2.50% – 2.99%	0%	0%	0%	0%	2%	1%
3.00% – 3.49%	0%	2%	0%	0%	7%	4%
3.50% – 3.99%	0%	0%	0%	0%	0%	0%
4.00% – 4.49%	0%	0%	0%	0%	1%	1%
4.50% – 4.99%	0%	2%	0%	0%	1%	1%
Plan-Weighted Average Accrual Rate	0.95%	1.30%	1.10%	1.05%	1.47%	1.31%

Table 13 - Benefit Accrual Rates for Plans with Percent of Contribution Formula by Industry Classification

Current Monthly Benefit Accrual Rate	Construction	Leisure & Hospitality	Manufacturing	Retail	Transportation & Warehousing	Other Industry	% of Subtotal Plan Count
Less than 0.25%	1%	0%	0%	0%	0%	0%	1%
0.25% - 0.49%	2%	0%	6%	0%	5%	5%	3%
0.50% - 0.74%	10%	0%	0%	0%	14%	0%	8%
0.75% - 0.99%	8%	0%	0%	10%	0%	15%	7%
1.00% - 1.24%	40%	100%	72%	40%	48%	35%	44%
1.25% – 1.49%	6%	0%	6%	0%	14%	10%	7%
1.50% – 1.74%	13%	0%	6%	10%	5%	0%	10%
1.75% – 1.99%	6%	0%	6%	0%	0%	25%	7%
2.00% – 2.49%	8%	0%	0%	20%	14%	5%	8%
2.50% – 2.99%	2%	0%	0%	0%	0%	0%	1%
3.00% – 3.49%	4%	0%	6%	20%	0%	0%	4%
3.50% – 3.99%	0%	0%	0%	0%	0%	0%	0%
4.00% – 4.49%	1%	0%	0%	0%	0%	0%	1%
4.50% – 4.99%	1%	0%	0%	0%	0%	5%	1%
Plan-Weighted Average Accrual Rate	1.32%	1.00%	1.20%	1.67%	1.14%	1.42%	1.31%

Table 14 - Benefit Accrual Rates for Plans with Final Average Pay Formula

Current Annual Benefit Accrual Rate	% of Subtotal Plan Count	% of Subtotal Active Current Liability	% of Subtotal Active Count
1-Year Pay Averaging Period	6%	3%	3%
1.50% – 1.99%	3%	2%	3%
3.00% or greater	3%	1%	< 0.5%
3-Year Pay Averaging Period	26%	13%	7%
1.00% – 1.49%	3%	< 0.5%	< 0.5%
2.00% – 2.49%	3%	1%	1%
2.50% – 2.99%	10%	8%	4%
3.00% or greater	10%	4%	2%
5-Year Pay Averaging Period	52%	40%	27%
Less than 1.00%	3%	< 0.5%	< 0.5%
1.00% – 1.49%	10%	5%	4%
1.50% – 1.99%	16%	14%	13%
2.00% – 2.49%	19%	19%	10%
2.50% – 2.99%	3%	1%	**
10-Year Pay Averaging Period	10%	42%	61%
1.50% – 1.99%	3%	38%	59%
2.00% – 2.49%	3%	3%	1%
2.50% – 2.99%	3%	1%	1%
Over 10 Years Pay Averaging Period	6%	2%	2%
2.00% – 2.49%	6%	2%	2%
Total	100%	100%	100%

Table 15 - Benefit Accrual Rates for Plans with Percent of Career Earnings Formula*

Current Benefit Accrual Rate	% of Subtotal Plan Count	% of Subtotal Active Current Liability	% of Subtotal Active Count
Less than 1.00%	27%	21%	47%
1.00% – 1.49%	9%	1%	1%
1.50% – 1.99%	27%	20%	14%
2.00% – 2.49%	18%	33%	18%
2.50% – 2.99%	9%	15%	4%
3.00% or greater	9%	11%	16%
Total	100%	100%	100%

* All studied multiemployer pension plans with percent-of-career-earnings benefit formula are in the “Green” zone for the 2016 plan year. The plan-weighted average accrual rate for these plans is 1.57% of career earnings.

BENEFIT AVERAGES ACROSS ALL PLANS

Tables 16 through 18 depict the average estimated monthly benefit accruals per year of service for a hypothetical active participant with 15 years of benefit service under various breakdowns for all studied plans which were deemed to have reasonably reliable information (442 plans out of the 582 plan sample were deemed to meet this criteria). Note that if a plan's benefit accruals are frozen, the average benefit accrual rates were calculated based on the years that the formula was still in effect, up through January 1, 2016 – there are five such plans included here, representing about 1% of the total. The monthly estimates for plans with percentage of contribution formulas and pay-related formulas are based on an approximation, as outlined in the Appendix.

Table 16 - Average Estimated Monthly Benefit Accruals

Average Monthly Benefit Accrual	% of Total Plan Count	% of Total Active Current Liability	% of Total Active Count
Less than \$11.00	1%	0%	2%
\$11.00 - \$24.99	6%	3%	8%
\$25.00 - \$34.99	4%	5%	11%
\$35.00 - \$44.99	6%	3%	6%
\$45.00 - \$59.99	10%	7%	11%
\$60.00 - \$74.99	16%	30%	30%
\$75.00 - \$99.99	18%	10%	8%
\$100.00 - \$124.99	18%	16%	8%
\$125.00 - \$149.99	9%	14%	10%
\$150.00 - \$199.99	8%	8%	4%
\$200.00 - \$249.99	1%	1%	<0.5%
\$250.00 or more	2%	4%	2%
Total	100%	100%	100%

Table 17 - Average Estimated Monthly Benefit Accruals by 2016 Zone Status

Average Monthly Benefit Accrual	Critical & Declining	Critical	Seriously Endangered	Endangered	"Green"	% of Total Plan Count
Less than \$11.00	0%	1%	0%	0%	2%	1%
\$11.00 - \$24.99	19%	10%	0%	5%	3%	6%
\$25.00 - \$34.99	8%	4%	0%	0%	4%	4%
\$35.00 - \$44.99	11%	5%	0%	2%	7%	6%
\$45.00 - \$59.99	14%	17%	0%	11%	8%	10%
\$60.00 - \$74.99	31%	13%	0%	14%	16%	16%
\$75.00 - \$99.99	3%	17%	33%	18%	21%	18%
\$100.00 - \$124.99	11%	13%	33%	23%	19%	18%
\$125.00 - \$149.99	3%	9%	33%	11%	9%	9%
\$150.00 - \$199.99	0%	9%	0%	5%	9%	8%
\$200.00 - \$249.99	0%	1%	0%	5%	1%	1%
\$250.00 or more	0%	1%	0%	7%	2%	2%
Total	100%	100%	100%	100%	100%	100%
Plan-Weighted Average Accrual	\$57.40	\$85.58	\$106.97	\$120.16	\$103.90	\$98.83
Plan-Weighted Median Accrual	\$56.29	\$74.50	\$102.00	\$100.00	\$86.24	\$83.33

Note that Critical and Critical & Declining plans have lower than average benefit accruals. Such plans also tend to have relatively high contribution rates – as such, the differential in the benefit accrual rate (relative to contributions) is likely larger than the numbers above suggest.

Also, as previously noted, if a plan's benefit accruals are frozen, the average benefit accrual rate was calculated based on the years that the formula was still in effect, up through January 1, 2016.

Table 18 - Average Estimated Monthly Benefit Accruals by Industry Classification

Average Monthly Benefit Accrual	Construction	Leisure & Hospitality	Manufacturing	Retail	Transportation & Warehousing	Other Industry	% of Total Plan Count
Less than \$11.00	1%	5%	0%	0%	0%	3%	1%
\$11.00 - \$24.99	1%	5%	27%	32%	2%	10%	6%
\$25.00 - \$34.99	2%	11%	8%	14%	0%	8%	4%
\$35.00 - \$44.99	4%	16%	19%	5%	5%	10%	6%
\$45.00 - \$59.99	9%	16%	27%	23%	12%	4%	10%
\$60.00 - \$74.99	16%	0%	12%	14%	26%	18%	16%
\$75.00 - \$99.99	22%	5%	0%	9%	19%	19%	18%
\$100.00 - \$124.99	22%	16%	8%	5%	14%	14%	18%
\$125.00 - \$149.99	10%	5%	0%	0%	12%	9%	9%
\$150.00 - \$199.99	11%	0%	0%	0%	9%	3%	8%
\$200.00 - \$249.99	2%	0%	0%	0%	2%	0%	1%
\$250.00 or more	2%	21%	0%	0%	0%	1%	2%
Total	100%	100%	100%	100%	100%	100%	100%
Plan-Weighted Average Accrual	\$103.10	\$290.22*	\$44.38	\$44.25	\$92.45	\$75.01	\$98.83
Plan-Weighted Median Accrual	\$95.46	\$55.46	\$41.41	\$42.12	\$81.73	\$72.62	\$83.33

* The plan-weighted average for the Leisure & Hospitality industry is skewed due to very large benefits under professional sports teams' plans. The plan-weighted average monthly benefit accrual for the Leisure & Hospitality industry, excluding the professional sports teams, is \$60.87.

NORMAL RETIREMENT PROVISIONS

Tables 19 through 21 summarize normal retirement eligibility requirements by various categories for all studied plans.

Table 19 - Plan's Normal Retirement Eligibility Requirements

Normal Pension Eligibility Requirements (Age/Service)	% of Total Plan Count	% of Total Active Current Liability	% of Total Active Count
Under 62/Under 5	1%	< 0.5%	< 0.5%
Under 62/5	5%	3%	2%
Under 62/Over 5	1%	1%	1%
62/Under 5	2%	1%	< 0.5%
62/5	17%	9%	7%
62/Over 5	1%	< 0.5%	< 0.5%
63 - 64/5	2%	3%	2%
65/Under 5	4%	10%	9%
65/5	67%	73%	79%
65/Over 5	1%	1%	< 0.5%
Over 65/5	< 0.5%	< 0.5%	< 0.5%
Total	100%	100%	100%

Table 20 - Normal Retirement Eligibility Requirements by 2016 Zone Status

Normal Retirement Eligibility Requirements (Age/Service)	Critical & Declining	Critical	Seriously Endangered	Endangered	"Green"	% of Active Participants
Under 62/Under 5	-	-	-	1%	< 0.5%	< 0.5%
Under 62/5	< 0.5%	3%	-	3%	1%	2%
Under 62/Over 5	-	3%	-	-	< 0.5%	1%
62/Under 5	-	< 0.5%	-	< 0.5%	1%	< 0.5%
62/5	1%	4%	65%	6%	7%	7%
62/Over 5	-	-	-	< 0.5%	< 0.5%	< 0.5%
63 - 64/5	10%	5%	-	-	< 0.5%	2%
65/Under 5	10%	8%	1%	1%	11%	9%
65/5	78%	76%	35%	88%	78%	79%
65/Over 5	-	1%	-	1%	1%	< 0.5%
Over 65/5	-	-	-	-	< 0.5%	< 0.5%
Total	100%	100%	100%	100%	100%	100%

Table 21 - Active Participant Normal Retirement Eligibility Requirements by Industry Classification

Normal Retirement Eligibility Requirements (Age/Service)	Construction	Leisure & Hospitality	Manufacturing	Retail	Transportation & Warehousing	Other Industry	% of Total Active Participants
Under 62/Under 5	<0.5%	1%	-	-	-	-	<0.5%
Under 62/5	2%	-	<0.5%	3%	2%	1%	2%
Under 62/Over 5	<0.5%	-	-	3%	1%	-	1%
62/Under 5	<0.5%	1%	-	-	<0.5%	1%	< 0.5%
62/5	11%	<0.5%	<0.5%	8%	3%	5%	7%
62/Over 5	<0.5%	-	-	<0.5%	<0.5%	-	<0.5%
63 - 64/5	3%	-	<0.5%	-	5%	-	2%
65/Under 5	1%	4%	1%	13%	48%	2%	9%
65/5	82%	94%	99%	73%	39%	91%	79%
65/Over 5	1%	-	-	-	2%	-	<0.5%
Over 65/5	<0.5%	-	-	-	-	-	<0.5%
Total	100%	100%	100%	100%	100%	100%	100%

EARLY RETIREMENT ELIGIBILITY

Tables 22 through 24 summarize early retirement eligibility requirements by various categories for all studied plans. Note that these tables include eligibility for both subsidized and unsubsidized early retirement. For information about subsidized early retirement benefits, see the section on Ancillary Benefits (Tables 29-33).

Table 22 - Early Retirement Eligibility Requirements

Early Pension Eligibility Requirements (Age/Service)	% of Total Plan Count	% of Total Active Current Liability	% of Total Active Count
Under 50/Under 5	1%	<0.5%	<0.5%
Under 50/5	1%	1%	1%
Under 50/Over 5	1%	1%	1%
50 - 54/Under 5	<0.5%	<0.5%	<0.5%
50 - 54/5	3%	2%	2%
50 - 54/Over 5	7%	8%	5%
55/Under 5	1%	2%	1%
55/5	21%	30%	39%
55/6 – 9	1%	<0.5%	<0.5%
55/10	37%	32%	28%
55/11 – 14	<0.5%	2%	1%
55/15	9%	7%	6%
55/Over 15	3%	4%	3%
Over 55/Under 5	<0.5%	<0.5%	<0.5%
Over 55/5	6%	6%	11%
Over 55/Over 5	9%	4%	3%
Total	100%	100%	100%

Table 23 - Early Retirement Eligibility Requirements by 2016 Zone Status

Early Retirement Eligibility Requirements (Age/Service)	Critical & Declining	Critical	Seriously Endangered	Endangered	"Green"	% of Active Participants
Under 50/Under 5	-	-	-	1%	<0.5%	<0.5%
Under 50/5	-	-	-	3%	1%	1%
Under 50/Over 5	6%	-	-	2%	<0.5%	1%
50-54/Under 5	-	-	-	-	<0.5%	<0.5%
50-54/5	<0.5%	2%	-	3%	2%	2%
50-54/Over 5	32%	3%	65%	2%	3%	5%
55/Under 5	-	<0.5%	-	6%	<0.5%	1%
55/5	10%	56%	24%	25%	39%	39%
55/Over 5	50%	35%	11%	50%	36%	38%
Over 55/Under 5	-	<0.5%	-	-	-	<0.5%
Over 55/5	<0.5%	1%	-	6%	16%	10%
Over 55/Over 5	2%	3%	-	2%	3%	3%
Total	100%	100%	100%	100%	100%	100%

Table 24 - Early Retirement Eligibility Requirements by Industry Classification*

Early Pension Eligibility Requirements (Age/Service)	Construction	Leisure & Hospitality	Manufacturing	Retail	Transportation & Warehousing	Other Industry	% of Total Active Count
Under 50/Under 5	-	2%	-	-	-	-	<0.5%
Under 50/5	1%	-	-	-	1%	-	1%
Under 50/Over 5	1%	-	-	-	3%	-	1%
50-54/Under 5	**	-	-	-	-	-	<0.5%
50-54/5	**	3%	-	4%	3%	3%	2%
50-54/Over 5	3%	-	<0.5%	7%	21%	1%	5%
55/Under 5	2%	-	-	-	-	<0.5%	1%
55/5	22%	58%	68%	56%	51%	40%	39%
55/6 – 9	<0.5%	-	-	-	-	<0.5%	<0.5%
55/10	39%	6%	14%	24%	3%	37%	28%
55/11 – 14	1%	-	-	-	3%	-	1%
55/15	6%	1%	15%	4%	7%	5%	6%
55/Over 15	2%	<0.5%	-	4%	2%	11%	3%
Over 55/Under 5	-	-	-	-	<0.5%	-	<0.5%
Over 55/5	20%	25%	1%	-	1%	1%	10%
Over 55/Over 5	3%	5%	2%	1%	5%	2%	3%
Total	100%	100%	100%	100%	100%	100%	100%

OPTIONAL FORMS OF BENEFIT

Tables 25 through 28 summarize optional payment forms under various categories for all studied plans.

Table 25 - Optional Payment Forms Currently Offered

Optional Payment Forms	% of Total Plan Count	% of Total Active Current Liability	% of Total Active Count
Guarantee (Certain) Period	63%	65%	57%
Full Lump Sum at Retirement	1%	1%	1%
Partial Lump Sum at Retirement	8%	11%	10%

Table 26 - Plans by Size of Active Current Liability and Optional Payment Form

Active Current Liability	Guarantee (Certain) Period	Full Lump Sum at Retirement	Partial Lump Sum at Retirement
Less than \$100 million	59%	1%	3%
Between \$100 million and \$500 million	65%	< 0.5%	8%
More than \$500 million	67%	2%	15%
% of Plans	63%	1%	8%

Table 27 - Active Participants by 2016 Zone Status and Optional Payment Forms

2016 Zone Status	Guarantee (Certain) Period	Full Lump Sum at Retirement	Partial Lump Sum at Retirement
Critical & Declining	69%	-	< 0.5%
Critical	46%	-	1%
Seriously Endangered	7%	-	11%
Endangered	88%	-	14%
"Green"	54%	1%	13%
% of Total Active Count	57%	1%	10%

Table 28 - Active Participants by Industry Classification and Optional Payment Form

Industry Classification	Guarantee (Certain) Period	Full Lump Sum at Retirement	Partial Lump Sum at Retirement
Construction	68%	1%	8%
Leisure & Hospitality	22%	-	21%
Manufacturing	82%	-	57%
Retail	35%	-	-
Transportation & Warehousing	34%	< 0.5%	4%
Other Industry	72%	2%	8%
% of Total Active Count	57%	1%	10%

ANCILLARY FORMS OF BENEFIT

Tables 29 through 33 summarize ancillary benefits under various categories for all studied plans.

Table 29 - Types of Ancillary Benefits Offered

Ancillary Benefits Offered	% of Total Plan Count	% of Total Active Current Liability	% of Total Active Count
Subsidized Early Retirement	72%	82%	75%
Disability Pension	89%	95%	95%
Pre-retirement Full* Lump Sum Death Benefit	13%	15%	11%
Pre-retirement Limited Lump Sum Death Benefit	25%	30%	25%

* Full lump sum death benefit implies the single payment of all employer contributions made on participant's behalf or one-time actuarially equivalent cash-out of the annuity payable to beneficiary.

Table 30 - Distribution of Types of Ancillary Benefits by 2016 Zone Status (Plan Weighted)

Zone Status for 2016 Plan Year	Subsidized Early Retirement	Disability Pension	Pre-retirement Full Lump Sum Death Benefit *	Pre-retirement Limited Lump Sum Death Benefit
Critical & Declining	47%	53%	2%	4%
Critical	61%	83%	10%	14%
Seriously Endangered	60%	100%	-	40%
Endangered	77%	92%	12%	30%
"Green"	78%	94%	15%	29%
% of Total Plan Count	72%	89%	13%	25%

* Full lump sum death benefit implies the single payment of all employer contributions made on participant's behalf or one-time actuarially equivalent cash-out of the annuity payable to beneficiary.

Table 31 – Distribution of Types of Ancillary Benefits by 2016 Zone Status (Participant Weighted)

Zone Status for 2016 Plan Year	Subsidized Early Retirement	Disability Pension	Pre-retirement Full Lump Sum Death Benefit *	Pre-retirement Limited Lump Sum Death Benefit
Critical & Declining	75%	89%	2%	35%
Critical	43%	87%	10%	5%
Seriously Endangered	35%	100%	0%	29%
Endangered	84%	98%	26%	23%
"Green"	83%	97%	10%	30%
% of Total Active Count	75%	95%	11%	25%

* Full lump sum death benefit implies the single payment of all employer contributions made on participant's behalf or one-time actuarially equivalent cash-out of the annuity payable to beneficiary.

Table 32 – Ancillary Benefits by Industry Classification (Plan Weighted)

Industry Classification	Subsidized Early Retirement	Disability Pension	Pre-retirement Full Lump Sum Death Benefit*	Pre-retirement Limited Lump Sum Death Benefit
Construction	84%	95%	20%	32%
Leisure & Hospitality	50%	79%	8%	13%
Manufacturing	47%	71%	0%	9%
Retail	50%	75%	5%	3%
Transportation & Warehousing	69%	79%	0%	18%
Other Industry	59%	89%	2%	22%
% of Total Plan Count	72%	89%	13%	25%

* Full lump sum death benefit implies the single payment of all employer contributions made on participant's behalf or one-time actuarially equivalent cash-out of the annuity payable to beneficiary.

Table 33 – Ancillary Benefits by Industry Classification (Participant Weighted)

Industry Classification	Subsidized Early Retirement	Disability Pension	Pre-retirement Full Lump Sum Death Benefit*	Pre-retirement Limited Lump Sum Death Benefit
Construction	90%	99%	25%	19%
Leisure & Hospitality	35%	95%	3%	34%
Manufacturing	80%	96%	-	59%
Retail	61%	83%	2%	<0.5%
Transportation & Warehousing	90%	94%	-	67%
Other Industry	53%	96%	1%	16%
% of Total Active Count	75%	95%	11%	25%

* Full lump sum death benefit implies the single payment of all employer contributions made on participant's behalf or one-time actuarially equivalent cash-out of the annuity payable to beneficiary.

APPENDIX

DETAILS ON METHODOLOGIES AND ASSUMPTIONS

Study Methodology and Assumptions

The benefit provisions and plan measurements used to compile the descriptive statistics shown in this study are based on the information that was available on the DOL EFAST website in late November - early December 2018.

The following pension plan statistics were taken directly from the downloaded 2016 Schedule MB filings:

- Zone status,
- Amount of active current liability,
- Number of active and in-pay plan participants,
- Expected annual benefits paid to plan participants.

The downloaded data was reviewed for reasonability but was not audited.

The industry classifications were based on the code entry on the Form 5500, which describe a very wide range of detailed industry types – statistics for this report are consolidated and are being presented as high-level industry groups. These groups can be diverse in composition and this diversity may explain some of the variation within the group. This is particularly apparent in the Leisure and Hospitality Industry, which is very diverse, including sponsors ranging from operas and professional sports teams to hoteliers and food service workers. Plans reporting as Insurance & Employee Benefit Funds (525100) or Labor Unions and Similar Labor Organizations (813930) are manually researched and corrected based on the business activity of the largest contributing employers.

The benefit provisions listed below were taken from the attachment to the most recent Schedule MB available on the DOL EFAST website:

- Pension benefit accrual formula and the corresponding time periods when certain accrual rates are effective,
- Normal retirement age and service eligibility requirements,
- Early retirement age and service eligibility requirements,
- Early retirement subsidy,
- Disability coverage,
- Pre-retirement survivor annuity death benefit,
- Pre-retirement lump sum death benefit, and
- Optional forms of payment.

The following methods and procedures were used to assemble the data for the study and to calculate needed statistics:

- All benefit formulas were classified into four major types: (i) flat dollar per year of service, (ii) percent of contribution (POC), (iii) percent of final average pay, and (iv) percent of career average pay.
- All Accrued benefits were calculated as of December 31, 2015.
- To calculate estimated accrued benefits under POC plans, employer contribution amounts and active participant headcounts were taken from Schedule MB for plan years 2003 through 2015 to calculate per-capita contributions. Because contributions shown on the Schedule MB include withdrawal liability payments, which are not generally broken out on Form 5500, a generic approximation was developed based on available withdrawal liability data that had been collected and averaged across all plans for which withdrawal liability data was available. Based on this, the amount of reported contributions was decreased by a flat 18% across all plans (except for plans in the Construction industry, where no such adjustment was made) to approximate the benefit-bearing portion of annual contributions. While this adjustment is not accurate on individual plans, it is likely to be a reasonable estimate on an aggregate basis. The contributions were also adjusted for any caps and supplemental contributions (amounts not considered for benefit accrual purposes) if clearly disclosed by the actuary in the plan provisions summary.
- The uniform Final Average Salary used to calculate estimated accrued benefits under final-average pay plans, (reflected in the results presented in this report) was \$50,000. This assumption is based on the participant-weighted average compensation reported in the corresponding attachment to the 2016 Schedule MB by the studied final-average pay plans with active current liability of \$350 million or greater.
- The uniform Career Average Pay per year of service used to calculate estimated accrued benefits under career-average pay plans, reflected in the results presented in this study, was \$55,000. This assumption is based on the participant-weighted average compensation reported in the corresponding attachment to the 2016 Schedule MB by the studied career-average pay plans with active current liability of \$500 million or greater. Career-average pay plans in the study cover higher-paid populations, therefore, the overall assumed annual average pay per year of service in a Career Average plan is higher than the overall assumed final average pay.
- In this study, the estimated average benefit accruals per year of service only for a hypothetical active employee with 15 years of service are shown. The 15-year average (covering the period from 2001-2015) smooths out temporary accrual rate freezes and better represents plans that change accrual rates periodically (up and down). The results for 20-year and 25-year career lengths are not materially different.

Due to coverage of numerous participant groups and complexity of benefit provisions of certain multiemployer pension plans, the following simplifying assumptions were made to summarize the benefit provisions and fit them into the format required by the study:

- The benefit provisions of the predominant participant group, if determinable, based on information disclosed on line 8a of the Form 5500 (pension plan features), line 13 of Schedule R (employers making contributions greater than 5% of total plan contributions), or attachments to Schedule MB. If different provisions applied to employees hired before and after a certain date, the set of provisions applicable to the most recent hires was recorded. Otherwise, the provisions of the first participant group listed in the plan provisions attachment to Schedule MB was used.
- The hypothetical employee was assumed to work 1,500 hours per year if the benefit accrual rate was dependent on the number of work hours.
- One pension credit was assumed to be earned by a hypothetical employee in each plan year.
- If disclosed by the plan actuary, the normal retirement age applicable to the most recent benefit accruals was recorded for the study. Otherwise, the age of the earliest eligibility for Normal/Regular Pension applicable for the most recent benefit accruals under the plan was recorded.
- If disclosed by the plan actuary, the normal retirement service was set according to the plan's most recent definition of the Normal Retirement Date (NRD). Otherwise, it was set to the least number of years required to earn a non-forfeitable benefit under the plan.
- Early retirement eligibility applicable to the most recent benefit accruals was recorded for the study.
- When there were multiple eligibilities for early retirement (for example, 55/15 and 60/5), the provision with the earliest age (unless it required 30 or more years of service) was reflected.
- An early retirement reduction of 5% per year or less for ages prior to NRD was assumed to be an early retirement subsidy. A plan that offers an early retirement subsidy, even if only a benefit portion had the embedded subsidy, while the remaining accruals were reduced on an actuarial equivalent basis, was recorded as having a subsidy.
- If disability or other ancillary benefits used to be offered under the plan, but have been eliminated, it was recorded that no such benefit is provided under the plan.
- If the largest amount of lump sum death benefit offered under the plan was \$5,000 or less, it was recorded that the plan offers no lump sum death benefit.
- If the maximum amount of lump sum payable upon retirement was \$5,000 or less, it was recorded that the plan offers no lump sum form of payment.
- If a payment form, normal or optional, was available for at least a portion of the benefit, it was recorded that such payment option is generally offered under the plan.
- Under POC plans, if the benefit-bearing portion of employer contributions was not clearly disclosed, it was assumed that all employer contributions were used for benefit accrual purposes.
- Two plans that described their benefit accruals in terms of lump sum amounts to the equivalent single life annuity accrual rates (by dividing the lump sum accrual by 15) were classified as flat dollar per year of service formulas.

Constraints and Limitations

Our study assumes that each participant is subject to the plan provisions applicable to the 15-year period ending December 31, 2015. Grandfathered plan provisions were excluded from the study for all purposes.

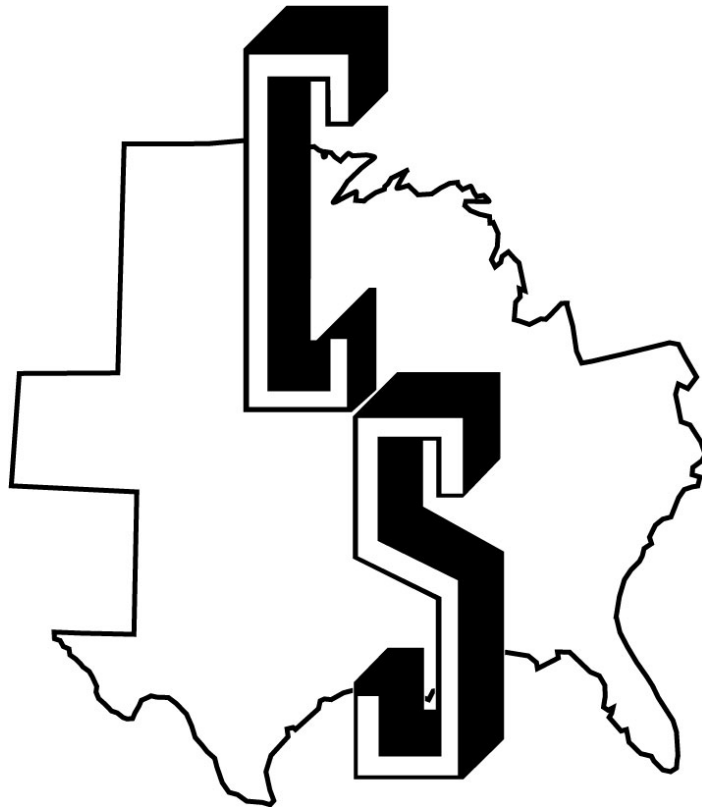
Simplifying assumptions were made to summarize the benefit provisions, as described previously in this document; therefore, Tables 16 through 18 rely on estimated accrued plan benefits and should be used with caution.

No distinction was made between normal and optional payment forms when studying the plan provisions data. Therefore, the proportion of multiemployer plans shown in this study as offering a guarantee (certain) period may be understated because not all filings contain disclosure of optional payment forms.

Only five out of 582 plans selected for the study (covering about 13,000 active participants) were in seriously endangered status for the 2016 plan year. Any findings for this plan category should be referenced with reservation due to the small sample size.

EXHIBIT F

Central States, Southeast and Southwest Areas Pension Plan



RESTATED PLAN EFFECTIVE JANUARY 1, 1985
AS AMENDED THROUGH JANUARY 1, 2022

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a jointly administered, defined benefit employee benefit plan

ADDRESS OF ADMINISTRATIVE OFFICE

8647 West Higgins Road
Chicago, Illinois 60631

TELEPHONE NUMBER

(847) 518-9800
1-800-323-5000 (Toll-Free)

EMPLOYER IDENTIFICATION NUMBER

36-6044243

PLAN NUMBER

001

BOARD OF TRUSTEES

UNION

Charles A. Whobrey
George J. Westley
Gary Dunham
Trevor Lawrence

EMPLOYER

Gary F. Caldwell
Robert Whitaker
Mark Angerame
Richard K. Ellis

EXECUTIVE DIRECTOR

(also Agent for Service of Legal Process)
Thomas C. Nyhan

APPENDIX M-1. REHABILITATION PLAN**Section 1. PREAMBLE AND DEFINITIONS.**

This Appendix M-1 is added to the Pension Plan effective on and after March 26, 2008 in order to comply with the requirements of the Pension Protection Act of 2006 ("PPA"). The Central States, Southeast and Southwest Areas Pension Fund (the "Fund") was certified on March 24, 2008 by its actuary to be in "critical status" (sometimes referred to as the "red zone") under the PPA. The Fund's Board of Trustees, as the plan sponsor of a "critical status" pension plan, is charged under the PPA with developing a "rehabilitation plan" designed to improve the financial condition of the Fund in accordance with the standards set forth in the PPA. That is the purpose of this Rehabilitation Plan.

Under the PPA, a rehabilitation plan must include one or more schedules showing revised benefit structures, revised contributions, or both, which, if adopted by the parties obligated under agreements participating in the pension plan, may reasonably be expected to enable the Fund to emerge from critical status in accordance with the rehabilitation plan. The PPA also provides that one of the rehabilitation plan schedules of benefits and contributions shall be designated the "default" schedule. The default schedule must assume that there are no increases in contributions under the plan other than the increases necessary to emerge from critical status after future benefit accruals and other benefits have been reduced to the maximum extent permitted by law. The PPA also creates certain categories of "adjustable benefits" which may be reduced or eliminated dependent upon the outcome of bargaining over the rehabilitation plan schedules and dependent on the exercise of certain flexibility and discretion conferred upon the Board of Trustees by the PPA. Adjustable benefits that may be affected in this manner include post-retirement death benefits, early retirement benefits or retirement-type subsidies, and generally any benefit that would be payable prior to normal retirement age (age 65 benefits under the Fund's Plan Document – or, as discussed below, a Contribution Based Benefit actuarially reduced to be equivalent to an age 65 benefit).

Unless otherwise indicated, all capitalized terms herein shall have the definitions and meanings assigned to them in the Fund's Pension Plan Document.

Section 2. SCHEDULES OF CONTRIBUTIONS AND BENEFITS.

With the PPA requirements outlined above in mind, the Fund's Board of Trustees hereby provides the following PPA Schedules to the parties charged with bargaining over agreements requiring contributions to the Fund.

A. PRIMARY SCHEDULE (PRESERVES ALL CURRENT BENEFITS).**1. Benefits**

With regard to Bargaining Units (and any non-Bargaining Unit employee groups participating in the Fund) whose Contributing Employers are in compliance with this Primary Schedule, there will be no change in benefit formulas, levels or payment options in effect on January 1, 2008.

However, subject to the notice requirements of the PPA and other applicable law, any Bargaining Units (and any non-Bargaining Unit employee groups participating in the Fund) whose Contributing Employers incur a Rehabilitation Plan Withdrawal on or after March 26, 2008 shall have their Adjustable Benefits listed in Section 2(F) below eliminated or reduced to the extent indicated in Subsection B(1) below.

2. Contributions

Compliance with the Primary Schedule requires annually compounded contribution rate increases effective immediately after the expiration of the Collective Bargaining Agreement (or other agreement requiring contributions to the Fund) and each agreement anniversary date (or reallocation anniversary, where applicable) during the term of the new bargaining agreement to the extent indicated below, depending on the year that the new agreement is effective (as shown below). Note that all contribution rate increases are annually compounded on the total contribution rate (including any reallocations of employee benefit contributions or agreed mid-contract contribution increases) immediately prior to the increase.

- Pre-2006 agreements: 7% per year
(beginning with 2006 agreement anniversary or reallocation dates)
- 2006 agreements: 7% per year
- 2007 agreements: 8% per year
- 2008 agreements: 8% per year
- 2009 agreements: 8% per year

The required annual rate increase may be provided through annual allocations to pension contributions of general and aggregate employee benefit contribution increases that were negotiated at the outset of an agreement, but were not specifically allocated to pension contributions until subsequent contract years. The Primary Schedule requires 8% per year contribution rate increases for the first 5 years, 6% per year contribution rate increases for the next 3 years and 4% per year contribution rate increases each year thereafter for 2008 agreements under the Primary Schedule and comparable rate increases over time for all other agreements under the Primary Schedule (see Exhibit A).

B. DEFAULT SCHEDULE.

1. Benefits

With regard to Bargaining Units (and any non- Bargaining Unit employee groups participating in the Fund) whose Contributing Employers agree to comply with this Default Schedule [or who become subject to the Default Schedule due to a failure to achieve an agreement to accept one of the Rehabilitation Plan Schedules within the time frame specified under ERISA § 305(e)(3)(C)], the benefit formulas, levels, and payment options in effect on January 1, 2008 will remain in effect except for the following, upon the effective date that the Default Schedule applies to the Bargaining Unit (or to any non-Bargaining Unit employee groups participating in the Fund):

- Adjustable Benefits listed in Section 2(F) below are eliminated or reduced to the maximum extent permitted by law, but the future benefit accrual rate of 1% of contributions (the Contribution-Based Pension) remains in effect, with the modification that the Contribution Based Pension monthly benefit

payable at age 65 is reduced by ½% per month for each month prior to age 65 at the time of retirement, with a minimum retirement age of 57.

2. Contributions

Compliance with the Default Schedule consists of annually compounded contribution rate increases of 4% effective immediately after the expiration of the Collective Bargaining Agreement (or other agreement requiring contributions to the Fund) and each anniversary thereof during the term of the agreement.

3. Effect of agreement to or imposition of Default Schedule.

- (i) If a Contributing Employer agrees to the Default Schedule with respect to a particular Bargaining Unit, the Fund will not accept any subsequent Collective Bargaining Agreements covering that Bargaining Unit which are compliant with the Primary Schedule, except as determined by the Board of Trustees in their sole discretion.
- (ii) If a Contributing Employer becomes subject to the Default Schedule by operation of ERISA Section 305(e)(3)(C), because the bargaining parties have failed to adopt either of the Schedules compliant with this Rehabilitation Plan within 180 days of the expiration of their prior Collective Bargaining Agreement, the Fund will then accept a Collective Bargaining Agreement that is compliant with the Primary Schedule described in this Rehabilitation Plan, provided that such new Collective Bargaining Agreement provides for Primary Schedule contribution rates that are retroactive to the expiration date of the last Collective Bargaining Agreement that covered the affected Bargaining Unit.

C. ADJUSTMENT OF BENEFITS OF CERTAIN PARTICIPANTS WHO HAVE EARNED CONTRIBUTORY SERVICE WITH AN EMPLOYER INCURRING A REHABILITATION PLAN WITHDRAWAL.

Subject to the provisos indicated in the final clauses of this Subsection C, effective March 26, 2008, all Adjustable Benefits (listed below in Section 2(F)) shall be eliminated or reduced (to the same extent indicated in Subsection B(1) above) with respect to Participants whose benefit commencement date [within the meaning of ERISA § 305(i)(10)] with the Fund is on or after April 8, 2008, and:

- (1) whose last Hour of Service prior to January 1, 2008 was earned while employed by United Parcel Service, Inc. ("UPS"), or with any trades or businesses at any time under common control with UPS, within the meaning of ERISA § 4001(b)(1);
or
- (2) who (i) has earned or earns an Hour of Service while employed with a Contributing Employer (or any predecessor or successor entity) that at any time on or after March 26, 2008 incurs a Rehabilitation Plan Withdrawal (see Section 2(G) below), and (ii) whose *last* year of Contributory Service Credit *prior* to the Rehabilitation Plan Withdrawal was earned while a member of a Bargaining Unit (or any predecessor or successor Bargaining Unit) ultimately incurring such Withdrawal.

Provided, however, that any Pensioner otherwise subject to the elimination of Adjustable Benefits, due to a Rehabilitation Plan Withdrawal pursuant Subsection C(2) above, who has a benefit commencement date [within the meaning of ERISA § 305(i)(10)] one year or more prior to the earlier of: (i) the date of such Rehabilitation Plan Withdrawal or (ii)

the date of the expiration of the last Collective Bargaining Agreement requiring Employer Contributions under the Primary Schedule prior to such Withdrawal, shall not be subject to the elimination of Adjustable Benefits provided that the Pensioner does not engage in Restricted Reemployment at any time subsequent to the benefit commencement date.

And provided further that the spouse of any Participant otherwise subject to the elimination of Adjustable Benefits, due to a Rehabilitation Plan Withdrawal pursuant to Subsection C(2) above, shall not incur a loss of Adjustable Benefits with respect to any Surviving Spouse Benefits for which such spouse has a benefit commencement date [within the meaning of ERISA Section 305(i)(10)] prior to the date of the Rehabilitation Plan Withdrawal.

D. ADJUSTMENT OF BENEFITS OF CERTAIN PARTICIPANTS WHO HAVE EARNED CONTRIBUTORY SERVICE WITH AN EMPLOYER WHO BECOMES SUBJECT TO THE DEFAULT SCHEDULE.

Subject to the provisos indicated in the final clauses of this Subsection D, effective March 26, 2008, all Adjustable Benefits (listed below in Section 2(F)) shall be eliminated or reduced (to the same extent indicated in Subsection B(1) above) with respect to any Participants whose benefit commencement date [within the meaning of ERISA § 305(i)(10)] is on or after April 8, 2008, and:

- (1) who have earned any Contributory Service Credit with a Contributing Employer (or any predecessor or successor entity) that at any time becomes subject (by agreement or otherwise) to the Default Schedule described herein; and
- (2) whose *last* year of Contributory Service Credit *prior* to the Employer's becoming subject to the Default Schedule was earned while a member of a Bargaining Unit (or any predecessor or successor Bargaining Unit) that ultimately became subject to the Default Schedule.

Provided, however, that any Pensioner otherwise subject to the elimination of Adjustable Benefits, due to his Contributing Employer becoming subject to the Default Schedule pursuant to this Subsection D, who has a benefit commencement date [within the meaning of ERISA § 305(i)(10)] one year or more prior to the Contributing Employer becoming subject to the Default Schedule, shall not be subject to the elimination of Adjustable Benefits provided that the Pensioner does not engage in Restricted Reemployment at any time subsequent to the benefit commencement date.

And provided further that the spouse of any Participant otherwise subject to the elimination of Adjustable Benefits, due to his Contributing Employer becoming subject to the Default Schedule pursuant this Subsection D, shall not incur a loss of Adjustable Benefits with respect to any Surviving Spouse Benefits for which such spouse has a benefit commencement date [within the meaning of ERISA Section 305(i)(10)] prior to the date on which the Contributing Employer became subject to the Default Schedule.

E. RESTORATION OF ADJUSTED BENEFITS.

Any Participant who incurs a benefit adjustment or elimination under the terms of Sections 2(A), 2(B), 2(C) or 2(D) above may have those affected benefits restored if, subsequent to the event causing the benefit adjustment, the Participant:

- (1) in the case of benefit adjustment caused by a Rehabilitation Plan Withdrawal (see Section 2(G) below), permanently ceases all employment with, and performance of services in any capacity for, the Contributing Employer (and any successors or trades or businesses under common control with such Employer within the meaning of ERISA § 4001(b)(1)) within 60 days of the occurrence of such Rehabilitation Plan Withdrawal; and
- (2) in any case, subsequently earns one year of Contributory Service Credit with a Contributing Employer while that Employer is in compliance with the Primary Schedule described herein.

F. ADJUSTABLE BENEFITS.

As used herein, Adjustable Benefits shall mean and include:

- (1) Any right to receive a Retirement Pension Benefit (Pension Plan, Article IV) prior to age 65 [including without limitation any pre-age 65 benefits that would otherwise be payable as (i) a Twenty Year Service Pension (Pension Plan § 4.01); (ii) a Contributory Credit Pension (Pension Plan § 4.04); (iii) a Vested Pension (Pension Plan § 4.07); (iv) a Deferred Pension (Pension Plan § 4.08); or (v) a Twenty-Year Deferred Pension (Pension Plan § 4.09)].
- (2) Early retirement benefit or retirement-type subsidies [including without limitation (i) an Early Retirement Pension (Pension Plan Section 4.02); (ii) a 25-And-Out Pension (Pension Plan Section 4.05); or a 30-And-Out Pension (Pension Plan Section 4.06)].
- (3) All Disability Benefits not yet in pay status (Pension Plan, Article V).
- (4) Before Retirement Death Benefits (Pension Plan, Article VI) other than the 50% surviving spouse benefit.
- (5) Post-retirement death benefits that are not part of the annuity form of payment.
- (6) All Partial Pensions (Pension Plan, Appendix D), to the extent any such pension is tied to one or more of the Adjustable Benefits listed above.
- (7) All Contribution-Based Pensions (Pension Plan § 4.03) except that, assuming the Participant meets all other requirements for receiving a Contribution-Based Pension, the Contribution-Based Pension is payable at age 65 reduced by ½% per month for each month prior to age 65 at the time of retirement with a minimum retirement age of 57. Such minimum retirement age shall not apply if the Participant retired prior to age 57 before the Participant's Adjustable Benefits were eliminated or reduced. In such circumstance, the Participant shall be entitled to receive the Contribution-Based Pension reduced by ½% per month for each month prior to age 65 at the time of retirement.

- (8) To the extent not already included in paragraphs (1) – (7) above, the following categories of benefits listed and defined as “adjustable benefits” under ERISA § 305(e)(8)(iv):
- (i) benefits, rights, and features under the plan, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits,
 - (ii) any early retirement benefit or retirement-type subsidy (within the meaning of ERISA section 204(g)(2)(A)) and any benefit payment option (other than the qualified joint and survivor annuity), and
 - (iii) benefit increases that would not be eligible for a guarantee under ERISA Section 4022A on the first day of the Fund’s initial critical year under the PPA because the increases were adopted (or, if later, took effect) less than 60 months before such first day.

Provided, however, that except as provided in subparagraph (8)(iii) above, nothing in this paragraph shall be construed to reduce the level of a Participant’s accrued benefit payable at normal retirement.

G. REHABILITATION PLAN WITHDRAWAL.

Subject to the discretionary authority of the Board of Trustees indicated in the final clause of this Section 2(G), a “Rehabilitation Plan Withdrawal” occurs on the date a Contributing Employer is no longer required to make Employer Contributions to the Pension Fund under one or more of its Collective Bargaining Agreements as a result of actions by members of a Bargaining Unit (or its representatives) or the Contributing Employer, which actions include, but are not limited to the following:

- (1) decertification or other removal of the Union as a bargaining agent;
- (2) ratification or other acceptance of a Collective Bargaining Agreement which permits withdrawal of the Bargaining Unit, in whole or in part, from the Pension Plan;
- (3) administrative termination of the Contributing Employer with respect to any or all of its Collective Bargaining Agreements due to: (i) a violation of the Fund’s rules with respect to the terms of a Collective Bargaining Agreement [including, without limitation, a provision providing for a split bargaining unit]; or (ii) a violation of any other Fund rule or policy [including, without limitation, practices or arrangements that result in adverse selection];
- (4) any transaction or other event [including without limitation, a merger, consolidation, division, asset sale (other than an asset sale complying with ERISA § 4204), liquidation, dissolution, joint venture, outsourcing, subcontracting] whereby all or a portion of the operations for which the Contributing Employer has an obligation to contribute are continued (whether by the Contributing Employer or by another party) in whole or in part without maintaining the obligation to contribute to the Fund under the same or better terms (including, for example, as to number of participants and contribution rate) as existed before the transaction.

Provided, however, that with respect to the circumstances described in Subparas. (3)(ii) or (4) above, the Board of Trustees shall have full discretionary authority to consider,

weigh and balance the following factors in determining whether a Rehabilitation Plan Withdrawal has occurred:

- (i) the extent to which the affected Bargaining Unit or its bargaining representative participated in or controlled, or could have controlled or prevented, through bargaining, grievance procedures, NLRB proceedings, litigation or other means, the cessation of Employer Contributions;
- (ii) the extent to which the affected Bargaining Unit benefited, directly or indirectly, from the cessation of Employer Contributions;
- (iii) the extent to which the affected Bargaining Unit, or its bargaining representative, resisted or attempted to resist, or acquiesced in, the cessation of Employer Contributions;
- (iv) the extent to which the affected Bargaining Unit, or any of its members, become engaged as employees or independent contractors in the service of operations that were or are in whole or in part a successor of the operations of the Contributing Employer who incurred the cessation of Employer Contributions; and
- (v) the extent of the hardship that might be incurred by members of the affected Bargaining Unit by the elimination of Adjustable Benefits.

Section 3. REHABILITATION PLAN STANDARDS AND OBJECTIVES.

The Schedules of Contributions and Benefits discussed above have been formulated by the Fund's Board of Trustees as reasonable measures which, under reasonable actuarial assumptions, are designed and projected to --

- Meet the increasingly stringent requirements of the amortization extension granted to the Fund by the Internal Revenue Service (IRS) in July 2005. The requirements include a-funded ratio and a required minimum credit balance requirement (see attached Exhibit B) (pertinent portions of IRS amortization extension).
- Enable the Fund to emerge from critical status in approximately the year 2028.

The annual standards for meeting the requirements of the Rehabilitation Plan are as follows:

- The annual actuarial valuation for the Fund shows that, as of the valuation date, the Fund satisfies the annual funding ratio and required credit balance conditions contained in the IRS amortization extension approval letter.
- Actuarial projections updated for each year show, based on reasonable assumptions, that under the Rehabilitation Plan and its schedules (as amended and updated from time to time) the Fund will continue to satisfy the increasingly more stringent IRS amortization extension requirements.
- Actuarial projections updated for each year show, based on reasonable assumptions, that under the Rehabilitation Plan and its schedules (or as amended from time to time) the Fund is expected to emerge from Critical Status. The Board of Trustees recognize that actual experience may differ from their reasonable assumptions, and therefore the exact year of emergence may be difficult to predict.

Section 4. ALTERNATIVES CONSIDERED BY THE TRUSTEES.

The Board of Trustees considered numerous alternatives (including combinations of contribution rate increases and benefit adjustments) that would satisfy the amortization extension conditions and might enable the Fund to emerge from Critical Status either by the end of ten year PPA Rehabilitation Period (which begins on January 1, 2011 and ends on December 31, 2020). Some of the alternatives considered were determined to be unreasonable measures. The various default and alternative schedules considered included the following:

Schedules considered by the Board of Trustees to emerge by the end of the Rehabilitation Period on December 31, 2020

Schedule	Benefit Reductions	Contribution Rate Increases
Default	Immediate maximum Critical Status benefit cuts for all participants to the extent permitted by law	15% per year until emergence in 2021 (plus an additional 1.6% annual increase for Benefit Classes 14 and below)
Alternative 1	Maintain current benefits	17% per year until emergence in 2021
Alternative 2	On the second anniversary of the new bargaining agreement, reduce the future benefit accrual rate from 1% of contributions payable at age 62 to 1% of contributions at payable at age 65	16% per year until emergence in 2021

The Board of Trustees concluded that utilizing any and all *possible* measures to emerge from Critical Status by the end of the 10-year presumptive Rehabilitation Period described in ERISA section 305(e)(4) would be unreasonable and would involve considerable risk to the Fund and Fund participants. In particular, the Board of Trustees concluded that the continued existence of the Fund and the Trustees' ability to maintain and improve the Fund's funded status in accordance with the terms of the IRS approved amortization extension would be jeopardized by any attempt to emerge from critical status by the end of the presumptive 10-year Rehabilitation Period.

As shown above, emergence by the end of the presumptive 10 year Rehabilitation Period could require double-digit annual contribution rate increases. For example, the daily contribution rate would generally have to grow from \$52 to over \$300. Therefore, the Trustees concluded that annual contribution rate increases above the 8%/6%/4% level in the Primary Schedule were not reasonable and could trigger mass withdrawals and significant losses to the Fund and the participants.

In the last several years, the Trustees have implemented numerous measures to improve the Fund's funding. These have included:

- Reducing the benefit accrual rate from 2% of contributions to 1% of contributions;
- Protecting the "and-out" and early retirement benefits while freezing them at their year-end 2003 levels;

- Obtaining agreements from the major bargaining parties to reallocate about \$400 million per year of benefit contributions to the Pension Fund;
- Obtaining the amortization extension with its IRS-imposed conditions; and
- Requiring as a condition of continued participation in the Fund that new bargaining agreements in the last several years include significant annual contribution rate increases.

The Board of Trustees determined that mandating additional significant benefit cuts, or mandating contribution rate increases at levels beyond those required in recent years, would substantially accelerate the rate at which employers would withdraw from the Fund, in large part because the Union could conclude that it would be in its members' best interest to agree to withdrawals.

EXHIBIT A**Primary Schedule: Contribution Rate Increases By Bargaining Agreement Year
(all rate increases are to be compounded annually)**

Calendar Year of Contribution Rate Increase	Year of New Bargaining Agreement			
	2006	2007	2008	2009
2006	7%			
2007	7%	8%		
2008	7%	8%	8%	
2009	7%	8%	8%	8%
2010	7%	8%	8%	8%
2011	6%	8%	8%	8%
2012	5%	6%	8%	8%
2013	4%	4%	6%	8%
2014	4%	4%	6%	8%
2015	4%	4%	6%	8%
2016	4%	4%	4%	6%
2017	4%	4%	4%	4%
2018	4%	4%	4%	4%
2019	4%	4%	4%	4%
2020	4%	4%	4%	4%
2021	4%	4%	4%	4%
2022	4%	4%	4%	4%
2023	4%	4%	4%	4%
2024	4%	4%	4%	4%
2025	4%	4%	4%	4%
2026	4%	4%	4%	4%
2027	4%	4%	4%	4%

EXHIBIT B

Significant Index No. 0412.00-00

200620024**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224****TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION**

FEB 22 2006

SE:T:EP:RA:T:A2

In re:

Fund =

Industry =

This letter constitutes notice that your request for a 10-year extension for amortizing the unfunded liabilities described in section 412(b)(2)(B) of the Internal Revenue Code ("Code") and section 302(b)(2)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), has been approved subject to the following conditions:

- (1) A credit balance is maintained such that the credit balance is at least as large as the accumulation (at the plan's valuation rate) of the amortized (at the Plan's valuation rate over a period of 15 years) differences between the amortization payments of the extended bases (amortized at the section 6621(b) rate) and the amortization payments of such bases had such bases been extended and amortized at the Plan's valuation rate;
- (2) The Plan's funded ratio, calculated by dividing the market value of Plan assets as of the Plan's valuation date by the Plan's actuarial accrued liability (computed using the unit credit method and the Plan assumptions as of January 1, 2004), is:
 - (a) no less than 59% for each valuation date from January 1, 2005, through January 1, 2011, inclusive;
 - (b) no less than 60% as of January 1, 2012 and as of January 1, 2013;
 - (c) no less than 61% as of January 1, 2014, and as of January 1, 2015;
 - (d) no less than 62% as of January 1, 2016;

200620024

- (e) for each valuation date subsequent to January 1, 2016, no less than 1% greater than the floor funded ratio as of the previous valuation date. (For example, because the floor funded ratio as of January 1, 2016, is 62%, the funded ratio must be at least 63% as of January 1, 2017, and 64% as of January 1, 2018); and
- (3) For each plan year that the extension remains in effect, starting with the plan year beginning January 1, 2004, a copy of the actuarial valuation report for each plan year will be provided to this office by September 15 of the following calendar year at the address below:

Your authorized representative agreed to these conditions in a letter dated July 13, 2005. If any one of these conditions is not satisfied, the approval to extend the amortization periods for amortizing the unfunded liabilities would be retroactively null and void. However, the Service will consider modifications of these conditions especially in the event that unforeseen circumstances beyond the control of the Fund cause the actual experience of the Plan to fail the funded ratio condition. An example of such an unforeseen circumstance would include a market fluctuation affecting the value of the Plan's assets. Of course, any request for a modification is considered another ruling request and would be subject to an additional user fee.

The extensions of the amortization periods of the unfunded liabilities of the Plan have been granted in accordance with section 412(e) of the Code and section 304(a) of ERISA. Section 412(e) of the Code and section 304(a) of ERISA authorize the Secretary to extend the period of time required to amortize any unfunded liability (described in section 412(b)(2)(B) of the Code and section 302(b)(2)(B) of ERISA) of a plan for a period of time (not in excess of 10 years) if the Secretary determines that such extension would carry out the purposes of ERISA and would provide adequate protection for participants under the plan and their beneficiaries and if the Secretary determines that the failure to permit such extension would (1) result in (A) a substantial risk to the voluntary continuation of the plan, or (B) a substantial curtailment of pension benefit levels or employee compensation, and (2) be adverse to the interests of plan participants in the aggregate.

EXHIBIT G

MULTIEMPLOYER PENSION PLANS

*Report to Congress Required by
the Pension Protection Act of 2006*





JAN 22 2013

The Honorable Joseph Biden
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

We are pleased to submit to the Congress the multiemployer pension plan report required by section 221 of the Pension Protection Act of 2006 (PPA). Section 221 directs the Secretary of Labor, the Secretary of the Treasury, and the Director of the Pension Benefit Guaranty Corporation (PBGC) to study the effects of the PPA's amendments to the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code of 1986, as amended, on the operation and funding status of multiemployer plans, and to report to the Congress the results of such study.

Sincerely,

Three handwritten signatures in black ink. From left to right: Hilda L. Solis, Timothy F. Geithner, and Joshua Gotbaum.

Hilda L. Solis
Secretary of Labor

Timothy F. Geithner
Secretary of the Treasury

Joshua Gotbaum
Director, PBGC



JAN 22 2013

The Honorable John Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

We are pleased to submit to the Congress the multiemployer pension plan report required by section 221 of the Pension Protection Act of 2006 (PPA). Section 221 directs the Secretary of Labor, the Secretary of the Treasury, and the Director of the Pension Benefit Guaranty Corporation (PBGC) to study the effects of the PPA's amendments to the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code of 1986, as amended, on the operation and funding status of multiemployer plans, and to report to the Congress the results of such study.

Sincerely,

Three handwritten signatures in black ink. The first signature is "Hilda L. Solis", the second is "Timothy F. Geithner", and the third is "Josh Gotbaum".

Hilda L. Solis
Secretary of Labor

Timothy F. Geithner
Secretary of the Treasury

Joshua Gotbaum
Director, PBGC

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Introduction and Summary

More than 10 million Americans working in a wide range of industries depend on about 1,500 private-sector multiemployer defined benefit plans to secure their retirement income.¹ Multiemployer plans provide portability for workers as they move to different employers or job sites within the same industry.

A multiemployer plan pools contributions, benefits, and risks for the contributing employers' unionized workers and other beneficiaries, rather than requiring that they be borne by the individual employer or individual employee. Multiemployer plans are maintained under collective bargaining agreements between labor unions and two or more employers, and are typically governed by joint boards of trustees appointed by sponsoring unions and employers.

Most of the participating employers in multiemployer plans are small businesses. Multiemployer plans offer small businesses a way to provide a traditional pension without the



burdens of having to set up a complex human resources organization. As with the private single-employer system, however, significant contributions are made by large employers and the majority of participants are in large plans to which hundreds or even thousands of employers contribute. In 2010, seventy multiemployer plans had assets of \$1 billion or more, and two plans had assets in excess of \$10 billion.

Employers fund multiemployer plans through contributions, which are generally based on hours worked by active employees. Contribution amounts are negotiated in labor contracts.

¹ This study focuses on multiemployer defined *benefit* pension plans. There were also nearly 1,300 multiemployer defined *contribution* pension plans that held about \$105 billion in assets in 2010 on behalf of approximately 4 million participants.

Typically, the trustees of each plan determine the level of benefits the plan will provide based on the level of contributions and the funding status of the particular plan. A plan can be amended to increase benefits both prospectively and retroactively for active employees, and for retired or separated vested employees, but generally cannot be amended to reduce benefits once they have been earned.

There are multiemployer plans and participants in every state. The map above estimates the approximate number of multiemployer plan participants, by state, for the 170 largest multiemployer plans in 2009, which collectively covered 7.9 million participants.²

Underfunding Following 2008 Market Crisis As of the first day of the plan year beginning in 2009, the value of vested benefits promised by all multiemployer plans was \$673 billion; to cover those liabilities, multiemployer plans had only \$327 billion in assets.³ This translates to an aggregate funding level of only 49 percent. Although asset values recovered to some extent during the 2009 and 2010 plan years, climbing from \$327 billion at the beginning of the 2009 plan year to nearly \$400 billion by the end of the 2010 plan year, aggregate underfunding remained significant.

This situation appears to be the result of several factors. Many plans had counted on unusually favorable investment earnings through the 1990s to finance expanded retirement benefits. Employers often were not called upon to increase their contribution rates to keep pace with benefit increases. In some cases, plans increased benefits to protect the tax deductibility of employer contributions already agreed to in multi-year collective bargaining agreements.

The 2000-2002 market downturn exposed weaknesses in the multiemployer plan funding rules, the effects of which were particularly noticeable for “mature” plans with a large proportion of retirees and significant unfunded liabilities. Benefit increases based on past service were subject to very slow funding under statutory rules that allowed amortization over 30 or 40 years and actuarial losses attributed to lower than expected asset returns were subject to a 15-year amortization. With asset losses and the materialization of significant underfunding in the early 2000s, plans were compelled to increase contributions.

Actives/Retirees and Other Demographic Factors The demographics of participant populations complicated the situation of many multiemployer plans. Many of these plans are seeing a declining percentage of active employees for whom contributions are being made: By 2010, only 39% of all participants in multiemployer plans were active employees, while 61% were retired or separated vested participants.

² These 170 plans, each of which had more than 10,000 participants in 2009, cover three-quarters of all multiemployer plan participants. The distribution of participants on this map is a rough approximation based on the state in which each plan is headquartered or administered. In addition, for some regional and national plans, a portion of the participants are assumed to be located in neighboring states or spread among all states, based on the Survey of Income and Program Participation, (SIPP), Wave 7, U.S. Census Bureau. Because participants' addresses are not reported to the ERISA agencies, in the case of regional and national plans, the map relies on incomplete data to approximate the geographic distribution of participants among the states.

³ The source of these asset and liability figures is the Form 5500 series annual report filings. Assets are based on market value as of the beginning of the plan year. Vested liabilities, also reported as of the beginning of the plan year, are adjusted to a standardized interest factor (see Footnote 44), unless otherwise noted.

Available Remedies Because benefits generally cannot be reduced after they are earned,⁴ underfunding can be made up only with prospective actions affecting active workers: contributions can be increased and/or accruals of future benefits for active employees can be reduced so that future contributions exceed the cost of future benefit accruals. The difference between future contributions and the cost of future benefit accruals is effectively an additional charge imposed on employees' earnings and/or employers' profits. The larger the needed charge, the more difficult it is to attract new employers and employees into the plan (which in turn increases the per participant charge) and the more likely employers are to withdraw.

Employers and active employees agree to implement such an additional charge with great reluctance, especially if the bulk of the benefit goes to retirees. The employers and employees are even less likely to support such a charge if many of these retirees are "orphan participants" (*i.e.*, they formerly worked for companies that no longer contribute to the plan).

The situation is made worse by withdrawing employers that often do not pay their full obligations. Although plans can and do assess withdrawal liability, the law limits the annual amounts that an employer must pay and caps the number of annual payments at 20 years; in cases of bankruptcy, the outstanding withdrawal liability is often unpaid. The more employers that withdraw without paying their share of underfunding, the larger the underfunding burden placed on employers and employees who remain.

For all these reasons, many plans' benefit obligations continued to grow even as asset values plummeted,⁵ and the level of underfunding in multiemployer plans – which had remained well below \$50 billion for the previous 30 years – jumped to just over \$100 billion in 2002 and exceeded \$200 billion for the first time in 2004. In 2003, the multiemployer insurance program at the Pension Benefit Guaranty Corporation (PBGC) went from a positive to a negative net position (*i.e.*, its liabilities now exceeded its assets), due to an increasing number of plans that were classified as likely to require financial assistance in the future. By 2004, PBGC's financial statements for its multiemployer insurance program included recognized liabilities of nearly \$1.3 billion but total assets of only \$1 billion.

Federal Actions to Date Congress acted repeatedly in the past decade to help multiemployer plans. The Pension Funding Equity Act of 2004 (PFEA) was enacted to address the increased funding requirements resulting from the 2000-2002 market downturn by providing for a deferral of the charges related to investment losses for certain multiemployer plans.

Many stakeholders in the multiemployer community worried that the short-term funding relief offered under PFEA would be inadequate. Some plans faced minimum funding requirements that far exceeded bargained-for contributions and employers faced excise taxes on funding deficiencies. Employer and union representatives, plan trustees, participants, and professional advisors developed proposals that they hoped would alleviate the strains

⁴ Under the Pension Protection Act of 2006 (PPA), plans in critical status must limit lump sums and may reduce certain benefits earned to date for active and separated vested participants (but not retired participants whose benefit commencement date is before the plan provides notice of critical status).

⁵ Total assets in all multiemployer plans increased at an average rate of 11% per year during the last half of the 1990s – increasing from \$210 billion in 1995 to \$357 billion in 2000. By 2003, however, plan assets fell to approximately \$309 billion, before recovering to \$347 billion in 2004. Benefit liabilities, on the other hand, increased from \$218 billion in 1995, to \$340 billion in 2000, to \$487 billion in 2003, and to \$556 billion in 2004.

experienced by plans and strengthen plan funding in the long term. The Pension Protection Act of 2006 (PPA) enacted significant changes to the funding rules for multiemployer plans.

PPA aimed to impose greater financial discipline on multiemployer plans, while also providing funding relief for plans with moderate and severe funding problems. New requirements include annual plan status certifications based on standardized funding and liquidity measures for determining the financial health of plans. These standardized measures are used to identify multiemployer plans in acute financial distress, known as “critical” (“red”) status plans, those plans experiencing financial difficulty, known as “endangered” (“yellow”) or “seriously endangered” (“orange”) status plans, and those plans in “green,” non-distressed status.

The plan’s status in turn would facilitate trustee recognition of the plan’s funding problems and lead to the development of long-term economic plans to improve funding, including quantifiable benchmarks for measuring funding progress. PPA provides more tools for plans to bring assets and liabilities into balance, but generally leaves decisions on how to solve a plan’s funding problems to the plan’s trustees and collective bargaining parties. The PPA changes also bolstered disclosure rules to enable participants and beneficiaries to better understand the funding status of their plans, expand employer accessibility to withdrawal liability estimates and other information, and allow the bargaining parties and the Department of Labor (DOL), the Internal Revenue Service (IRS), and the PBGC to monitor the response of plans to the new funding requirements.

After the market decline in 2008, Congress enacted other pension relief legislation, the Worker, Retiree, and Employer Recovery Act of 2008, P.L. 110-458 (WRERA) and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, P.L. 111-192 (PRA 2010). WRERA permitted multiemployer plans to elect a temporary forbearance from certain of the requirements of PPA. The vast majority of these plans certified to be in critical, seriously endangered, and endangered status in 2009 elected to defer actions otherwise required by their status certifications and/or to extend the time for demonstrating progress under their funding improvement or rehabilitation plans. As permitted under PRA 2010, more than 700 multiemployer plans chose to amortize investment losses incurred in the 2008 market crisis over a 29-year period (nearly twice as long as otherwise required under PPA) and/or to lessen the impact of investment losses on the actuarial value of plan assets used to determine their future funding requirements and funding status.⁶

Funding Status The condition of multiemployer plans varies widely. Some large and small plans have been able to ameliorate the steep contribution rate increases and benefit cuts that typically are required for plans in endangered and critical status. These tend to be plans that regularly adjusted accrual rates to reflect plan contributions and funding levels, limited past service benefit increases, restrained investment return assumptions, and mandated increases in

⁶ In the Deficit Reduction Act of 2005, P.L. 109-171 (DRA), Congress increased the annual premium plans pay for PBGC insurance from \$2.60 per participant to \$8 per participant, effective for plan years beginning in 2006 (indexed to the National Average Wage Index). The Moving Ahead for Progress in the 21st Century Act, P.L. 112-141 (MAP-21) increased the premium to \$12 per participant in 2013 (indexed thereafter). The current guarantee limit, which was last set by Congress in 2001 (Consolidated Appropriations Act, 2001, P.L. 106-554), provides a maximum guarantee for a participant with 30 years of service of \$1,072.50 per month (not indexed).

contributions even during periods of elevated investment returns. These plans responded promptly to investment losses by capping their plans' liabilities.

Other plans have not fared so well, showing precariously weak funding levels. Many of these plans (some already terminated by the mass withdrawal of all employers from the plan) are in declining industries that have high rates of employer bankruptcies, such as textiles, typographical and graphic arts, furniture, and fishing. Some plans are concentrated in a single industry that is facing challenges from other factors, such as: deregulation, non-union competition, or severe business cycles, which can cause large numbers of contributing employers (or a significant employer) to exit the plan, leaving the remaining employers responsible for the plan's underfunding.

Pre-PPA funding rules enabled many multiemployer plans to delay addressing their funding problems. Many plans in distress today provided frequent benefit increases for past and future service: vested benefit liabilities collectively more than doubled during the 1990s, and then nearly doubled again between 1999 and 2009. Among some plans contribution holidays were common, sparked by low ceilings on deductible contributions and favorable returns from a bullish stock market; plans regularly relied on excess investment returns to support benefits. At the same time, rising health care costs under tandem multiemployer welfare benefit plans, which historically captured a larger share of the employer's contributions, crowded out the longer-term need to cover pension costs. By the 2000s decade, plans were forced to confront the need for increased contributions. Local and regional plans had a particularly hard time avoiding market volatility and achieving efficiencies.

By 2009, the growth and magnitude of benefit liabilities and underfunding in multiemployer pension plans had reached staggering levels. Underfunding, which had hovered in the \$200 billion range between 2004 and 2008, ballooned to \$346 billion in 2009.⁷

When plans first certified their funding status to the IRS for the beginning of their 2008 plan year, 77% of all plans were in "green," non-distressed, status. For the 2009 plan year, "green" status certifications plummeted to 32% of plans. The percentage of plans certifying that they were in critical status or seriously endangered status grew from 12% to 44% between 2008 and 2009.

The 2009 Form 5500 Annual Report, filed by employee benefit pension plans with DOL, IRS, and PBGC, revealed that multiemployer plans sustained investment losses that averaged 21.3% of their portfolios during the plan year beginning in 2008 – which for most plans includes the 2008 market crisis.⁸ For many of these plans, the losses totaled hundreds of millions of dollars; some plans lost billions of dollars. As a result of these investment losses, plans suffered precipitous drops in their funded percentages for 2009 and plan actuaries projected funding

⁷ Plan assets, which had swelled to \$440 billion in 2008, plummeted to \$327 billion in 2009. Liabilities grew to \$673 billion in 2009, nearly doubling from a decade earlier, in 1999. (While a decline in interest rates beginning in 2003 had the effect of inflating the value of liabilities generally, rates in 1999 and 2009 were comparable.)

⁸ The 2008 weighted average return on investment, based on market value of assets for all plans as reported on the 2009 Schedule MB, Form 5500, is -21.3% (an investment loss). Plans with valuation dates of January 1, 2009 (return measured on December 31, 2008) lost somewhat more (24.9%), while non-calendar year plans lost less (15.6%). These averages are weighted by plan assets. (The unweighted average return on investment as reported on the 2009 Schedule MB for all plans is -18.2%.)

deficiencies over the next few years. Minimum required contributions skyrocketed, and there were fears that hourly contribution rates would have to triple or quadruple in order to avoid a funding deficiency.

Table 1 shows the number and percentage of plans and participants in the various zone statuses for the 2009 plan year.

Table 1. Multiemployer Plan Zone Status Certifications (2009)⁹

Funding Status	Plans		Participants	
	Number	Percent	Number	Percent
Critical	472	34.5	3,930,296	38
Seriously Endangered	125	9.1	1,469,284	14
Other Endangered	337	24.6	1,823,407	18
Neither Critical Nor Endangered	435	31.8	3,105,700	30
Total	1,369	100	10,328,687	100

Post-2008 Market Crisis The funded status of plans under PPA-required certifications has improved since 2009. The number of plans certified to be in critical or seriously endangered status declined from 44% in 2009, to 32% in 2010 and just below 26% in 2011. See Table 15 below. Better market performance accounts for some of this improvement: the 2009 weighted average return on investment, based on market value of assets for all plans as reported on the 2010 Form 5500, is 16.56%.¹⁰ The market value of plan assets in the aggregate increased by 12% during the 2009 plan year (from \$327 billion to \$366 billion from beginning to end of plan year), and then by 9% to nearly \$400 billion by the end of the 2010 plan year. However, for plans with plan years beginning January 1, 2011, the value of assets decreased by 2.74% during the 2011 plan year.¹¹

Despite the substantial improvement in plan assets since the market crisis of 2008, however, certifications of plans' funded status for the 2011 plan year – showing 60% of all plans to be in “green” status – likely overstate the extent of plans' financial health. This is due to the significant effect of PRA 2010 funding relief, which increased plans' funded percentages (*e.g.*, by allowing plans to spread the recognition of asset losses over ten years) and delayed projected funding deficiencies (*e.g.*, by extending certain amortization periods and reducing minimum required contributions).

⁹ The number of plans is based on annual certifications filed with the IRS pursuant to section 432(b)(3) of the Internal Revenue Code. The number of participants in each funding status is based on plans that reported their certified status on the 2009 Form 5500 annual return filings, generally for the beginning of the 2009 plan year.

¹⁰ The average is weighted by plan assets. The unweighted average return is 15.86%.

¹¹ Slightly over half of all plans are calendar year plans. The ERISA agencies do not yet have complete data on plans with plan years beginning later in 2011.

In fact, as of the beginning of the 2010 plan year, the average funding level for all plans remained relatively depressed. Liabilities measured \$757 billion and underfunding stood at \$391 billion. Both historically and in real terms the extent of underfunding in multiemployer plans now is unprecedented.¹² Data available through November 2012 indicate that 52% of participants are in moderately or severely distressed plans (plans in endangered, seriously endangered, or critical status under PPA);¹³ this percentage has declined from over 70% two years ago, due in part to improvements in some plans but also due to the effects of funding relief calculations which made it easier for plans to avoid endangered, seriously endangered or critical status. Although many plans are slowly recovering, the long-term financial condition of multiemployer plans does not appear to have improved as substantially as the change in plans' certified statuses might suggest.

Encouraging Signs for Most Plans Plans began in 2009 to take advantage of several PPA provisions that have the potential to substantively improve plans' funded status in the aggregate over time. As a result of entering endangered or critical status, many plans were required to adopt funding improvement or rehabilitation plans that will put them on a disciplined path toward better funding. In 2009, nearly 200 plans reported that they reduced future benefits (e.g., future accrual rates), and 115 critical status plans reported that they reduced adjustable past benefits. In 2010, future benefit reductions were made by 172 plans and adjustable benefit reductions were made by 149 plans, or nearly 40% of critical status plans in 2010. At the same time, plans frequently require substantial increases in contributions through funding improvement and rehabilitation plans, especially where only minor reductions in benefits are made.

Plans also benefitted from other PPA provisions: in 2010, 178 plans operated under a 5-year automatic amortization extension to reduce minimum required contributions, and 90 plans reported accumulated funding deficiencies¹⁴ totaling \$1.9 billion but were generally exempt from the otherwise applicable excise tax. In addition, PPA provisions restrict plans in distressed statuses from undertaking certain actions, which would decrease the plan's funded status, such as amendments increasing benefits or paying lump sum benefits.

Because funding improvement and rehabilitation plans will take time to be implemented – contribution and benefit schedules are generally adopted through collective bargaining – many more plans are expected in the near future to take advantage of PPA tools and provisions that will strengthen plans financially. PBGC projections suggest that PPA provisions will help improve some plans' funded percentages over time, relative to pre-PPA law. However, it is not possible to estimate with confidence either how many plans will take advantage of the provisions or the effect of their actions on their financial condition.

¹²The increase in underfunding for the 2010 plan year is largely attributable to a decrease in the standardized interest factor from 5.38% in 2009 to 4.52% in 2010. Using the 2009 factor, liabilities would have measured \$699 billion in 2010, resulting in aggregate underfunding closer to the 2009 level.

¹³ The figure does not reflect the most recent zone status certifications provided to IRS. Rather, status certifications (and the number of participants) are drawn from each plan's most recent Form 5500 filing, supplemented by more recent endangered or critical status notices or annual funding notices, if any.

¹⁴ This was more than four times the annual average of plans showing a minimum funding deficiency prior to the effective date of PPA.

Nevertheless, some severely distressed plans may not be able to recover using PPA tools and authorities. In some cases, these plans have reported that they are not making the scheduled progress required by law in meeting the requirements of their rehabilitation plans. A number of plans indicate that they have exhausted all “reasonable measures” for contribution increases and reductions in adjustable benefits and do not reasonably expect to emerge from critical status within a 10-year period or at a later time, and are taking measures to forestall possible insolvency.

About This Report PPA amended the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code) to substantially revise the funding rules and disclosure requirements applicable to multiemployer plans and to make other related changes.

Some of these provisions will sunset after 2014. To assist Congress in determining what actions should be taken, section 221(a) of PPA directs the Secretary of Labor, the Secretary of the Treasury, and the Director of the Pension Benefit Guaranty Corporation to conduct a study of the effect of the funding amendments and related changes on the operation and funding status of multiemployer plans and to report to the Congress the results of such study, including any recommendations for legislation. The study must include an evaluation of the funding difficulties faced by small businesses participating in multiemployer plans and the impact of PPA changes on small employers.

This document provides the information required under section 221(a) of PPA.¹⁵ It offers information on multiemployer plans that may be useful as Congress considers the effect of the multiemployer funding provisions under PPA and contemplates possible future action. The Chapters in this report focus on data reported by plans in their 2009 and 2010 Form 5500 series annual report filings, as supplemented by limited information from other recent notices to the federal government.

This report contains no recommendations. The many changes that have occurred since 2006, including major changes in economic conditions, financial markets, regulations, and funding requirements, make it difficult to assess with any specificity either the use by plans of the tools and authorities provided in PPA or the need for further changes. This is exacerbated by the fact that, until October 2012, the most recent plan year for which the Government had complete information was the 2009 plan year, with only limited information on plan actions since then. Nonetheless, the information provided can inform and assist a dialogue about multiemployer funding issues.

The following is a brief description of the Chapters in this report.

Chapter II, About Multiemployer Plans, describes the structure of multiemployer plans and the benefits they provide, the current demographic characteristics of plans, including numbers of orphan participants (whose employers no longer contribute to the plan) and

¹⁵ Every five years, PBGC is required to analyze and report on the adequacy of its multiemployer premiums (ERISA section 4022(A)). That report is being submitted separately. That report recommends PBGC premiums be evaluated in the context of and during the broader multiemployer legislative review prior to the 2014 sunset of some of the PPA provisions.

withdrawn employers derived from new reporting requirements under PPA, and the underfunding levels of multiemployer plans over time and in various industries.

Chapter III, Funding Rules, contains a description of the funding rules for multiemployer plans (including the special rules enacted under PPA) and comprehensive tabular data and analysis that describe the effects of the funding rule changes under that law. The data show the significant deterioration in plan funding health since the market downturn in the fall of 2008. For example, they show the depletion of credit balances under plans' funding standard accounts, the downgrading of many plans to endangered or critical status in 2009, the widespread use of benefit reductions under funding improvement and rehabilitation plans, the adoption of other self-help measures available under PPA – such as automatic amortization extensions – to adjust minimum required contributions, and the effects of the elimination of excise taxes for the many plans that suffered funding deficiencies after 2008. The data also demonstrate the heavy reliance of plans on funding relief provided under WRERA and PRA 2010.

Chapter IV, Reporting and Disclosure Requirements, describes additional reporting and disclosure requirements to which multiemployer plans are subject under PPA. These generally concern the provision of financial information and actuarial data to contributing employers, participating unions, plan participants, and ERISA agencies.

Chapter V, Small Business Participation in Multiemployer Plans, describes the benefits to small employers of participation in multiemployer plans, offers the results from surveys of trade representatives and industry representatives on small employer participation in construction industry multiemployer plans, and provides background data on the incidence of various types of retirement and savings plans among private industry employers of different sizes and the employer costs for plans of different-size employers.

Chapter VI, Further Steps to Strengthen Plans and Protect Pensioners, describes the importance of multiemployer plans as a source of retirement security for millions of workers, and the danger to some distressed plans, contributing employers, and participants and beneficiaries unless steps are taken to provide additional tools for trustees to stabilize the financial conditions of their plans. It urges a serious collaborative effort by all of the stakeholders, the Administration and Congress to discuss the current and potential future problems faced by multiemployer plans and to work toward consensus around the best ways to solve them.

* * *

As we noted above, this report makes no recommendations. There is now a wide range of circumstances under which multiemployer plans operate. Some will handle the challenges of the past years with the tools they already have. Others will require additional tools, but there is no consensus as to what those are. We hope this report contributes to a necessary dialogue over the next few years with all parties and to the development of a consensus like those of the past that enables the Congress to legislate with confidence and enhance the retirement security of the many workers who depend on these plans, while minimizing the burden on businesses that employ them.

About Multiemployer Plans

Determining Plan Benefits

Under a multiemployer plan, the plan's trustees are generally empowered to establish benefit levels, types of benefits, and eligibility rules for benefits. Design flexibility in defined benefit plans has allowed plans to offer a broad array of benefits. All plans provide life annuities at normal retirement age for participants with at least 5 years of service, and many plans offer retirement-type subsidies that reward long years of service (*e.g.*, unreduced benefits at age 55 after 30 years of service) and early retirement benefits that are reduced for early commencement. Surviving spouse annuities are required by law, unless the spouse consents to a form of payment that does not include a spousal survivor annuity or otherwise waives the survivor annuity. Common formulas for determining benefits include a benefit based on a monthly dollar unit per year of service (*e.g.*, a monthly benefit of \$30 per each year of service) or a percentage of the employer's contributions (*e.g.*, the accrual for a year is 1.5% of the contributions made on the participant's behalf for that year). In 2010, the average monthly benefit received by retirees in all multiemployer plans was \$922.¹⁶

Plans may offer disability benefits at an earlier age or at a higher level than retirement benefits available under the plan, as well as incidental death benefits to cover, for example, funeral expenses. Social Security supplements may be payable prior to a participant's eligibility for Social Security, and plans may provide automatic or ad hoc post-retirement cost-of-living adjustments. In addition, benefits are payable in a variety of forms, usually with an actuarial adjustment in the participant's benefit. These forms include life annuities with 60- or 120-month guarantees, a variety of joint and survivor benefits with a spouse or other beneficiary, "pop-up" benefits after a spouse's death, full or partial lump-sum options, and an option that provides a level income to a participant before and after Social Security retirement age (taking into account Social Security payments).

The contributions that are needed to support these benefits are determined by the plan's actuary and are made by contributing employers. The employer's contribution rate (*e.g.*, dollars per hour, day, or week of covered work or unit of production) is typically specified in a collective bargaining agreement, usually negotiated by the bargaining parties from a schedule of varying contribution rates and corresponding benefit levels offered by the plan's trustees (smaller plans often have a single contribution rate and benefit schedule). The contribution rate is commonly part of a total compensation package that includes the worker's wage, and a contribution to the pension plan, the health and welfare plan, and possibly other benefit plans on behalf of the worker.

In a multiemployer plan, all contributions and assets are available to pay the benefits of all participants (workers and former workers) and beneficiaries (spouses and dependents of participants) under the plan. Assets are pooled for investment purposes, and all administrative

¹⁶ This is determined by dividing benefits paid under all plans by the number of retired participants under all plans. The average is somewhat inflated because benefits paid during the year include lump sum payments (mostly de minimis lump sums of \$5,000 or less). The average monthly benefit received in 2010 is higher in transportation industry plans (\$1,324), where an annual benefit can reach \$30,000 or more for a participant with 30 years of service, and in construction industry plans (\$1,279); it is lower in retail trade and service industry plans (\$620).

costs are paid from plan assets. If an employer withdraws from a multiemployer plan, the participants attributable to that employer continue to participate in the plan as retired or terminated vested participants, or as active participants of another contributing employer.

To protect contributing employers from shouldering the liabilities of employers that withdraw from the plan, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) required plans (under certain circumstances) to assess withdrawal liability on employers that cease to have an obligation to contribute to the plan. Withdrawal liability, which represents an employer's allocable share of the plan's unfunded vested benefits, is payable as a lump sum or over a period of up to 20 years in an amount comparable to the employer's contribution level under the plan. If some of the withdrawal liability is determined to be uncollectible for reasons arising, for example, out of an employer's bankruptcy, the burden of that unfunded liability falls upon the employers remaining in the plan.¹⁷

Industries in which Plans Operate

Traditionally, employers in a multiemployer plan were mainly in a common industry with a high degree of union representation. Among industries with multiemployer plans, the construction and transportation industries have the highest rates of employees represented by unions.¹⁸ Construction industry plans – including workers in building and heavy construction, plumbing and pipefitting, heating, air conditioning, and electrical work – account for 55% of all plans and 37.5% of all participants. Plans in the construction industry generally rely on a large number of small contributing employers. About 15% of all multiemployer plan participants are in transportation industry plans, and 11% are in manufacturing (*e.g.*, aerospace construction). See Table 2 below. In addition to many small contributing employers, these industries also include bigger employers whose financial health can significantly influence the plan. Other industries in which multiemployer plans operate include retail food, health care, information and entertainment, public utilities, hotel and restaurant, mining, manufacturing, and retail trade. Many plans have become diversified over time, bringing in employers from other industries or merging with plans that were originally established in different industries.

¹⁷ Withdrawn employers and withdrawal liability are discussed below.

¹⁸ In 2011, unions represented 21.4% of employees in the transportation and warehousing industry, and 14.9% of employees in the construction industry. Union Members — 2011, Bureau of Labor Statistics, Table 3. Union affiliation of employed wage and salary workers by occupation and industry.

Table 2. Numbers of Participants and Plans in Selected Industries (2010)¹⁹

Industry	Participants	Percent of All Participants	Plans	Percent of All Plans
Construction	3,902,447	37.5%	817	55.4%
Services	1,866,207	17.9%	172	11.7%
Transportation	1,591,243	15.3%	145	9.8%
Retail Trade	1,446,911	13.9%	87	5.9%
Manufacturing	1,181,214	11.3%	172	11.7%
Other	425,189	4.1%	82	5.6%
All Industries	10,413,211	100%	1,475	100%

Plan Size and Employer Concentration

There were 1,475 multiemployer defined benefit pension plans in 2010.²⁰ Some of these plans are very large: 2010 Form 5500 filings indicate that 76% of the 10.4 million participants and beneficiaries in all multiemployer plans are concentrated in 168 plans, each with 10,000 or more participants. Virtually all multiemployer plan participants are covered by one of the 865 plans with 1,000 or more participants.²¹ The smallest 610 plans (*i.e.*, those with fewer than 1,000 participants) cover less than 3% of all participants.²²

The 2010 Form 5500 filings indicate there are 232,567 employers contributing to multiemployer plans, although this overstates the number of employers because of substantial overlap where an employer contributes to more than one plan.²³ Of this total, 131,993 employers had obligations to contribute to one or more of the large plans with 10,000 or more participants (this also overstates the number of employers because of substantial overlap where an employer

¹⁹ Data based on 2010 Form 5500 annual return filings. See also PBGC's 2010 pension insurance data tables, Table M-8, at <http://www.pbpc.gov/res/data-books.html>.

²⁰ We have attempted to reconcile the number of total plans from Form 5500 filings with PBGC premium filings, but those numbers can still vary slightly due to discrepancies in employer identification numbers and other factors. The number of plans has declined incrementally over time as a result of mergers and close-outs.

²¹ The median number of participants in a multiemployer plan is 1,374. The mean is 7,060, which is considerably higher than the mean of 3,935 in 1987, generally reflecting mergers among multiemployer plans since that time.

²² Among the 1,475 plans were 41 insolvent (mostly terminated) plans receiving PBGC's financial assistance in 2010, as well as 51 terminated plans and 29 ongoing plans expected to require financial assistance in the future. These numbers are reflected in PBGC's financial statement for the fiscal year ending September 30, 2010. As of September 30, 2012, PBGC reported 41 plans receiving financial assistance payments (an additional eight plans received financial assistance to close out), and 61 terminated plans and 46 ongoing plans expected to require financial assistance in the future.

²³ This is down from the 277,597 employers reported to be contributing to multiemployer plans in 1987, which was the last year for which this information was required to be reported to the ERISA agencies prior to 2008.

contributes to more than one plan). The 168 largest plans average 786 contributing employers; 47 of these plans receive contributions from over 1,000 employers each, and one plan receives contributions from over 10,000 employers. The 610 smallest plans average 31 contributing employers.

Table 3. Numbers of Plans, Participants and Employers (2010)²⁴

Number of Plan Participants	Plans	Participants	Average Participants/Plan	Employers	Average Employers/Plan²⁵
10,000 or more	168	7,920,624	47,147	131,993	786
1,000 to 9,999	697	2,207,883	3,168	83,474	120
Fewer than 1,000	610	284,704	467	17,100	31
Total	1,475	10,413,211	7,060	232,567	171

Many plans, large and small, depend on a few employers for a large percentage of total contributions. This raises risks due to the concentration of responsibility for funding. Beginning in 2008, PPA required plans to include in the Form 5500 annual report a list of employers that contributed more than 5% of total plan contributions. In 2009, 1,193 plans reported one or more individual employers contributing more than 5% of total plan contributions (“significant employers”). These significant employers contributed more than 50% of all plan contributions to over one-half of all critical status plans (381 out of 471 critical status plans). In addition, the Form 5500 filings show that several large employers contribute to multiple plans, including plans in different industries. This inter-connectedness may create significant risk to plans: if a plan fails in one industry, creating withdrawal liability for its contributing employers, that liability may impact the ability of these employers to continue contributing to plans in other industries.

Active Employees Now a Minority

The private-sector union membership rate in the U.S. economy has declined in recent decades, from 16.8% in 1983²⁶ to 6.9% in 2011.²⁷ As a result, many multiemployer plans today are “mature” plans with a large number of older participants who have earned substantial benefits under the plan and are now retired or close to retirement, and a much smaller number of younger participants.

With over 3.4 million participants drawing benefits from multiemployer plans in 2010, plan assets are being depleted – leaving plan portfolios with less available funds to generate

²⁴ Data based on 2010 Form 5500 annual return filings. See also PBGC’s 2010 pension insurance data tables, Tables M-5, M-6, at <http://www.pbpc.gov/res/data-books.html>.

²⁵ Average does not include terminated plans with no contributing employers or plans that did not report employers.

²⁶ Monthly Labor Review, October 2008, Bureau of Labor Statistics, Visual Essay: Union Membership, Table 2.

²⁷ Union Members — 2011, Bureau of Labor Statistics.

investment earnings. By 2008, many mature plans experienced increased benefit payouts just as the market downturn created unprecedented asset losses. This has put extreme pressure on employers to increase contributions just to cover plan disbursements.²⁸ Table 4 below reflects that in the four-year period between 2006 and 2010 benefit payments have increased 18.5% while contributions grew by 10.2%. As a result, during this period, the ratio of contributions to benefit payments decreased from 63.8% to 59.1% – and for critical status plans, the ratio is even lower, at 44.7% in 2010.²⁹

Table 4. Contributions and Benefit Payments (2006 and 2010)³⁰

Plan Years	Contributions	Benefit Payments	Contributions as % of Benefit Payments
2006	\$18.6 billion	\$29.2 billion	63.8%
2010	\$20.5 billion	\$34.6 billion	59.1%

Even for a plan that does not have a large outflow of current benefit payments, if the plan has more inactive participants (either retired or not currently employed, but with deferred vested benefits) than active participants, the plan is particularly vulnerable to asset losses. For example, if a plan with 10,000 inactive employees and \$1 billion of assets experiences an investment return of negative 10% instead of earning an expected 7%, the dollar amount of the loss (\$170 million in this example) must be borne by contributions for active employees. A 15-year amortization of this loss would be approximately \$17 million per year. If there were only 5,000 active employees in the plan, the annual contributions would have to increase by over \$3,000 per active employee in order to amortize that actuarial loss.

In 1980, there were 8 million total participants in multiemployer plans: 6.07 million were in active status and 1.93 million were in inactive (retired or separated vested) status. Three decades later, this three-to-one ratio of active to inactive participants had been replaced by a ratio of less than one-to-one: Of the 10.4 million total participants in multiemployer plans in 2010, 4.09 million were active participants and 6.33 million were inactive participants. In addition, the percentage of participants who are retired and receiving benefits under a plan has steadily increased from 17.7 percent in 1980 to 33 percent in 2010 – one-third of all participants.

²⁸ In 1987, employer contributions to multiemployer plans totaled \$7.8 billion; in 2010, employer contributions totaled \$20.47 billion.

²⁹ For some plans, benefits payments are expected to decline with demographic changes in future years.

³⁰ Data based on Form 5500 annual return filings.

Table 5. Active, Retired, and Separated Vested Participants
(Percentages, 1980-2010)³¹

Status	1980	1985	1990	1995	2000	2005	2008	2009	2010
Active	75.9%	66.1%	58.6%	52.4%	51.1%	45.7%	43.8%	41.3%	39.3%
Retired	17.7%	22.6%	25.2%	28.9%	30.1%	30.8%	32.0%	32.1%	33.0%
Separated Vested	6.5%	11.4%	16.2%	18.7%	18.7%	23.5%	24.2%	26.7%	27.7%

The proportion of inactive participants and their liabilities may be an indicator of a plan's financial health. In 2010, plans in critical and seriously endangered status had a higher percentage of retired participants and separated vested participants (35% retired and 31% separated vested) than plans in green status (33% retired and 25% separated vested).³² Among critical status plans, more than half (51%) reported liabilities for inactive participants that exceeded 70% of the plan's total liabilities.

Orphan Participants

When an employer withdraws from a plan, its employees are sometimes referred to as "orphan participants," and the remaining contributing employers become responsible for the benefits of these orphan participants who were never their employees. Orphan participants are a subset of inactive participants: they are generally participants who no longer participate actively in the plan because their employers or former employers no longer contribute to the plan.³³ If the plan becomes significantly underfunded – *i.e.*, the plan suffers a substantial asset loss or incurs unexpected adverse actuarial experience – the plan could have an orphan liability problem. There may be an insufficient number of contributing employers to make up for the shortfall with respect to the orphan participants, especially if there are no new employers to replace the withdrawn employers.³⁴

Although a withdrawing employer is required to pay withdrawal liability to account for the underfunding with respect to the employer, the withdrawal liability statutory regime, as

³¹ See PBGC's 2010 pension insurance data tables, Table M-7, at <http://www.pbpc.gov/res/data-books.html>. Data for 2010 is based on 2010 Form 5500 annual return filings.

³² Averages are weighted by number of participants.

³³ If a participant worked for more than one employer and one such employer continues to participate in the plan, the plan may identify liability for the participant's service with respect to the employer that terminated participation in the plan as orphan liability (while the participant's service with respect to the employer that continued participation in the plan would not be identified as orphan liability).

³⁴ The "orphan" liability problem may be less significant in the construction industry because participants whose employers leave the plan are often re-hired by replacement employers who take over the work of the exiting employer and contribute to the plan. However, orphan liabilities may still arise during periods of recession, or if non-union competition enters the jurisdiction of the plan, which can lead to participants who no longer have employers contributing to the plan. And there have been a number of construction plans that have incurred mass withdrawals with subsequent insolvencies that currently receive financial assistance; these plans have generally had orphan liabilities.

discussed below, has significant limitations. For instance, for many years until the 2000s decade, withdrawing employers in a large number of plans did not have withdrawal liability because the plans had no unfunded vested benefits (as determined under the plan's assumptions) as of the end of the plan year preceding the one in which the employer withdrew. In cases where plans did assess withdrawal liability, collections could be minimal if the plan operated in an industry suffering from high employer bankruptcy rates. Whether or not an orphan-heavy plan collected withdrawal liability, however, the plan could be well-funded in one year and subsequently become underfunded due to later events; such plans would also have an orphan liability problem not caused by non-payment of withdrawal liability.

Historically, reporting information did not differentiate between orphan participants and inactive participants, generally, making it difficult to identify plans with significant numbers of orphan participants. PPA requires multiemployer plans to include in the annual report filed with the ERISA agencies information regarding orphan participants. On the 2010 Form 5500, Schedule R, more than 400 plans reported having over 1.3 million orphan participants out of 6.7 million total participants.³⁵ About 43% of these orphan participants were in 153 critical status plans. Twenty-five plans reported over 10,000 orphan participants each, one "green" status plan reported just over 100,000 orphan participants (plan was in endangered status for 2009), and one critical status plan had nearly 200,000 orphan participants. Table 6 below describes the size of the orphan participant population in plans by plan status for the 2010 plan year.

³⁵ To reduce recordkeeping burdens, PBGC guidance permits plans to report as orphan participants only those participants whose most recent contributing employer had withdrawn from the plan, even if an employer with whom the participant earned earlier service credit continues to participate in the plan. (Alternatively, under the reporting rules, a plan may report as orphan participants those who have no former employers with a continuing obligation to contribute to the plan.) In addition, for the 2009 plan year, plans were permitted to give a reasonable approximation of the number of orphan participants either by conducting a random sampling of participants or by reporting the number of employers that withdrew since 1998 and the number of their participants.

Table 6. Orphan Participants by Plan Status (2010)³⁶

Plan Status	Number of Orphan Participants in Plans	Plans Reporting Orphan Participants (by Number of Orphan Participants)			
		Total	5,000+	10,000+	100,000+
Critical	570,331	153	21	13	1
Seriously Endangered	35,363	17	2	1	--
Endangered	84,880	51	5	2	
Neither Critical Nor Endangered	632,963	197	15	9	1
Total	1,323,537	418	43	25	2

Table 7 below focuses on 34 orphan-heavy plans – plans that reported at least 5,000 orphan participants – in 2009. Of a total of 3.4 million participants in these 34 plans, 1.3 million – or 27% – were orphan participants in 2009. Orphan participants averaged 31% of total participants in critical status plans and 41% of total participants in endangered and seriously endangered status plans. In contrast, among this group of orphan-heavy plans, orphan participants averaged 16% of total participants in “green” status plans (neither critical nor endangered status). The table shows the average number of orphan participants in these orphan-heavy plans by plan status in 2009 and the average percentage of participants in plans of each status who are orphan participants.

³⁶ Data based on 2010 Form 5500 annual return filings. In Tables throughout this report, unless otherwise indicated, the number of plans in each funding status is based on plans’ reported zone status on the Form 5500 annual return. These numbers may differ slightly from the number of plans that certified their funding status to the IRS for the plan year.

Table 7. Plans with 5,000 or More Orphan Participants (2009)³⁷

Plan Status	Plans Reporting 5,000+ Orphan Participants	Average # of Orphan Participants/Plan	Average # of Total Participants/Plan	Orphan Participants as % of Total
Critical	17	24,634	80,183	31%
Seriously Endangered	5	28,036	62,075	45%
Endangered	5	27,815	75,033	37%
Neither Critical Nor Endangered	7	31,576	198,415	16%
Total	34	27,031	101,104	27%

PPA also requires plans to report, for a plan year, in addition to the number of orphan participants for that plan year, the number of orphan participants for each of the two preceding plan years. For the 34 plans with 5,000 or more orphan participants, the percentage increase in orphan participants between 2007 and 2009 was 14%. (Orphan participants increased from 806,841 to 919,058.) Critical status plans experienced a significantly greater increase in orphan participants during these years than plans in other certified statuses: while the percentage increase was 20% for critical status plans, it ranged from 9% to 12% for plans in all other statuses. Among the greatest increases in orphan participants reported between 2007 and 2009 was a 40% increase in one large critical status plan with over 100,000 participants, a 289% increase in an endangered status plan with 10,000 or more participants, and a 51.2% increase in a plan that is neither in critical nor endangered status with over 100,000 participants.

Current law allows plans to apply to PBGC for an order of partition under which the nonforfeitable benefits of participants (including retirees) are transferred to the partitioned portion of the plan and such participants and beneficiaries receive only their PBGC-guaranteed benefit as the partitioned portion is a terminated and insolvent plan. The statute imposes strict requirements that must be satisfied for PBGC to exercise its discretion to order the partition. The statute requires that the PBGC make a finding that the plan is likely to become insolvent; has incurred a substantial reduction in contributions due to employer bankruptcies; is in or will likely be in reorganization requiring significant increases in contributions; and the likelihood of insolvency will be significantly reduced by partition. The immediate and detrimental impact on the partitioned participants is the reason the statutory requirements are so strict. Indeed, since the passage of MPPAA, PBGC has only partitioned two plans. Since PBGC's second order of partition, which happened in 2010 when PBGC partitioned a trucking plan, multiemployer plans

³⁷ Data based on 2009 Form 5500 annual return filings.

have expressed an increased interest in seeking partitions. To date, however, no other plans have satisfied the strict requirements necessary for an order of partition.

Withdrawn Employers and Withdrawal Liability

An employer withdrawal from a multiemployer plan occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan.³⁸ Such a cessation may occur as a result of a company going out of business, an employer's liquidation in bankruptcy or the rejection of a collective bargaining agreement in bankruptcy, the sale of assets to another employer (if the purchaser does not assume the collective bargaining agreement and comply with other statutory requirements), or the bargaining parties declining to renew a collective bargaining agreement requiring contributions to the plan.³⁹

An employer that withdraws from the plan is assessed withdrawal liability, which represents the employer's share of unfunded vested benefits (UVBs) as determined under the withdrawal liability method adopted by the plan.⁴⁰ The recent increase in plan underfunding has caused withdrawal liability assessments to soar. Also, because an employer's annual withdrawal liability payments are based on the employer's highest contribution rate in the last ten years, recent contribution rate increases have generally added to the amount an employer would be obligated to pay in annual withdrawal liability payments. Contributing employers to a plan may weigh the cost of contribution increases against potential withdrawal liability in deciding whether to withdraw, taking into account that the employer's withdrawal liability may be higher if the withdrawal occurs after a period of significantly higher contributions.

³⁸ There are separate rules for partial withdrawals, which may occur if an employer's contribution base shrinks by at least 70% or under similar circumstances. Special withdrawal liability rules apply for some industries, such as construction, where a cessation of contributions is not by itself considered a withdrawal. Generally, under these special rules, withdrawal liability is incurred if the employer's obligation to contribute ceases but the employer continues (or within five years resumes) the same type of work in the same area as was covered by the collective bargaining agreement and does not contribute on that work. A special provision under MPPAA permits a plan meeting certain requirements to allow a new employer to come into the plan for five years with no withdrawal liability. In addition, to encourage employers to join multiemployer plans, new PBGC regulations permit plans to designate a plan year with respect to which the plan's unfunded vested benefits would not be allocable to new employers joining thereafter.

³⁹ Special limitations apply in circumstances such as business reorganizations and insolvency liquidations.

⁴⁰ The MPPAA prescribes four methods that a plan may use to determine the amount of UVBs allocable to a withdrawing employer, as well as optional modifications to those methods. Under two statutory methods, the modified presumptive and rolling-5 methods, employers are generally responsible for one UVB pool determined as of the end of the plan year preceding the employer's withdrawal. Under the presumptive method, a withdrawing employer is liable for a share of the change in each year's UVBs during which the employer had an obligation to contribute. (Construction industry plans are limited to the presumptive method.) Under these methods, an employer's proportional share of the UVBs is based on a fraction equal to the sum of the employer's contributions over total contributions made by all employers for the five plan years preceding the plan year in which the UVBs arose. Under a fourth method, the direct attribution method, an employer's withdrawal liability is based generally on the benefits and assets attributable to participants' service with the employer, as well as a proportional share of the UVBs which are not attributable to service with the employer or other employers who are obligated to contribute in the plan year preceding the plan year the employer withdraws.

Under PPA, multiemployer plans are required to include in the annual report filed with the ERISA agencies the number of employers that withdrew from the plan during the preceding plan year. On the 2009 Form 5500, Schedule R, 248 plans reported that 4,255 employers withdrew in the prior plan year. See Table 8 below. Nearly one-half of all the plans reporting withdrawals in the 2008 plan year were in critical status in the 2009 plan year, and one-half of all withdrawing employers withdrew from plans that were in critical status in the 2009 plan year. Over one-third of withdrawing employers in 2008 withdrew from ongoing plans that were in neither critical nor endangered status for the 2009 plan year. Five plans reported withdrawals related to mass withdrawal terminations and one plan was merged into another plan. Most plans experienced fewer than ten employer withdrawals in 2008; of course, a small number of withdrawals from a small plan, or even a significant withdrawal from a bigger plan, can cause funding difficulties. (Less than 10% of all plans reporting withdrawals had fewer than 500 participants, and all but one of these plans reported fewer than 10 withdrawals.) Based on 2010 Form 5500 filings, the number of employers reported to have withdrawn from plans in 2009 was comparable to the number in 2008.

Under PPA, a plan must also report the aggregate amounts of withdrawal liability assessed (or estimated to be assessed) against employers that withdrew from the plan during the preceding plan year.⁴¹ This amounted to over \$1 billion for employers that withdrew in the 2008 plan year. See Table 8 below. Although 50% of all withdrawing employers were in plans that were in critical status in 2009, they were assessed about 80% of the total withdrawal liability resulting from withdrawals in the prior plan year (87% if mass withdrawals are excluded). In contrast, the 35% of all withdrawing employers that withdrew in 2008 from plans that were neither critical nor endangered in 2009 were assessed 3% of the total withdrawal liability that was assessed for withdrawals occurring in the prior plan year. About 7.5% of total withdrawal liability assessed in 2009 related to mass withdrawal terminations of plans in 2008 and 2009.

In 2010 Form 5500 filings, 248 plans reported that 4,126 employers withdrew in the previous year. Plans reported withdrawal liability assessments of nearly \$1.35 billion.

⁴¹ Withdrawal liability is determined based on the plan's UVBs ending at the plan year preceding the plan year in which the employer withdrew (or, under the presumptive method, the end of each plan during the employer's participation through the plan year preceding the withdrawal). Accordingly, assessments for employers withdrawing in 2008 are based on unfunded vested benefits as of the end of the 2007 plan year (or earlier).

Table 8. Employer Withdrawals in 2008 and Withdrawal Liability Assessments⁴²

2009 Plan Status	No. of Plans with Withdrawals in 2008	No. of Withdrawing Employers in 2008	Withdrawal Liability Assessed or Estimated (in millions)
Critical	115	2,205	\$893.1
Endangered	73	466	\$104.2
Neither Critical Nor Endangered	54	1,503	\$33.4
Not reported – Mass Withdrawal or Merger	6	81	\$82.6
Total	248	4,255	\$1,113.4 ⁴³

As indicated above, the withdrawal liability rules have statutory limitations. An employer's annual payments are limited to the contribution amounts the employer recently paid to the plan, and payments (absent a mass withdrawal) are not required after 20 years. When a majority of plans began to have UVBs in the past decade, requiring the assessment of withdrawal liability, in many cases the amounts assessed were exceptionally large due to the substantial underfunding that plans incurred. Because of the cap on the amount of the annual payment, and the 20-year limitation on annual payments, employers assessed withdrawal liability today will often not pay even the interest owed on the employer's allocable unfunded vested benefits. Some smaller employers will pay no withdrawal liability because of the "de minimis" reduction rule if an employer's withdrawal liability is under \$100,000 (up to \$150,000 in some cases). Also, some employers will pay reduced withdrawal liability because of limits on the amount of UVBs allocable to an insolvent employer undergoing liquidation or dissolution.

A mass withdrawal occurs when all or substantially all of a plan's contributing employers have withdrawn from the plan. When this occurs, the plan's trustees have the obligation to assess (i) initial withdrawal liability against all employers that have not yet been assessed, (ii) redetermination liability of all withdrawn employers for de minimis amounts and 20-year-limitation amounts, and (iii) reallocation liability; *i.e.*, the employer's share of the plan's unfunded vested benefits, determined using PBGC's assumptions, in excess of amounts the plan reasonably expects to collect. In the case of the complete withdrawal of all contributing employers, employers liable for reallocation liability are those employers that withdraw in the plan year in which the last employer withdraws, or in the two previous plan years. In the case of the withdrawal of substantially all employers, employers liable for reallocation liability are those

⁴² Data based on 2009 Form 5500 annual return filings.

⁴³ Two critical status plans and two plans that were neither critical nor endangered reported employer withdrawals but did not report withdrawal liability assessments.

who withdraw from the plan as part of a plan or arrangement (presumed to be all employers who withdraw in a three consecutive plan year period in which substantially all employers withdraw). When the plan faces serious financial difficulties, the withdrawal of a few employers or the bankruptcy of a major employer, and the discharge of that employer's liability, can trigger a mass withdrawal. However, only those employers that withdraw are liable; employers that continue contributing to the plan have no withdrawal liability unless they withdraw.

Underfunding Status and Concentration

Following the initial market downturn of the 2000s decade, total underfunding of all multiemployer plans changed very little between 2004 and 2008, when it stood at \$210 billion (there were \$648 billion in vested liabilities and \$440 billion in market value of assets). By 2009 and 2010, however, total underfunding had increased to \$346 billion and \$391 billion, respectively. Table 9 below shows the growth of assets, liabilities, and underfunding in multiemployer plans over the past 30 years.⁴⁴

Table 9. Funding of Multiemployer Plans During Selected Years (\$ in millions)⁴⁵

Beginning of Year	Assets	Liabilities	Funding Ratio	Underfunding	Overfunding	PBGC Rate
1980	\$40,363	\$52,123	77%	(\$17,887)	\$6,126	8.50%
1992	184,670	187,829	98	(17,835)	14,676	6.25
1995	209,947	218,458	96	(22,726)	14,216	7.15
1997	268,471	287,569	93	(32,549)	13,452	5.80
1999	320,704	351,021	91	(44,379)	14,063	5.30
2000	356,659	339,741	105	(21,135)	38,054	7.00
2001	351,108	385,272	91	(48,412)	14,249	6.40
2002	330,104	429,329	77	(102,469)	3,245	5.70
2003	308,678	486,845	63	(178,915)	748	5.00
2004	347,471	556,018	62	(209,181)	634	4.00
2007	430,091	621,289	69	(192,849)	1,651	4.99
2008	440,132	648,069	68	(210,167)	2,230	5.37
2009	326,940	672,518	49	(345,793)	215	5.38
2010	366,333	756,999	48	(391,027)	360 ⁴⁶	4.52

⁴⁴ This data is based on plan data reported as of the beginning of the plan year on Form 5500 filings. The data reflect the market value of assets as reported, and adjusts the reported vested liabilities using a standardized interest factor that along with an assumed mortality table reflects the cost to purchase an annuity at the beginning of the year ("PBGC rate" or "PBGC factor"). See part 4044 of PBGC's regulations.

⁴⁵ See PBGC's 2010 pension insurance data tables, Table M-9, at <http://www.pbgc.gov/res/data-books.html>. This report includes adjustments for late and amended filings that will be reflected in the data tables when they are updated. Data for 2010 is based on 2010 Form 5500 annual return filings.

⁴⁶ For the 2010 plan year, 39 multiemployer plans had overfunding totaling \$360 million and an average funding ratio of 128%. These plans represented 2.4% of all plans and covered less than 1% of all multiemployer participants. For the 2008 plan year, prior to the market turbulence, 81 plans were overfunded by \$2 billion.

Underfunding is highly concentrated within a small proportion of plans. Ten plans accounted for more than a quarter (\$106 billion) of the 2010 underfunding. Each of those 10 plans was underfunded by at least \$5.1 billion, and those ten plans covered 2.47 million participants and beneficiaries. Fifty plans (including the above-mentioned ten) covering 5.28 million participants and beneficiaries were responsible for more than half (\$209 billion) of the underfunding in 2010.

In 2008, the average funding ratio⁴⁷ for all plans was 68%, and more than half of all multiemployer plan participants (60%) were in plans that had a funding ratio of less than 70%. The average funding ratio for all plans fell to 49% in 2009 and 48% in 2010. In 2010, nearly 90% of all plans – which cover 96% of all plan participants – had a funding ratio of less than 70%.⁴⁸

For 2010, construction industry plans, which cover 37.5% of total participants, represented 49.4% of the total underfunding at \$193 billion. Transportation industry plans, which cover 15.3% of all participants, represented 22.7% of the total underfunding at \$89 billion. Plans in retail trade and services, which cover 31.8% of all participants, represented 17.2% of the total underfunding at \$67 billion. Plans in manufacturing industries cover 11.3% of all participants and represent 6.3% of the total underfunding at \$25 billion. Table 10 below summarizes data on underfunding concentration.

⁴⁷ The terms “funding ratio” and “funded percentage” are distinct. Funding ratio is based on the plans’ market value of assets and reported vested liabilities, adjusted to reflect PBGC’s interest factor. “Funded percentage” is used in PPA as a basis for determining whether a plan is subject to additional funding requirements. Funded percentage is based on liabilities as measured by plans for funding purposes using varying interest rate assumptions and smoothed asset values.

⁴⁸ The PBGC interest rate used to determine funding ratios was 5.37% for the 2008 plan year, 5.38% for the 2009 plan year, and 4.52% for the 2010 plan year. The weighted average valuation liability interest rate reported by plans on line 6d of Schedule MB, Form 5500, was 7.52% for both the 2009 and the 2010 plan years (average weighted by plan liabilities). Liabilities using a rate of 7.52% total \$575 billion for 2010, resulting in a funding ratio of 63.7%.

Table 10. Concentration of Underfunding by Plan and Industry (2010)⁴⁹

Plans	Underfunding (in millions)	Percent of Total Underfunding	Percent of Total Participants	Average Funding Ratio
All Plans (1,475)	(\$391,027)	100%	100%	48%
<u>10 plans with greatest underfunding</u>	(\$106,143)	27.1	23.7	46
<u>50 plans with greatest underfunding</u>	(\$208,738)	53.3	50.7	46
Construction industry Plans	(\$193,303)	49.4	37.5	48
Transportation industry plans	(\$88,768)	22.7	15.3	46
Retail Trade and Services plans	(67,132)	17.2	31.8	51
Manufacturing plans	(\$24,788)	6.3	11.3	52

During the 2010 plan year, underfunding declined by \$1.0 billion for the 10 most underfunded plans, going from \$106 billion at the beginning of the 2010 plan year to \$105 billion at the beginning of the 2011 plan year.⁵⁰ Their market value of assets increased \$7.4 billion, to reach \$99.4 billion by the end of the period. Their aggregate liabilities increased \$6.4 billion, to reach \$204.5 billion as of January 1, 2011.

During the 2011 plan year, the asset values for seven of these 10 plans for which 2011 Form 5500 filings are available remained fairly level (going from \$87.6 billion at beginning of the 2011 plan year to \$85.3 billion at the end of the 2011 plan year).

⁴⁹ Data based on 2010 Form 5500 annual return filings. See also PBGC's 2010 pension insurance data tables, Tables M-8, M-12, M-14, at <http://www.pbtc.gov/res/data-books.html>.

⁵⁰ The change in liabilities and underfunding from the beginning of the 2009 plan year to the beginning of the 2010 plan year were measured using the 4.52% PBGC factor in effect for the 2010 plan year. Values are based on 2011 Form 5500 data for seven of the 10 plans and 2010 Form 5500 data (liabilities projected to the end of the year) for three of the plans.

Funding Rules

Overview

Multiemployer and single-employer defined benefit plans are subject to minimum funding requirements under the Code,⁵¹ with parallel requirements under ERISA. In the past, the funding rules for multiemployer and single-employer plans had similar structures, but over time they have diverged, particularly since PPA.

The funding rules have historically provided multiemployer plans with considerable flexibility in determining minimum funding requirements each plan year. There is broad discretion for the selection of funding methods and assumptions used to measure the plan's liabilities and assets. A number of actuarial funding methods can be used, as well as "smoothed assets" – an actuarial value of assets that is used to determine funding costs and funded status – recognizing gains or losses in the market value of assets each year over a period of up to 5 years (and in some cases longer), but generally not more than 20% above or below market value. There are relatively long amortization periods for unfunded liabilities. PPA preserved much of this flexibility for multiemployer plans, and even expanded it, as discussed further below, by providing automatic approval of certain amortization period extensions and of adoption of an alternative funding method, the "shortfall" method.

By contrast, single-employer plans have considerably less funding discretion and flexibility, particularly after PPA. The funding rules mandate most of the assumptions for single-employer plans – including the interest rate (based on an investment-grade corporate bond yield curve) and mortality assumptions – used in determining liabilities and funding requirements. Single-employer plans are required to use asset values more closely aligned with the market value of assets (limited to a 10-percent corridor around market value), and the maximum smoothing period allowed is 25 months. Also, single-employer plans are generally required under PPA to amortize unfunded liabilities over seven years.⁵²

Single-employer plans and multiemployer plans have been held to different standards because of the perceived difference in their exposure to risk. For single-employer plans, ongoing fiscal discipline is critical because the plan is dependent on a sole sponsor whose deteriorating health may not allow it to fully fund the plan before the plan terminates.

The funding of multiemployer plans is quite different from the funding of single-employer plans. Contribution rates are fixed by collective bargaining agreements and generally stay in effect for the duration of the contract period. The funding rules therefore permit multiemployer plans to be funded over longer periods. It was assumed that the risks of a longer time horizon are mitigated by the pooling of employer contributions, plan assets, and liabilities,

⁵¹ In this section, "the Code" refers to the Internal Revenue Code unless otherwise stated.

⁵² The funding rules for single-employer plans were tightened many times through the 1980s and 1990s. The funding rules for multiemployer plans remained steady during that period. For example, under special rules referred to as the "deficit reduction contribution rules," from 1989 through 2007, single-employer plans were required to make additional contributions if the plan's funded current liability percentage (based on mandated interest rate and mortality table assumptions) was less than 90 percent; in that case, a four-to-seven-year amortization period applied.

which spreads the risk of fully funding plan benefits among numerous employers. The multiemployer plan rules are designed to allow some employers to exit the plan (possibly with withdrawal liability) and others to enter on the expectation that the long-term funding prospects for the plan would not be affected.

It is now apparent, however, these expectations for multiemployer plans are unlikely to hold true in the foreseeable future. A shrinking pool of active participants over the past 20 years caused the contribution base of many plans to decline, reducing funds available to pay for previously earned but unfunded benefits,⁵³ while ongoing benefit accruals continued at previous levels. As a result, these plans struggled to pay down liabilities for retirees and separated vested participants. During the strong performance of plan assets in the 1990s, many plans raised benefits for all participants and some increased their stock market exposure. These plans became significantly underfunded when asset values plummeted in the early 2000s, causing minimum contribution requirements to spiral well above amounts specified in collective bargaining agreements and raising the specter of funding deficiencies. This happened at a time when the industries in which multiemployer plans were predominant were experiencing downturns leading to fewer hours worked and, accordingly, lower contributions, to these plans. Ultimately, success in funding these plans will depend on economic improvement in these industries which leads to increased contributions, as well as positive investment returns.

PPA addressed funding problems in multiemployer plans by introducing a new statutory framework for strengthening their financial health and increasing disclosure of information about multiemployer plans. Multiemployer plan trustees are required to identify and confront potential funding problems early, before those problems become too severe. Under PPA, plans are sorted into categories that reflect their funding difficulties – plans in critical status, endangered status, and neither critical nor endangered status.⁵⁴ Trustees of a plan in endangered or critical status are required to develop a package of measures, including increased contributions and reduced benefits as needed, to enable the plan to achieve certain statutory targets for improved funding over a period of years. PPA also provided plans with additional tools and flexibility to avoid undue stress on contributions and benefits.

PPA made a number of changes to the excise tax rules for plans in endangered and critical status. For plans in critical status with funding deficiencies, PPA suspended the excise taxes that would otherwise apply to contributing employers. (For plans in endangered or critical status, PPA created a new 100% excise tax for failure to make a contribution in accordance with the funding improvement or rehabilitation plan, as applicable.)

Basic Funding Rules

Defined benefit plans use actuarial funding to estimate the costs of promised benefits under the plan. The costs are dependent on many factors regarding the future – such as the

⁵³These plans have a history of increasing plan benefits, including past service benefits for active and inactive participants—at times in response to healthy investment returns and sometimes to comply with the limits on deductibility of employer contributions—and the increased liabilities are funded over future years.

⁵⁴ Some special rules apply to certain endangered plans, referred to as “seriously endangered.” The actuary for a multiemployer plan is required to report its status on Form 5500, which lists seriously endangered as a separate category.

number of employees, the number of hours worked, life expectancy, retirement and disability rates, and the rate of investment return. The actuary is responsible for providing reasonable assumptions to develop the estimated costs. Actuaries also use a number of actuarial funding methods and methods for valuing assets and investment income that affect the timing of contributions and the level of required contributions. Actuaries conduct plan valuations on an annual basis to determine the extent to which the plan's experience was consistent with the assumptions and may modify the assumptions to the extent necessary to properly fund the plan.

Funding Standard Account

Under the basic funding rules, the minimum required contribution to a multiemployer plan is determined each year based on an actuarial valuation of the benefits promised by the plan. For purposes of determining the minimum required contribution, a "funding standard account" must be maintained for the plan. Specified charges and credits are made to the funding standard account every year.⁵⁵

Charges include the plan's normal cost for the year (the annual cost associated with service for the current year for active employees under the funding method used by the plan), plus the cost of amortizing the plan's unfunded liability (*e.g.*, changes in liability due to amendments increasing past service benefits) with interest, in equal installments over a period of years. Charges also reflect the amount needed to amortize losses attributable to plan experience (*e.g.*, investment losses) or to changes in funding methods or actuarial assumptions.

Credits include employer contributions made to the plan every year. Credits also include the amount needed to amortize experience gains, gains from changes in actuarial assumptions, and reductions in plan liabilities resulting from amendments reducing benefits over a period of years. If, as described below, there is a credit balance, then assumed interest on the credit balance is added to the funding standard account.

Credit Balances and Funding Deficiencies

If the total credits to the funding standard account exceed the total charges, a "credit balance" results, and no further contributions are required under the statutory minimum funding rules until future charges eliminate the credit balance.⁵⁶ If the total charges to the funding standard account exceed the total credits, a funding "deficiency" results, and additional contributions must be made – generally above the amounts employers are obligated to pay in their collective bargaining agreements – so that the plan can meet its minimum funding requirements. If additional contributions are not made by the time required, contributing

⁵⁵ As a means for enforcing the funding requirements, information about the funding standard account is reported by the plan's actuary on Schedule MB of Form 5500.

⁵⁶ However, this does not relieve employers of their obligations to make the contributions provided for under collective bargaining agreements.

employers are required to pay an excise tax to the IRS of five percent of the deficiency, increasing to 100 percent if the deficiency goes uncorrected.⁵⁷

Many plans built up credit balances in years during which contributions required under collective bargaining agreements exceeded required minimum contribution levels. Credit balances also expanded with the run up of asset values in the late 1990s (as a result of the amortization credits with respect to the actuarial gains resulting from better than expected asset returns during that period). Because credit balances are often used in lieu of cash contributions, the existence of these credit balances has masked a declining contribution base. In the aftermath of massive asset losses during the 2000s, credit balances were rapidly depleted – in just two years, between 2007 and 2009, aggregate credit balances fell by \$10 billion, from \$63 billion to \$53 billion.⁵⁸

Many plans are projecting imminent funding deficiencies in the absence of a significant increase in contribution rates. For the 2009 plan year, 80 plans reported funding deficiencies.⁵⁹ This was more than four times the annual average over the previous decade. Funding deficiencies for all 80 plans totaled \$1.0 billion. For the 2010 plan year, 90 plans reported funding deficiencies totaling \$1.9 billion. As shown in Table 11 below, 57 of these plans had an accumulated funding deficiency in excess of \$1 million, 19 plans reported deficiencies in excess of \$10 million, and three plans had deficiencies in excess of \$100 million. Many of these plans with funding deficiencies are large: 10 plans have 10,000 or more participants, and an additional 7 plans have at least 5,000 participants each.

⁵⁷ If certain conditions are met, the Secretary of the Treasury may grant a funding waiver of all or a portion of the contributions required for the year. No plans reported obtaining a funding waiver for the 2009 or 2010 plan years. As discussed below, a common tool used by multiemployer plans to avoid funding deficiencies is an extension of the amortization period for certain plan liabilities.

⁵⁸ Credit balances increased to \$56.3 billion for the 2010 plan year. However, up to \$2 billion of this improvement may be related to trustee elections of PRA 2010 relief. On the Form 5500 annual return filings for the 2010 plan year, more than 650 plans showed revised “prior year” credit balances for the 2009 plan year and most plans attributed the increase in credit balance to lowered amortization charges due to the application of PRA 2010 relief. See Chapter III, section entitled “Subsequent Funding Relief Legislation.”

⁵⁹ Seven plans that were not in critical status reported a funding deficiency for the year (five reported being in endangered status and two reported being in neither endangered nor critical status). Perhaps these plans certified their status incorrectly on the basis of their WRERA elections rather than certifying their status irrespective of the WRERA election.

Table 11. Plans with Accumulated Funding Deficiencies (2010)⁶⁰

Plan Size by Participants	# of Plans with Funding Deficiency	Funding Deficiency < \$1 Million	Funding Deficiency \$1 Million to \$10 Million	Funding Deficiency >\$10 Million to \$35 Million	Funding Deficiency >\$35 Million to \$99 Million	Funding Deficiency > \$100 Million
	90					
< 1,000 Participants		28	11	1		
1,000 to 4,999 Participants		5	22	4	2	
5,000 to 9,999 Participants			2	4		1
10,000+ Participants			3	2	3	2

Amortization Periods

Historically, liabilities under multiemployer plans were permitted to be amortized over long periods. Specifically, when a plan increased benefits in years immediately prior to PPA, the resulting past service liability was amortized over 30 or 40 years (depending on when the liability arose); gains and losses from changes in actuarial assumptions were amortized over 30 years; and experience gains and losses were amortized over 15 years.

PPA shortened the amortization periods for all types of unfunded liabilities to 15 years.⁶¹ The change from 30 years to 15 years for amortizing plan benefit amendments and changes in actuarial assumptions are significant because they recognize the need for plans to fund new liabilities more quickly.⁶² Adequate pre-funding reduces the risk that a market downturn in the future will deplete the plan's assets and weaken the plan so significantly that it cannot reasonably make up the losses through future contributions and earnings. It also compels the plan's trustees to carefully deliberate about whether the plan and its contributing employers can afford a benefit increase or a change in assumptions that produces an actuarial loss.

Under PPA, the shortened 15-year amortization period does not apply to plan liabilities that arose before 2008. Many plans with large existing liabilities for older participants continue to be governed by the old rules for those liabilities, which allow the liabilities to be paid off at a very slow pace (over 30 or 40 years). For those plans, higher underfunding will continue for longer, exposing plan participants to a greater risk of insolvency in the event the fixed amortization charges become unaffordable as a result of a decline in the number of active participants (and a resulting decline in the contribution base) before benefits are fully funded. In addition, slower funding deprives the plan of a cushion, which is important in the event that the plan's portfolio loses value.

⁶⁰ Data based on 2010 Form 5500 annual return filings.

⁶¹ If a benefit increase will be paid out over a period shorter than 15 years, the applicable amortization period is the shorter period.

⁶² PPA also shortened from 30 to 15 years the period for amortizing a decrease in liability resulting from benefit reductions, including adjustable benefit reductions by plans in critical status, as discussed below. This speeds up the plan's recognition of reduced liabilities for purposes of the minimum funding requirements.

Amortization Extensions

Before PPA, the amortization periods applicable in determining charges to the funding standard account could be extended up to ten additional years, with IRS approval. The extension of an amortization period is a type of funding relief that reduces charges to the funding standard account and thus can have the effect of avoiding contribution increases or benefit reductions that would otherwise be required. Applications for such relief increased noticeably after the 2000 to 2002 market downturn. To obtain an extension, the plan was required to show that failure to permit an extension would: (i) result in a substantial risk to the voluntary continuation of the plan or a substantial curtailment of pension benefit levels or employee compensation, and (ii) be adverse to the interests of plan participants in the aggregate. Multiemployer plans were subject to a lower rate of interest on an extension than the assumed rate of return that would usually apply, which had the effect of reducing required contributions far more than the reductions produced by the extension itself. Finally, during the time an extension was in effect, benefit increases of more than a de minimis amount were not permitted.

PPA provided for automatic approval for a 5-year extension of amortization periods. The eligibility requirements for a 5-year extension are much easier to satisfy than previous requirements — in an application filed with the IRS, the plan's actuary must certify that, (i) absent the extension, the plan would have an accumulated funding deficiency in the next nine years; (ii) the plan sponsor has adopted a plan to improve the plan's funding status; (iii) the plan is projected to have sufficient assets to cover expenses over the extended amortization period; and (iv) notice has been provided to affected parties. While PPA reduced amortization periods to 15 years for nearly all charge bases under a plan's funding standard account, the effect of the shorter period is offset to some extent by the availability of an automatic 5-year extension in cases where an extension under prior law would not have been granted. Plans may also request an additional 5-year extension from the IRS under criteria similar to those under pre-PPA law. In addition, the IRS is now required to act within 180 days of the plan's application. For both types of extensions, PPA eliminated the special interest rate for applications filed with IRS on or after July 1, 2005. Instead, the valuation interest rate is used (which is generally higher than the interest rate that applied in the case of extensions requested previously).

Six multiemployer plans were operating under amortization extensions for the 2005 plan year.⁶³ This number surged after PPA: in 2008, 53 plans were operating under an automatic extension of the amortization periods and 11 plans were operating under IRS-approved extensions; in 2009 – following the market downturn – upwards of 125 plans were operating under an automatic 5-year extension,⁶⁴ and 9 plans were operating under extensions approved by the IRS. By 2010, there were 190 plans operating under amortization extensions: 178 plans used the automatic 5-year extension and 12 plans used an approved extension. Plans seized on this relief after investment losses added millions in amortization charges each year to their funding standard accounts. In particular, PPA's automatic 5-year amortization extension was

⁶³ More plans likely would have needed such extensions to counteract steep increases in contributions that were occurring in the 2000s decade: contributions barely topped \$8 billion in 2000, but increased to \$16 billion by 2005. (The 2000 plan year may have some underreporting due to processing difficulties.)

⁶⁴ All extensions were taken for the full five years. The number of plans adopting automatic extensions could be slightly more because some plans that received IRS-approved extensions did not indicate whether or not they also adopted automatic extensions.

heavily utilized: in 2010, nearly all plans (94%) operating under any extension used the automatic extension.

Table 12. Amortization Extensions 2008 to 2010

Plans Using Amortization Extensions	2008	2009	2010
Automatic Extension	53	125	178
Approved Extension	11	9	12
Total Extensions	64	134	190

For the 2010 plan year, the following percentages of plans by zone status were operating under an amortization extension: 23% of all critical status plans, 24% of all seriously endangered plans, 17% of all other endangered plans, and 8% of all “green” plans. There was a significant increase in the percentage of plans using amortization extensions between 2009 and 2010 in all zone statuses. As indicated in Table 13 below, nearly half of all plans using amortization extensions in 2010 were in critical status.

Table 13. Use of Automatic Extensions / Approved Extensions
(2010)⁶⁵

Plan Status	Number of Plans	Plans Using Automatic Extension	Plans Using Approved Extension
Critical	378	79	9
Seriously Endangered	46	10	1
Other Endangered	222	38	1
Neither Endangered nor Critical	683	51	1
Total	1,329	178	12

Plans reported a reduction in the minimum funding requirements for the 2010 plan year of \$1.8 billion as a result of the two types of extensions.⁶⁶ Eighty-two plans reported a reduction of more than \$1 million for the year, 19 plans reported a reduction of more than \$10 million for the year, and five plans reported a reduction of more than \$100 million for the year. The average plan reduction in the minimum required contribution for all 137 plans reporting reductions was about \$13.2 million.

Actuarial Assumptions

Before PPA, actuarial assumptions selected by a multiemployer plan actuary in determining normal cost and actuarial liability needed only to be reasonable “in the aggregate” (*i.e.*, resulting in a contribution equivalent to the contribution that would be obtained if each assumption and method were reasonable). This facilitated the selection of investment return (interest rate) assumptions at the higher end of the range of reasonableness, offset by more conservative assumptions, such as the employee termination rate, disability retirement rate, and retirement ages. PPA changed this rule, requiring each actuarial assumption and method to be individually reasonable (taking into account the experience of the plan and reasonable expectations).

Assumptions about interest rates, which generally represent the average expected rate of investment return on plan assets over time, can have a large impact on the measurement of plan costs. A one-quarter percentage point variation in the interest assumption, for example, can produce a 2% to 3% variation in the measurement of plan liabilities, which, in turn, will produce a higher difference (such as 5% to 7%) in the level of required annual contributions. Higher

⁶⁵ Data based on 2010 Form 5500 annual return filings.

⁶⁶ Some plans adopting the extension did not report the resulting difference in contributions.

interest rates also implicitly assume that a greater proportion of the plan's benefit costs will be paid from investment earnings rather than contributions. This implicit assumption becomes riskier as a plan matures and disbursements increase, leaving fewer assets to generate earnings.

Historically, multiemployer plan actuaries have often selected relatively high valuation liability interest rates of 7.5% or higher, which had the effect of reducing minimum required contributions.⁶⁷ Between 1995 and 2007, plans with more than \$1 billion in liabilities used an average valuation liability interest rate (weighted by plan liabilities) of 7.57%.⁶⁸ The 2010 Form 5500 filings indicate that the valuation liability interest rates used by plans ranged from 5% to 8.5%. Out of 141 plans with liabilities in excess of \$1 billion, 121 plans used rates between 7.5% and 8.5%, and the remaining 20 plans used rates ranging from 6.75% to 7.25%.⁶⁹ The average valuation liability interest rate for all plans, weighted by plan liabilities, was 7.52% for the 2010 plan year.⁷⁰ The extent to which the new PPA standard for assumptions will affect the selection of valuation liability interest rates remains unclear.

Shortfall Funding Method

Among the funding methods available to multiemployer plans is the shortfall method. Although, under some funding methods, normal cost charges can be adjusted automatically for fluctuations in base units (*e.g.*, hours of service or units of production), charges to amortize losses and benefit increases are normally fixed. Under the shortfall method, rather than fixed charges to the funding standard account, charges increase or decrease as base units, on which contributions are based, vary from assumed levels. This allows short-term fluctuations in employment levels to be reflected in charges to the plan's funding standard account. For example, if the base units under the plan are substantially less than the estimated base units, charges and credits are adjusted to reflect the actual hours worked. Any difference in charges and credits (resulting from differences between actual and expected base units) is amortized over a period generally beginning with the expiration of the current collective bargaining agreement and ending 20 years after the difference occurred. The shortfall method can substantially reduce a plan's minimum required contributions for a plan year, particularly in slow economic periods when hours of service or units of production are lower than assumed. However, the plan's funded status would be worsened in such a case. While the shortfall funding method protects employers against funding deficiencies in the short term, it does not provide relief when a plan's workforce has permanently declined.

⁶⁷ Many plans adopted high earnings assumptions during the period of high returns in the 1990s.

⁶⁸ The comparable average rate for large single-employer plans over this period was 8.34%. However, under pre-PPA law, single-employer plans were also subject to deficit reduction contribution rules if they met certain thresholds, such as a current funded liability percentage of less than 90% using the RPA '94 interest rate; RPA '94 rates averaged 6.43% between 1995 and 2007. In 2005 through 2007, years when these thresholds were most often met, about 10% of large single-employer plans were subject to the rules.

⁶⁹ Using the plans' valuation liability interest rates to measure liabilities, there are 102 plans with over \$1 billion in liabilities; 85 of these plans used valuation liability interest rates of between 7.5% and 8.5%.

⁷⁰ The unweighted average liability interest rate reported on the 2010 Schedule MB for all plans is 7.35%. The RPA '94 interest rate, used to report a plan's current liabilities on line 1d of Schedule MB, Form 5500, was 4.62% for the 2010 plan year (average rate, based on plan year commencement date, is weighted by plan liabilities).

Prior to PPA, IRS approval was required before a plan that was not using the shortfall funding method could adopt that method (or before a plan that was using the shortfall funding method could cease using the method). In Form 5500 filings between 2002 and 2007, 130 plans reported using the shortfall method.

PPA allows plans to adopt the shortfall funding method (or to stop using the shortfall funding method) once every five years, without IRS approval. As a condition of this automatic approval, plans must not have operated under other relief measures within the past five years and may not increase their liabilities by amendment during any period they are on the shortfall method. For 2009, Form 5500 filings indicate that only 39 plans were using the shortfall funding method. The average annual reduction in minimum required contributions for the 2009 plan year was \$2.7 million; eleven plans had reductions of over \$1 million, and one plan had a reduction of \$42.7 million for the year. Of the 39 plans, 11 were in critical status, 4 were in seriously endangered status, 9 were in other endangered status, and 14 were in “green” status, and the status of one plan was unclear. Forty-one plans reported using the shortfall method in 2010, and 14 plans reported total reductions of \$63.6 million in their minimum funding requirements.

Increase in Maximum Deductible Contribution Amounts

The Code has for many years provided limits on employer deductions for contributions to qualified defined benefit plans. If plan assets were less than accrued liabilities determined under the plan’s funding method, contributions were deductible to the extent they did not exceed the amount necessary to amortize the shortfall over a specified period, generally 10 years. If plan assets exceeded accrued liabilities, the plan was considered “fully funded” and no deductible contributions were permitted. The Omnibus Budget Reconciliation Act of 1987 limited the deduction by providing that the plan was also considered fully funded if the assets exceeded 150% of “current liability,” even if that was less than the accrued liability under the plan’s funding method. The Taxpayer Relief Act of 1997 provided for a phase-in of an increase of this alternative determination of when the plan was considered fully funded to 170% of current liability. Nonetheless, many plans still were considered fully funded at the end of the 1990s. Such a plan would be compelled to increase benefits and/or decrease contributions.⁷¹ In practice, plans increased benefits, which diminished the cushion of overfunding available to withstand a decline in investment returns.⁷² Another means of avoiding the maximum deductible limit on contributions was to forego scheduled increases in contributions to the plan under collective bargaining agreements.

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) eliminated the alternative determination of when the plan was considered fully funded. EGTRRA also provided that contributing employers to a multiemployer plan can make deductible contributions at a faster rate than 10-year amortization (potentially in an amount above accrued liability under a plan’s funding method) provided that assets are less than 100 percent of current liability. PPA raised this limit by allowing employers to make deductible contributions provided that assets are

⁷¹ If a plan did neither of these, contributions would be nondeductible and a 10 percent excise tax would apply.

⁷² In some cases, plans tried to avoid the maximum deductible limit by adopting amendments making the benefit formula more generous. In other cases, plans tried to avoid this limit without creating ongoing liability, for example, providing a one-time check to retirees (sometimes known as a 13th check).

less than 140 percent of current liability. This allows employers to continue to make deductible contributions during periods when the plan is well funded (but not significantly overfunded), which will create a funding cushion for less favorable economic cycles.

Reorganization and Insolvency

Even before PPA, the basic funding rules for multiemployer plans were augmented by special rules for certain plans experiencing financial difficulty. Such plans are referred to as being in “reorganization” status. If a plan is in reorganization, the plan’s minimum contribution requirement is generally statutorily increased (in certain circumstances, an overburden credit prevents undue impact on contributing employers). Also, despite the general “anti-cutback” prohibition under the Code and ERISA that protects previously accrued benefits, plans in reorganization may reduce or eliminate benefits or benefit increases in effect under the plan for less than 60 months and must cease paying lump sum benefits in excess of \$1,750. However, the reorganization index that makes plans subject to the special funding rules is rarely triggered, even by plans with serious financial difficulties.⁷³ Four plans in 2009 and seven plans in 2010 reported that they were in reorganization status for the plan year.⁷⁴

Special rules also apply if a multiemployer plan becomes insolvent, that is, all of a plan’s available resources – including its assets, cash, contributions, earnings, and withdrawal liability payments, less reasonable administrative expenses – are insufficient to cover benefit payments when due for the plan year. In that case, the plan must reduce nonforfeitable benefits and suspend other benefits to the level that can be covered by plan assets, but not below the benefit level guaranteed by PBGC. The plan is eligible for financial assistance from the PBGC if needed to pay benefits and expenses after benefits have been reduced to the guaranteed level.

A few plans become insolvent while they are still ongoing, *i.e.*, providing accrual or vesting service credit to participants and receiving contributions from employers. The vast majority of insolvent plans, however, are plans that terminated (generally by the mass withdrawal of all employers from the plan long before becoming insolvent). Such plans operate as wasting trusts, paying benefits and expenses as they come due and collecting withdrawal liability payments.⁷⁵ In contrast to an underfunded single-employer plan that is trustees by PBGC when it terminates, an insolvent multiemployer plan – whether it is ongoing or terminated – is not taken over by PBGC, but receives financial assistance when it is unable to pay the guaranteed level of benefits.

⁷³ The reorganization index is triggered if the net charge under the plan’s funding standard account is insufficient to amortize retired participants’ benefits over ten years and all other participants’ vested benefits over 25 years. This calculation arises in extreme situations.

⁷⁴ Multiemployer practitioners have questioned the applicability of the reorganization rules if a plan is otherwise subject to the PPA rules.

⁷⁵ Terminated plans operate as wasting trusts for an average period of ten to eleven years before they exhaust assets to pay guaranteed benefits. At that point, the plans continue to pay benefits at the guarantee level using the financial assistance they receive from PBGC.

Additional Rules for Plans in Endangered or Critical Status

Under pre-PPA law, multiemployer plans were not required to take actions to improve their funded status unless they triggered the “reorganization” requirements of ERISA. PPA establishes earlier thresholds for addressing funding problems and timeframes for trustee actions. It imposes benchmarks for funding improvements (although plans generally have discretion to design their own action plans for achieving those benchmarks) and provides certain enforcement mechanisms. The new regime includes additional flexibility for plans facing financial problems.

Annual Accelerated Certification of Funded Status

In the case of a multiemployer plan in effect on July 16, 2006, PPA requires the plan’s actuary to certify the plan’s status within the zones established under PPA, to the plan’s trustees and the Secretary of the Treasury within 90 days after the beginning of each plan year. The certification states whether or not the plan has triggered any of the tests to be in critical status or endangered status and, for a plan already in critical or endangered status, whether the plan is progressing as scheduled toward the applicable statutory target for improved funding. A failure by the plan actuary to timely certify the plan’s status is treated as a failure by the plan administrator to file the Form 5500 and can result in a civil penalty under ERISA of up to \$1,100 per day.⁷⁶

The applicable statuses are “endangered” and “critical.” Within the category of endangered, there is a subcategory of “seriously endangered.” The zone statuses and triggers for those statuses are described in Table 14 below:

⁷⁶ DOL, in conjunction with the IRS, is pursuing a PPA related enforcement initiative to identify plans that have failed to file with IRS an actuarial certification of their funding status. DOL is sending the IRS and PBGC summaries of its findings with respect to missing certification cases. As of the beginning of November 2012, DOL has observed substantial compliance with the PPA’s certification requirement.

Table 14. Triggers for Critical and Endangered Zone Status⁷⁷

Status for Plan Year	Funded Percentage (FP)	Funding Deficiency (FD)	Funded Percentage <u>and</u> Funding Deficiency	Insolvency ⁷⁸	Funded Percentage <u>and</u> Insolvency	Annual Cost and Present Value of Benefits (PVB) <u>and</u> Funding Deficiency
Endangered Status (“Yellow Zone”)	FP < 80%	FD within 7 years (<u>including</u> amortization period extensions)				
Seriously Endangered Status (“Orange Zone”)			FP < 80% <u>and</u> FD within 7 years (<u>including</u> amortization period extensions)			
Critical Status (“Red Zone”)		FD within 4 years (<u>excluding</u> amortization period extensions) <u>or</u> Plan was in critical status in the previous year and FD within 10 years (<u>including</u> amortization period extensions)	FP ≤ 65% <u>and</u> FD within 5 years (<u>excluding</u> amortization period extensions)	Insolvent within 5 years	FP < 65% <u>and</u> Insolvent within 7 years	Normal cost and interest on unfunded liabilities > Current year contributions <u>and</u> PVB for inactive participants > PVB for active participants <u>and</u> FD within 5 years (<u>excluding</u> amortization period extensions)

⁷⁷ Unless indicated otherwise, each trigger applies separately to assign a plan to an applicable status, except that if a plan is in critical status, then endangered or seriously endangered status (and the related triggers) do not apply.

⁷⁸ Insolvency for purposes of the critical status triggers is measured by comparing the fair market value of plan assets plus the present value of expected contributions over a future period with the present value of benefits and expenses expected to be paid over the same period.

A plan's "funded percentage" – one of the triggers for purposes of determining whether the plan is subject to the additional funding rules – is defined as the actuarial value of the plan's assets divided by the plan's accrued liability. The calculation of the plan's accrued liability uses a single statutorily prescribed funding method, the unit credit funding method (whether or not that method is used to determine the plan's minimum required contribution). A plan's funded percentage is based on the asset valuation method selected by the plan for its actuarial valuation and for determining its costs. The actuarial assumptions used for the computation of funded percentage are also used in determining minimum funding requirements.

The methods used in determining the actuarial value of assets commonly involve five-year (or even longer) smoothing in recognizing investment gains and losses, which can result in asset valuations significantly above market in the aftermath of losses. In addition, plan actuaries have wide discretion in selecting interest rates for measuring plan liabilities, which, as discussed above, can have a significant effect on what the plan reports for its liabilities. In particular, the higher the rate, the lower the plan's measured liabilities. The use of a plan's methods and assumptions for determining funded percentage – rather than, for example, a market value of assets or a standardized interest rate for measuring plan liabilities – does not necessarily reflect the actual funded status of a plan.⁷⁹ Two plans with the same market value of assets and the same future benefit payments can appear to have different funded percentages.

Nor does the use of a plan's methods and assumptions for determining funded percentage facilitate an accurate comparison with other plans' certified funded statuses. In the case of a plan close to the line between statuses (*e.g.*, green and endangered or endangered and critical), the selection of the plan's asset valuation method and interest rate may affect which side of the line the plan falls.

Determining a plan's status also involves projections (used for determining whether the funding deficiency or insolvency tests have been triggered) as to future plan contributions and participation, which in turn involve projections of future employment in the industry or industries in which plan participants work. Projections of industry activity, including future covered employment and contribution levels, are based on information provided to the plan actuary by the plan trustees, acting reasonably and in good faith. Even under the reasonable,

⁷⁹ The difference between a plan's funded percentage and current liability percentage is often significant. In contrast to the actuary's selection of assumptions used to determine the plan's actuarial accrued liability and funded percentage, plans must report current liability on the Schedule MB using the RPA '94 interest rate (based on 30-year Treasury securities) and a specified mortality table; the average RPA '94 interest rate for the 2009 plan year was 4.74%. For critical status plans in 2009, the average current liability percentage was 41.5%, and the average funded percentage was 71.9%. Three hundred critical status plans reported a difference of greater than 20 percentage points between their current liability percentage and funded percentage; nearly 200 critical status plans reported a difference of greater than 30 percentage points between these two funding measurements. (These averages are based on 375 critical status plans that reported a funded percentage on the 2009 Schedule MB, and 357 critical status plans that reported a current liability percentage on the 2009 Schedule MB (only plans with a current liability percentage of less than 70% are required to report the current liability percentage).) For 2009, plans other than critical status plans reported an average funded percentage of 91.0% (914 plans) and an average current liability percentage of 48.2% (859 plans).

good faith standard, in the case of a plan close to the line between statuses, variations in the information provided may similarly affect which side of the line the plan falls.⁸⁰

Table 15 below summarizes the number of multiemployer plans in critical and endangered status for plan years 2008 through 2011, based on actuarial certifications received by IRS.⁸¹ It shows the substantial distress experienced by plans during the 2008 plan year, as first reflected in the 2009 certifications: The proportion of plans in critical status increased from 10.2% to 34.5% between 2008 and 2009, and two-thirds of all plans were in critical or endangered status in 2009. The 2010 plan year showed a marked decrease over 2009 in the number of distressed plans: critical status plans fell from 34.5% to 28.8% of all plans, and fewer than 50% of all plans were in critical or endangered status in 2010. (This translates to an 18% decline in critical status plans, a 41% decline in endangered and seriously endangered status plans, and a 57% increase in “green” status plans.) Improved market performance in 2009 may have contributed to the improvement in plans’ certified 2010 zone statuses.⁸²

Certifications for the 2011 plan year show a continued increase in the number of “green” status plans, which represented 60% of all plans. This may give the wrong impression, however, about the extent of the actual improvement in plans’ funding condition. As explained in the section “Subsequent Funding Relief Legislation” below, PRA 2010 funding relief can have the effect of increasing a plan’s funded percentage or delaying a projected funding deficiency, which can improve a plan’s certified zone status without any real change in the plan’s funding levels. The ERISA agencies do not have data yet to separate out the effects of PRA 2010 relief from the financial health indicated in zone status certifications in both 2010 and 2011.

⁸⁰ The desired outcome can also be influenced by the actions taken. In some cases, plans immediately recognized all 2008 investment losses in order to enter critical status and use the tools therein to allocate benefit reductions over more plan participants, with less stress on future accruals. Other plans in similar financial condition elected to avoid critical status by cutting future accruals and increasing contributions.

⁸¹ The total number of plan certifications is lower than the total number of plans due largely to terminated multiemployer plans that continue to pay benefits from the trust but do not file zone status certifications. As discussed above, these plans operate as wasting trusts after they terminate. While they are required to submit an annual Form 5500, they are not subject to the minimum funding requirements and do not file a Schedule MB.

⁸² These certifications may also, in some cases, reflect funding relief under PRA 2010 (discussed below), although many plans did not apply the relief to determine their certified zone status until 2011.

Table 15. Multiemployer Plan Zone Status Certifications (2008-2011)

Funding Status	2008		2009 ⁸³		2010		2011	
	Number	%	Number	%	Number	%	Number	%
Critical	139	10.2	472	34.5	386	28.8	319	24.3
Seriously Endangered	28	2.1	125	9.1	44	3.3	17	1.3
Other Endangered	155	11.3	337	24.6	229	17.0	196	14.9
Neither Critical Nor Endangered	1,047	76.5	435	31.8	682	50.9	780	59.5
Total	1,369	100	1,369	100	1,341	100	1,312	100

Effects of Endangered or Critical Status / Funding Improvement or Rehabilitation Plan

Within 30 days after the actuary certifies that a plan is in endangered or critical status, the plan sponsor must provide written notice of the status to the plan participants and beneficiaries, the bargaining parties, PBGC, and DOL. In addition, PPA requires critical status plans to impose employer surcharges (equal to 5% of the contribution otherwise required under the employer's collective bargaining agreement, increased to 10% after the first year) until the effective date of a collective bargaining agreement that includes terms consistent with the rehabilitation plan, and therefore encourages bargaining parties to quickly negotiate an agreement with these terms. Surcharges are paid to the plan, and therefore directly improve the funding of the plan.⁸⁴ Surcharges do not generate additional benefit accruals under the plan.

Within 11 months of the beginning of the initial plan year for which a plan is certified to be in endangered status or in critical status, the trustees of the plan must adopt a funding improvement plan (FIP) or a rehabilitation plan (RP), respectively. If the trustees of a multiemployer plan that is in endangered or critical status fail to adopt a FIP or RP, DOL may assess a civil penalty under ERISA of up to \$1,100 per day.⁸⁵ If the trustees of a plan in critical status fail to adopt a rehabilitation plan, an excise tax under the Code of \$1,100 per day or, if

⁸³ As discussed under the subheading "Subsequent Funding Relief Legislation," WRERA permitted plans for one year (generally the 2009 plan year) to temporarily treat their statuses the same as their status for the immediately preceding plan year. However, plans were required to report their actual certified zone status as determined for purposes of section 432 of the Code.

⁸⁴ In contrast, excise taxes have the function of creating an incentive for employers to fund the plan, which only indirectly improves the funding of the plan.

⁸⁵ DOL is reviewing plans that, based on analyses of the certification details obtained from the IRS and the Form 5500, should have adopted and implemented funding improvement/rehabilitation plans. DOL continues to observe substantial compliance with the PPA's FIP and RP adoption rules.

greater, five percent of the accumulated funding deficiency, also applies. Furthermore, PPA created a cause of action where a plan sponsor of a plan certified to be in endangered or critical status (1) has not adopted a FIP or RP within 240 days after the deadline for certification of endangered or critical status, or (2) fails to update or comply with the terms of the funding improvement or rehabilitation plan. In such case, a civil action may be brought under ERISA by a contributing employer or an employee organization that represents active participants, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan. To date, there is no indication that any civil actions have been brought under this provision.

A FIP or RP consists of actions that will enable the plan to achieve certain targets in improved funding, generally over a ten-year period, referred to as a funding improvement period for an endangered plan and a rehabilitation period for a critical plan.⁸⁶ These long-term economic plans include various actions devised by the plan's trustees. The trustees must provide the bargaining parties with one or more schedules that increase contribution rates and/or decrease future benefit accruals or other benefits to the extent necessary to achieve the required improvement in the plan's funding. These schedules are generally adopted as part of the collective bargaining process.⁸⁷ While the statute does not specify particular actions to be included in a FIP or RP, it specifies actions that should be considered. These include: applications for extensions of amortization periods, use of the shortfall funding method in making funding standard account computations, amendments to the plan's benefit structure, reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals, and increases in contributions. The trustees may also consider changes in the plan's investment policy, the withdrawal liability policy, the plan's administrative expenses, and other funding methods and assumptions.

Standards for FIPs and RPs

Under PPA, the FIPs and RPs of plans in endangered, seriously endangered, and critical status must provide for the attainment of certain minimum requirements. FIPs of endangered status plans (and certain seriously endangered plans) must be designed to achieve a one-third increase in the plans' funded percentage and no funding deficiency (taking into account amortization extensions) over a 10-year funding improvement period. For certain seriously endangered plans, a lower target and longer period apply. RPs of critical status plans must provide for the plans to emerge from critical status over a 10-year rehabilitation period or, if the plan sponsors determine that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plans cannot reasonably be expected to emerge from critical status by that date, to emerge at a later time or forestall possible insolvency.⁸⁸

⁸⁶ A longer period may apply for plans electing WRERA relief and certain seriously endangered plans. In addition, special rules apply for critical plans that cannot exit from critical status by the end of the rehabilitation period.

⁸⁷ If the parties do not adopt one of the schedules within a certain period following the expiration of the collective bargaining agreement that was in effect when the plan entered endangered or critical status, a default schedule is imposed automatically.

⁸⁸ Under WRERA, plans certified to be in endangered, seriously endangered, or critical status for a plan year beginning in 2008 or 2009 could elect a three-year extension of their funding improvement or rehabilitation periods.

To accommodate the collective bargaining process, the beginning date of a plan's funding improvement or rehabilitation period is deferred until the first plan year following the second anniversary of the adoption of the FIP or RP or, if earlier, the expiration of the collective bargaining agreements that are in effect on the due date for the initial certification of endangered or critical status and that cover 75 percent of participants as of that date.

A FIP or RP must set forth a projected path that a plan will take in meeting the standards for a FIP or RP. For example, in the case of a FIP, this would include a projection of the funded percentage and credit balance or deficiency for each year in the funding improvement period. A FIP or RP must also be updated each year.

Table 16 below summarizes the standards for plans in different zone statuses.

Table 16. Standards for Funding Improvement

	Endangered (and some Seriously Endangered)	Seriously Endangered⁸⁹	Critical
Funding Improvement Period/ Rehabilitation Period	10-year period (13 with WRERA election)	15-year period (18 with WRERA election)	10-year period (13 with WRERA election)
Beginning of Period	Plan year beginning after the 2 nd anniversary of adoption of FIP (if earlier, expiration of CBAs covering 75% of actives as of due date for the initial endangered certification)	Same as endangered status	Same as endangered status based on the adoption date of the RP
Targets for Improvement in Funding	Reduce underfunding percentage by 33% by the end of the funding improvement period <u>and</u> Avoid funding deficiency during funding improvement period (<i>including extensions</i>)	Reduce underfunding percentage by 20% by the end of the funding improvement period <u>and</u> Avoid funding deficiency during funding improvement period (<i>including extensions</i>)	Emerge from critical status by end of rehabilitation period <u>or</u> If above standard cannot be met using all reasonable measures, use reasonable measures to emerge at a later time or to forestall possible insolvency

⁸⁹ In the case of a seriously endangered plan with a funded percentage in excess of 70% as of the beginning of the initial endangered year, this special standard applies (and continues to apply for later years) only if the plan's actuary certifies that the plan is not projected to meet the regular standard for endangered plans.

Each year during the plan's funding improvement or rehabilitation period, the plan's actuary must certify the plan's status and whether the plan is making the scheduled progress in meeting the requirements of its FIP or RP. For the 2011 plan year, the IRS received 319 critical status certifications: 26 plans reported they were not making the scheduled progress in meeting the requirements of their rehabilitation plans and 85 plans reported they were making the scheduled progress. There were 213 endangered and seriously endangered plans in 2011: three reported they were not making the scheduled progress in meeting the requirements of their funding improvement plans and 64 reported they were making the scheduled progress. Three hundred fifty-four (354) plans (208 critical status plans and 146 endangered and seriously endangered status plans) provided little or no information on their scheduled progress; in some cases, this may indicate that their rehabilitation periods or funding improvement periods had not yet commenced.

For many plans, it is too early to draw conclusions from the data reported to the ERISA agencies, and continued tracking of plans' scheduled progress will be needed. PPA zone status certifications are the most recent sources of information on whether a plan is making the scheduled progress under a funding improvement or rehabilitation plan, but certifications are filed on a plan-by-plan basis only with the IRS. Other useful information for monitoring purposes would be whether a plan has exhausted all reasonable measures to emerge from critical status by the end of the rehabilitation plan period. While some of this information must be described in a plan's rehabilitation plan, it is not required to be reported to the ERISA agencies.

Restrictions on Endangered or Critical Status Plans

Plans in endangered and critical status are restricted with respect to the types of actions they may take, the types of amendments they may adopt, and the collective bargaining agreements they may accept. Certain restrictions apply during the period beginning on the date of certification for the initial determination year and ending on the day before the first day of the funding improvement period (known as the "funding plan adoption period") or the rehabilitation period (known as the "rehabilitation plan adoption period"). Other restrictions apply after the adoption date of the plan's FIP or RP. See Table 17 below.

Table 17. Restrictions During Plan Adoption Period and After Adoption of a Funding Improvement or Rehabilitation Plan

	Endangered	Seriously Endangered	Critical
Restrictions During Funding Plan Adoption Period or Rehabilitation Plan Adoption Period	No amendment increasing plan liabilities by reason of an increase in benefits, a change in the accrual of benefits, or a change in the rate at which benefits become non-forfeitable (unless required by law) <u>and</u> No CBA or participation agreement may be accepted that provides for: a reduction in the level of contributions for any participants, a suspension of contributions with respect to any period of service, or any new direct or indirect exclusion of younger or newly hired employees from plan participation	Same as endangered status <u>and</u> Plan must take all reasonable actions to increase funded percentage and postpone funding deficiency for at least 1 year	Same as endangered status <u>and</u> No lump sum payments (other than small amounts) or other accelerated payments
Restrictions After Adoption of Funding Improvement Plan (FIP)/ Rehabilitation Plan (RP)	(i) No amendments increasing benefits, including future benefit accruals, unless the plan actuary certifies that the increase is consistent with the FIP and is paid for out of contributions not required by the FIP to meet the applicable funding targets in accordance with the schedule in the FIP and consistent with FIP, <u>and</u> (ii) No amendments that are inconsistent with the FIP <u>and</u> (iii) No CBA or participation agreement may be accepted that provides for: a reduction in the level of contributions for any participants, a suspension of contributions with respect to any period of service, or any new direct or indirect exclusion of younger or newly hired employees from plan participation	Same as endangered status	(i) No amendments increasing benefits, including future benefit accruals, unless the plan actuary certifies that the increase is paid for out of additional contributions not contemplated by the RP, and, after the increase, the plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the RP, <u>and</u> (ii) No amendments that are inconsistent with the RP <u>and</u> (iii) No lump sum payments (other than small amounts) or other accelerated payments

A failure by an endangered status plan (which is not in seriously endangered status) to meet the applicable standards by the end of the funding improvement period can result in a civil penalty under ERISA of up to \$1,100 per day. A plan in seriously endangered status that fails to meet the standards by the end of the funding improvement period is subject to an excise tax based on the greater of the amount of the contributions necessary to meet such standards, or the plan's accumulated funding deficiency. An excise tax applies on this same basis in the case of a plan in critical status that fails to meet the requirements of section 432(e) of the Code by the end of the rehabilitation period or fails to make scheduled progress in meeting its requirements under the RP for three consecutive years. The IRS may waive these excise taxes based on a finding that the failure was due to reasonable cause and not to willful neglect.

Contribution Increases, Benefit Reductions, and Other Elements of FIPs and RPs

Possible actions or measures for inclusion in a funding improvement or rehabilitation plan are contribution increases and reductions in plan benefits and expenses. Extensions of amortization periods and adoption of the shortfall method may also be used to affect minimum required contributions and, thus, the plan's zone status.

The trustees of a plan in endangered status are required to provide the bargaining parties with (i) a schedule that reflects reductions in future benefit accruals to the extent necessary to meet the targets for improvement in the plan's funding, assuming no contribution increases (except as necessary to meet the targets once future benefit accruals have been reduced to the maximum extent permitted by law), and (ii) a schedule that increases contributions to the extent necessary to meet the targets, assuming no reductions in future benefit accruals.⁹⁰ The schedule in (i) is also a "default" schedule that must be imposed by the plan's trustees if the bargaining parties fail to adopt a schedule consistent with the plan's FIP within 180 days after expiration of the collective bargaining agreement in effect when the plan entered endangered status. Other schedules of contributions and benefits may also be provided as options under the FIP.

Similar requirements apply with respect to schedules relating to a RP, except that only a schedule similar to (i) above is required to be provided to the bargaining parties, and such schedule may not reduce the rate of future accruals below a monthly benefit equal to 1% of contributions made with respect to a participant or, if lower, the rate in effect as of the first day of the initial critical year (this is the default schedule). However, additional schedules may reduce the rate of future accruals to zero. A RP may also include legally permissible reductions to previously earned benefits (see below).

To curtail plan costs, plans in endangered or critical status may reduce future benefits (*i.e.*, benefits that have not yet been earned), as well as previously earned benefits that are not protected under the anti-cutback rules⁹¹ (such as certain disability or death benefits). Plans may, for example, reduce the future benefit accrual rate from 2 percent to 1 percent of contributions, or – with respect to future benefit accruals – eliminate an ongoing cost-of-living adjustment, an

⁹⁰ Schedules of benefits and associated contributions must be updated annually to reflect the experience of the plan, but the schedules in effect when the bargaining parties negotiate a collective bargaining agreement remain in effect for the duration of that collective bargaining agreement.

⁹¹ The Code and ERISA generally prohibit a reduction in accrued benefits or the accrued right to early retirement benefits, retirement-type subsidies, and optional forms of benefit.

early retirement subsidy, or a lump sum payment option. In addition, critical status plans are required to reduce certain previously earned rights. As soon as notice of a plan's critical status is sent to participants and other parties, the plan must cease paying benefits in the form of lump sums and other accelerated payments (except lump sums up to \$5,000 or payment of benefits owed for past periods).⁹²

Critical status plans also have the ability to reduce certain *previously earned* benefits that would otherwise have anti-cutback protection. In particular, plans in critical status may reduce the "adjustable benefits" of certain participants. Reductions in adjustable benefits, which may not affect a participant's accrued benefit at normal retirement age, include the reduction or elimination of early retirement benefits, retirement-type subsidies, optional forms of payment (other than an option that provides required benefits for a surviving spouse), and benefits not eligible for PBGC's guarantee because they were recently adopted (*i.e.*, increases adopted within 60 months of the plan's critical status certification). Plans in funding statuses other than critical status may not reduce adjustable benefits.

Adjustable benefit reductions are generally limited to active participants and inactive participants with vested benefits (separated vested participants) who have not started receiving benefits as of the time of the plan's critical status certification. (An exception applies in the case of benefits not eligible for PBGC's guarantee as of that date because they were recently adopted, which may be reduced with respect to retirees in pay status.) Adjustable benefits may be reduced only if at least 30 days' prior notice of the reduction is provided to participants and beneficiaries, contributing employers, and unions.

While plan trustees may unilaterally reduce the adjustable benefits of separated vested participants (subject to the notice requirement), adjustable benefit cutbacks for active participants are reduced based on the outcome of collective bargaining over the schedules provided by the plan trustees. The trustees generally provide multiple schedules with varying degrees of benefit reduction, each of which corresponds to a different contribution rate. Collective bargaining parties then negotiate which of these packages to adopt.

The Form 5500, Schedule R, instructs plans to indicate whether an amendment was adopted during the plan year that decreased the value of future benefits in any way, including a decrease in future accruals, a freeze in accruals for some or all participants, or closure of the plan to new employees. On the 2009 Form 5500, 194 plans reported that they reduced future benefits. About one-half of those plans were in critical status. For the 2010 plan year, nearly the same number of plans – 172 – reported that they reduced future benefits, and over one-half of these plans were in critical status.

On the Schedule MB, critical status plans must report whether any adjustable benefit reductions were made and the reduction in liabilities resulting from the reduction in adjustable benefits measured as of the valuation date. For the 2009 plan year, 115 plans reported making adjustable benefit reductions. Of the 86 plans that reported a reduction in liabilities, the total reduction was \$765 million in liabilities, for an average plan reduction of \$8.9 million (or 1.6% of the total unfunded vested liabilities in these 86 plans). For the 2010 plan year, 149 plans reported making adjustable benefit reductions. Of the 108 plans that reported a reduction in

⁹² Once this occurs, the plan must be amended to reflect the cessation.

liabilities, the total reduction was \$2.15 billion in liabilities, for an average reduction per plan of about \$20 million (or 3.3% of the total unfunded vested liabilities in these 108 plans).⁹³

Table 18 below shows the number of plans in 2010 that adopted amendments decreasing the value of benefits by funding zone status. For critical status plans, it also shows the number of plans that reported reducing adjustable past benefits. In total, 268 plans reduced either future benefits, adjustable past benefits, or both: 172 plans reduced future benefits and 149 plans reduced adjustable past benefits. There were 328,000 active participants in plans that made both types of reductions in 2010 – three times as many as in 2009. The percentage of critical status plans that made adjustable benefit reductions increased from 24% in 2009 to nearly 40% in 2010 (the number of plans in critical status fell by about 18%). Reductions in adjustable benefits will generally occur gradually over time as new collective bargaining agreements are negotiated. The cumulative effect of these reductions on a plan's liability – and whether this is a useful tool that will be used to reduce plan liability – will become clear over time.

Table 18. Reductions in Future Benefits/Adjustable Past Benefits (2010)⁹⁴

2010 Plan Status	No. of Plans Certified	Only Reduced Future Benefits	Only Reduced Adjustable Past Benefits	Reduced Both Future Benefits and Adjustable Past Benefits
Critical	378	42	96	53
Seriously Endangered	46	6		
Other Endangered	222	20		
Neither Critical Nor Endangered	684	48		
Not reported	3	3		
Total	1,333	119 ⁹⁵	96	53

⁹³ It is unclear whether the reported reductions in plan liability apply for benefit reductions made in the previous year or in the year to which the Form 5500 return applies. For example, in some cases, reductions reported in 2009 appear to have occurred in the 2008 plan year and were valued with respect to their effect on the plan's liability for the 2009 plan year. Alternatively, some of the benefit reductions reported on the 2009 Schedule MB may be reductions that occurred in the 2009 plan year, but which are valued with respect to their effect on plan liability in the 2010 plan year. For the 2008 plan year, 31 plans reported that they reduced adjustable benefits (data limited to 1,210 plans); although some of the 31 plans reported a reduction in plan liability, totaling just over \$1 million, other plans reported a zero reduction in liability. The 2012 instructions to the Schedule MB clarify this question.

⁹⁴ Data is based on 2010 Form 5500 annual return filings. This Table treats two plans that reported reducing adjustable benefits but were in endangered status as critical status plans.

⁹⁵ In both 2009 and 2010, a small percentage of these plans – about 9% to 15% – also adopted amendments that increased the value of some benefits.

Critical status plans often adopt RPs that call for significant increases in contribution rates, particularly under schedules that preserve the current benefit formula and all or most benefits under existing plan terms (known as “alternate” or “preferred” or “primary” schedules). Summaries of RPs in Form 5500 filings indicate that the schedules adopted by many bargaining parties require contribution rate increases of 7% or more each year for an extended period.

Employer contributions to multiemployer plans totaled about \$20.0 billion for the 2009 plan year and \$20.5 billion for the 2010 plan year. Average contributions per active participant climbed from \$4,300 in 2008, to \$4,500 in 2009, to \$5,000 in 2010; the data show that contributions increased for plans in all zone statuses. Table 19 below shows average contributions per active participant by plans according to plan funding status for the 2010 plan year.

Table 19. Average Contributions by Plan Status (2010) ⁹⁶

Plan Status	Contributions Per Active Participant	Did Not Reduce Benefits	Only Reduced Future Benefits	Only Reduced Adjustable Past Benefits	Reduced Both Future and Adjustable Past Benefits
Critical	\$4,000	\$4,550	\$5,800	\$4,000	3,400 ⁹⁷
Seriously Endangered	\$7,500				
Other Endangered	\$7,600				
Neither Critical Nor Endangered	\$5,000				

Critical status plans averaged lower contributions per active participant in 2010 than plans in other funded statuses – about \$4,000 per active participant as compared with about \$5,500 per active participant. Critical status plans that did not reduce benefits in 2010 had average contributions per active participant of \$4,550. In the case of critical status plans that reduced only future benefits, average contributions rose from \$3,400 in 2008 to \$5,800 in 2010. For critical status plans that reduced both future and past adjustable benefits in 2010, average contributions per active participant increased from \$5,000 in 2008 to \$5,400 in 2009, but then dropped to \$2,100 in 2010 (see footnote 97).

According to representatives from the multiemployer plan community, many plans have taken significant actions to increase contributions and reduce benefits in response to the funding challenges of recent years. In some cases efforts to improve funding status have involved

⁹⁶ Data based on 2010 Form 5500 annual return filings. Numbers are rounded.

⁹⁷ Generally, a different set of plans reduced both types of benefits in 2010 than the set in 2009. The 2010 average in this Table does not include two plans with unusually low contribution rates that covered 45% of all participants in 2010; by including those plans, the average contribution goes down to \$2,100.

mergers of smaller plans into larger plans, which are expected to result in greater stability in future costs and benefits.⁹⁸

Some plans in critical status have indicated, in summaries of RPs or informally, that there are natural constraints on the extent to which the bargaining parties will accept contribution rate increases and benefit reductions. In some cases, these plans contend that it would not be reasonable to require further contribution increases or benefit reductions, as that would induce employers and unions to cease bargaining for continued contributions to the plan.⁹⁹ Under PPA, if the plan sponsor has determined that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period (in some cases, there is a determination that the plan cannot reasonably be expected to emerge from critical status at any time), the plan sponsor is allowed to adopt a RP that will not lead to emergence from critical status by the end of the rehabilitation period. The ERISA agencies cannot easily determine whether the plan sponsor's determination that the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period is appropriate and therefore are hard-pressed to determine whether a plan that adopts such a RP could have instead adopted a RP that is reasonably expected to lead to emergence by the end of the rehabilitation period.

A multiemployer plan that is in endangered or critical status is required to attach a summary of the plan's FIP or RP, and any update, to the plan's annual report, and to summarize the plan's FIP or RP in the plan's annual funding notice to participants and beneficiaries, and other parties. The ERISA agencies reviewed a sample of FIP and RP summaries submitted by plans with the 2009 Form 5500. The sample included plans of various sizes, with a slight bias towards larger plans. The sample included 14 FIP summaries and 15 RP summaries. FIP and RP summaries in the annual funding notices were examined as well, although they often provide fewer details.

In reviewing the sample, we documented what tools have been adopted by the plan's trustees, as well as what tools are being proposed on at least one schedule being offered to the collective bargaining parties. Given that many plans are still waiting for the collective bargaining process to select a schedule, our review provides more of an indication of the tools being considered in the process rather than information on actions being adopted and implemented.

⁹⁸ Some mergers involve a dominant employer participating in several plans that has an interest in consolidating the plans and improving the funding of the remaining plan. Mergers may also help reduce administrative expenses, which can be substantially greater (on a per participant basis) in smaller plans. For 2009, in plans with fewer than 500 participants, administrative expenses per participant were 70% higher than in plans with 1,000 to 9,999 participants, and were three times as high as such expenses in plans with 10,000 or more participants. Many plans with fewer than 500 participants had average per participant administrative expenses that were four, five, and six times greater than those for large plans.

⁹⁹ For example, we have heard that early retirement subsidies may be more important than the future accrual rate under the plan to active employees deciding whether to support the plan. Also, the fear of adjustable benefit reductions could push active employees to retire earlier than they otherwise would. These concerns may be more likely in plans with a large proportion of older participants, whereas plans with a greater proportion of younger participants may emphasize future accruals.

Approximately one-third of the FIPs project that the plan will recover on schedule, and no action was required. Of the remaining plans, virtually all are considering or have already implemented both an increase in the contribution rate and a reduction in benefits. None of the FIP summaries reviewed mention use of the amortization extension or the shortfall method.

Among the RPs reviewed, the vast majority propose for consideration, or have already implemented, an increase in the contribution rate and reductions in future benefits. Approximately a quarter of the plans mention an amortization extension, and none mention the shortfall method. The following adjustable benefits are proposed for reduction, or have already been reduced, by the vast majority of RPs reviewed: early retirement benefits, disability benefits, death benefits, as well as optional forms of payment, such as period certain guarantees and lump sums. Reductions in early retirement subsidies are proposed by about half of the RPs. A reduction in post-retirement benefit increases was not mentioned in any of the RPs reviewed.¹⁰⁰

Administrative Issues Presented by PPA

Since PPA, the ERISA agencies and members in the multiemployer plan community, such as the American Academy of Actuaries Multiemployer Pension Plans Subcommittee, have identified a number of technical issues surrounding the operation of the PPA funding rules.

Uncertainty regarding application of sunset

Section 221(c) of PPA provides that the special funding rules under section 432 of the Code and section 305 of ERISA generally do not apply to plan years beginning after December 31, 2014. However, under section 221(c)(2) of PPA, if a multiemployer plan is operating under a FIP or RP for its last plan year beginning before January 1, 2015 it must continue to operate under that FIP or RP while the FIP or RP remains in effect and all the provisions of ERISA and the Code relating to the operation of the FIP or RP continue in effect.

The sunset raises a number of ambiguities that will need to be resolved, including the following:

- What does it mean for a multiemployer plan to be “operating under” a FIP or RP?
 - If a plan enters endangered or critical status in the 2014 plan year, is the plan sponsor subject to the requirement to adopt a FIP or RP before the sunset, and is the plan then considered to be “operating under” the FIP or RP for purposes of section 221(c)(2) of PPA?
 - If the answer to the question above is no, what actions cause a plan to be “operating under” a FIP or RP? For example, if a plan enters endangered or critical status in the 2013 plan year, is the plan “operating under” a FIP or RP even if no collective bargaining agreements have been adopted pursuant to the FIP or RP for the last plan year beginning before January 1, 2015?

¹⁰⁰ PPA permits reductions in post-retirement adjustments only if the adjustment took effect less than 60 months before the plan’s critical status. Plans adopted post-retirement adjustments more often before 2000, than after 2000.

- Which excise tax provisions “relate to the operation” of the FIP or RP and therefore remain in effect after the sunset with respect to plans operating under a FIP or RP for purposes of section 221(c)(2) of PPA?

Uncertainty regarding application of sanctions for “reasonable measures” plans

Under section 432(e) of the Code, a rehabilitation plan must generally consist of actions that would enable a multiemployer plan to emerge from critical status by the end of the rehabilitation period (generally, a 10-year period). If a plan sponsor determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period (but can reasonably be expected to emerge after that time), the rehabilitation plan must consist of reasonable measures to enable the plan to emerge from critical status at a later time; if the plan cannot reasonably be expected to emerge from critical status at any time, the rehabilitation plan must consist of reasonable measures to forestall possible insolvency. However, while the statute recognizes that it would be unreasonable to expect these two types of plans (sometimes referred to as “reasonable measures plans”) to emerge from critical status by the end of the rehabilitation period, the statutory excise tax provisions do not provide special treatment for reasonable measures plans.

Section 4971(g)(3)(B)(ii) of the Code imposes an excise tax on a plan in critical status that “has received a certification under section 432(b)(3)(A)(ii) for three consecutive years that the plan is not making the scheduled progress in meeting the requirements of its rehabilitation plan.” Under section 432(b)(3)(A)(ii) of the Code, the requirement to certify that a multiemployer plan is making scheduled progress under its rehabilitation plan applies only in the case of a plan “which is in a . . . rehabilitation period.” Because section 432(b)(3)(A)(ii) requires a plan to certify its scheduled progress under a rehabilitation plan only for plan years during the rehabilitation period, a reasonable measures plan is not required to certify its progress after that period, even though its rehabilitation plan continues to be in effect.

Similarly, under section 4971(g)(3)(B)(i) of the Code, it is clear that a sanction applies if a plan fails to meet the requirements of section 432(e) of the Code by the end of the rehabilitation period, but it is not clear how it applies to reasonable measures plans that fail to emerge by that date.¹⁰¹

¹⁰¹ One possible interpretation would be to apply the section 4971(g)(3)(B)(i) to all plans (including reasonable measures plans) that fail to emerge from critical status by the end of the rehabilitation period. The reference in that section to meeting the requirements of section 432(e) by the end of the rehabilitation period suggests that the relevant requirement for all plans is emergence from critical status, the only purpose under section 432(e) for which the end of the rehabilitation period is relevant. However, because section 432(e) does not require reasonable measures plans to emerge from critical status by the end of the rehabilitation period, such an interpretation would apply a sanction in the case of reasonable measures plans for failing to comply with a statutory requirement that the statute recognizes is unreasonable for them. Although the statute permits waivers in appropriate circumstances, the waiver process is uncertain and could result in significant administrative burdens.

Timing rules for improvements in funded status under a funding improvement plan

Under current law, a multiemployer plan's actuary must certify the plan's status (endangered, critical, or neither) by the 90th day of each plan year. Within 240 days of that due date, a plan that has received an initial certification of endangered status must adopt a FIP. The FIP must be formulated to provide for an increase in the plan's funded percentage so that, as of the end of the funding improvement period, the plan's funded percentage equals or exceeds the sum of: (i) the funded percentage as of the beginning of the funding improvement period, plus (ii) 33 percent¹⁰² of the difference between 100 percent and the plan's funded percentage as of the beginning of the funding improvement period. The funding improvement period is the 10-year period¹⁰³ that begins on the first day of the first plan year beginning after the earlier of (i) the second anniversary of the date on which the funding improvement plan is adopted, or (ii) the expiration of the collective bargaining agreements that were in effect on the due date for the plan's initial endangered status certification and covering, as of such date, at least 75 percent of the active participants in the plan.

A FIP is designed to achieve a required increase in the multiemployer plan's funded percentage, based on the plan's funded percentage as of the beginning of the funding improvement period. However, the funding improvement period does not begin until after the FIP is adopted. Therefore, the FIP must use an estimate of what the funded percentage will be as of that date.

Administrative questions have been raised regarding whether the starting point for the required increase in the plan's funded percentage should be based on the more certain funded percentage as of the plan's initial endangered status certification, rather than an estimated funded percentage as of the date the funding improvement period begins.

Other administrative issues

Groups in the multiemployer plan community have raised other administrative issues as well:

- Whether a plan that is moving from endangered status to critical status should operate under a FIP or a RP during the period before the rehabilitation period begins.
- When is a default schedule imposed if a collective bargaining agreement expires before, rather than after, the plan enters endangered or critical status and how does the 180-day period apply.

Another interpretation regarding the application of section 4971(g)(3)(B)(i) in the case of a reasonable measures plan might involve determining whether the plan has met the requirements of section 432(e) by the end of the rehabilitation period by analyzing whether all reasonable measures have been taken to enable the multiemployer plan to emerge from critical status. However, in situations where all reasonable measures have not been taken, it would be difficult to determine the amount of the sanction, which is based in part on the "amount of contributions necessary to meet such . . . requirements." Such an interpretation would make it more difficult to impose a sanction in the case of a reasonable measures plan, would result in disparate treatment of plans in critical status that are scheduled to emerge by the end of the rehabilitation period and those that are not (even if the plan were scheduled to emerge just one year after the rehabilitation period ends), and accordingly could create incentives for a plan to characterize itself as a reasonable measures plan.

¹⁰² For certain seriously endangered plans, 20% is substituted for 33%.

¹⁰³ This period may be longer for plans that made WRERA elections and for certain seriously endangered plans.

- Whether a critical status plan may treat the restriction on lump sum payments as eliminating the lump sum form of payment, as opposed to simply suspending the form of payment, if such elimination is necessary for the plan to emerge from critical status.
- Whether the prohibition against a reduction in the level of contributions was intended to apply for endangered status plans but not critical status plans (after the rehabilitation plan adoption period), or whether the rules for such plans should be harmonized.
- Whether surcharges paid by employers in critical status plans should be included as part of the employer's contribution rate for purposes of determining the annual payment withdrawal liability amount.
- How the rules for plans in reorganization status operate in interaction with the PPA rules.

Subsequent Funding Relief Legislation

WRERA was signed into law on December 23, 2008, to give plans respite from the effect of losses experienced during the 2008 stock market decline. With respect to the plan year beginning on or after October 1, 2008, and not later than September 30, 2009, plans were permitted to elect to temporarily freeze their prior plan year's certified funding status,¹⁰⁴ and/or to defer any updates or actions required under a FIP, RP, or schedule relating to the prior plan year. (If the plan would have been in critical status but for the election to freeze the prior year's status, the exemption from the excise tax for any funding deficiency continues to apply.) In addition, plans that were in endangered or critical status for a plan year beginning in 2008 or 2009 were permitted to extend any funding improvement period or rehabilitation period for an additional three years (*i.e.*, from ten years to 13 years in the case of a plan in endangered or critical status, and 15 to 18 years in the case of a seriously endangered plan). Because multiemployer plan contributions are fixed in multi-year collective bargaining agreements, such an election bought the trustees and the bargaining parties time to increase contributions and adopt other changes needed to shore up plan assets.

The IRS received 764 WRERA elections. This represented most of the plans that were certified to be in endangered or critical status for the 2009 plan year. Of the 764 WRERA elections received, the vast majority – 638¹⁰⁵ – were elections to freeze the prior year's certified status (if the plan had the same status for both the election year and the prior year, the effect of that election was to defer an update of the plan's rehabilitation or funding improvement plan for the year). About one-quarter of the elections extended the plan's rehabilitation or funding improvement period by three years. One-half of WRERA elections were made by critical status plans, and the other half were made by endangered status and seriously endangered status plans.

¹⁰⁴ If the prior plan year began before the plan was subject to PPA, the plan was permitted to submit an actuarial certification of the plan's status for the prior year in the same manner as if PPA had applied.

¹⁰⁵ Of the 638 elections, 19 were applicable for the 2008 plan year and 619 were applicable for the 2009 plan year.

Table 20. WRERA Elections

Funding Status (Certified)	Number of WRERA Elections	Elections to Freeze Status or Defer FIP/RP		Election to Extend Funding Improvement/Rehabilitation Period	Both Elections
Critical	379	295		127	43
		Frozen Green Status	195		
		Frozen Endangered Status	32		
		Frozen Seriously Endangered Status	11		
		Frozen Critical Status	47		
		Did not submit a certification	10		
Seriously Endangered	109	102		16	9
Other Endangered	267	232		45	10
Neither Endangered nor Critical	9 ¹⁰⁶	9		0	0
Total	764	638		188	62

As shown in Table 20 above, 295 plans that were certified to be in critical status elected to freeze their prior year's status: 195 of those plans were certified as being in "green" status, neither endangered nor critical status, for the prior plan year and 43 of those plans were certified as being in endangered or seriously endangered status for the prior plan year. Forty-seven of the plans certified to be in critical status elected to defer any updates or actions required under a rehabilitation plan, and 127 plans elected a three-year extension of the rehabilitation period.

¹⁰⁶ Nine elections to freeze the prior year's plan status were received from plans that reported they were neither endangered nor critical for the plan year of the election. In some of these cases, the plan was eligible for WRERA relief but misreported the plan's certified status for the year of election; in a few cases, elections reflected a misunderstanding of the effect of WRERA relief.

PRA 2010 Relief

While WRERA provided short-term relief, a significant number of multiemployer plans were still faced with increased funding obligations and the prospect of either falling into endangered or critical status or remaining in such status for a sustained period of time. In response, Congress enacted PRA 2010 in June 2010 in order to provide funding relief from the significant investment losses that occurred in and around 2008. PRA 2010 provided special funding rules that enable plans to decrease annual minimum required contributions, increase funding standard account credit balances, and improve zone statuses, which in turn alleviate pressures on contribution increases and benefit cuts under collective bargaining agreements.

Under a special amortization extension rule, plans that meet a solvency test may amortize net investment losses¹⁰⁷ incurred during one or both plan years ending after August 31, 2008 over a 29-year period, rather than the shorter 15-year period that would otherwise apply (e.g., a plan may pay down 2008 investment losses through the plan year ending in 2037). This reduces the plan's annual amortization charges relating to the 2008 losses (although the reduced charges continue for a longer time). One plan, for example, established an asset loss of \$21.4 million during the 2008 plan year: a 15-year amortization schedule produced an annual charge of \$2.3 million, but by adopting special funding relief, this charge was lowered to \$1.7 million based on a 29-year schedule. Reducing a plan's annual charges under the funding standard account has the effect of reducing the plan's minimum required contribution. For a plan with a looming funding deficiency, the lower minimum required contribution will delay the date of that funding deficiency, which will impact the plan's zone status under PPA.

Under a special asset valuation rule, plans that meet a solvency test may recognize investment losses incurred during one or both plan years ending after August 31, 2008, over a period of up to ten years, rather than the regular smoothing period of five years typically used by plans. By taking into account only one-tenth of the investment loss each year over 10 years, plans can spread the recognition of the huge drop in asset losses over a longer period. In addition, for purposes of smoothing, plans are permitted to use an actuarial value of assets that is as much as 30% greater than the market value of assets for one or both of the plan years beginning after August 31, 2008. Applying this rule will inflate the plan's funded percentage for certification purposes because the actuarial value of plan assets will make the funded percentage for that plan year higher than what it otherwise would have been.

Plans have relied extensively on PRA 2010 relief. PRA 2010 required plans applying the special funding relief to give notice to participants and beneficiaries, and to PBGC. As shown in Table 21 below, PBGC received more than 700 plan notices of a decision to use the special funding rules: 556 plans used 29-year amortization of applicable losses, 587 plans used ten-year smoothing in determining the actuarial value of assets, and 358 used the 130% corridor for

¹⁰⁷ Net investment losses are defined as the difference between the plan's actual and expected returns (*i.e.*, between the market value of assets as of the end of an eligible plan year and the market value of assets as of the beginning of the eligible plan year, plus contributions less disbursements for the year, increased at the plan's valuation interest rate).

determining actuarial value of assets.¹⁰⁸ The majority of these plans used both 29-year amortization and 10-year asset smoothing, and 225 plans used all three types of relief.

The 2010 status notices for plans that used PRA 2010 relief provide a rough break-down of these decisions by zone status: out of 716 plans electing relief, 411 plans were in “green” status; 135 plans were in endangered or seriously endangered status, and 170 plans were in critical status. Among all critical status plans in 2010, nearly 45% used the relief. It is unclear whether the remaining critical status plans were ineligible for the relief¹⁰⁹ or preferred the additional flexibility of critical status (*i.e.*, ability to reduce adjustable benefits, continue in critical status beyond the 10-year rehabilitation period if all reasonable measures are exhausted, and avoid excise taxes for funding deficiencies).

Table 21. Plans Using PRA 2010 Relief¹¹⁰

Plan Status (2010)	(1) 29-Year Amortization Schedule	(2) 10-Year Asset Smoothing	(3) 130% Corridor	Plans using one or more types of relief ((1), (2), and/or (3))	Plans using all three types of relief (1), (2), and (3)
Critical	128	137	96	170	60
Seriously Endangered	14	18	17	21	10
Other Endangered	90	82	50	114	31
Neither Critical nor Endangered	324	350	195	411	124
All Plans Using Relief	556	587	358	716	225

The special amortization rule first applies to reduce annual charges for the 2009 plan year. Because PRA 2010 was enacted in June 2010, the effects of the rule on minimum required

¹⁰⁸ The numbers of notices for each type of relief described herein are approximate because the notices were individually drafted by plans and did not always clearly describe the relief adopted.

¹⁰⁹ A condition of the relief is a solvency certification by the plan’s actuary that the plan is projected to have sufficient assets to cover benefit payments and expenses over the period of the relief. The solvency certification appears to have had little effect on the ability to use the asset valuation relief, but it did appear to have a more significant effect on the ability to use 29-year amortization. Anecdotal information indicates that the limitation on benefit increases for two plan years following the years in which the special rules apply deterred some plans from taking relief; other plans took the relief but explained in the notice that future benefit increases were possible by suspending the relief. In other cases, trustees chose not to adopt the relief but to tackle their plans’ funding problems immediately.

¹¹⁰ Due to the large volume of notices received, the wide range of formats and variety of descriptions used in describing the elections made, and the fact that many plans filed more than one notice changing their elections over time, these numbers are estimates. Also, the number of “green” status plans may be overstated because it includes any plan that did not provide notice of its 2010 status to PBGC (*i.e.*, because only endangered and critical status plan are required to provide a status notice to PBGC, the category “neither critical nor endangered” may include plans that should have filed the required notice but failed to do so). Individual plan certifications are not generally available from the IRS (although a plan’s status is later reported on the Form 5500 annual return).

contributions and credit balances would first be reported in many cases on the 2010 Form 5500.¹¹¹ In these 2010 filings, 666 plans reported a change in their credit balance for the 2009 plan year between the 2009 and 2010 annual reports; *i.e.*, specifically, the aggregate credit balances of these plans increased by \$2 billion – from \$32.3 billion to \$34.2 billion – for the 2009 plan year.¹¹² For many of these plans, Schedule MB attachments explained the difference in the prior year’s credit balance, showing a decrease in the amortization charges and an increase in the amortization credits due to the application of PRA 2010 relief.¹¹³ On average, these plans reported a prior year increase that was 6% higher (an average increase of \$2.9 million per plan) than what had been reported on the 2009 annual report.

The direct effects of the special amortization and the special asset valuation rules on plan status certifications may not be known immediately. Plans are permitted to apply the special rules in determining their zone status beginning with the 2010 plan year.¹¹⁴ While status certifications in 2010 and 2011 show a clear improvement in plans’ funding status (between 2009 and 2011, critical status plans dropped from more than one-third to fewer than one-quarter of all plans, and green status plans increased from nearly one-third to 60% of all plans), it is difficult to distinguish the effects of funding relief from other possible sources of funding improvement. Below are examples of the effects on zone status that many plans described in their election notices:

- Endangered status plans – Notices from certain endangered and seriously endangered plans indicated that higher actuarial asset values would cause the plans to move into “green” status. For example, one plan certified as endangered for 2010, based on a funded percentage of 78%, was recertified as “green” in December 2010 based on a funded percentage of 83% after applying the special asset valuation rule.
- Critical status plans – In some cases, notices from plans in critical status indicated that the plan was projected to move into “green” or endangered status due to increases in the plan’s credit balance and the number of years projected before a funding deficiency. In other cases, the notices explained that the plans remained in critical status despite the relief but were expected to emerge from critical status sooner as a result of the relief.
- Green status plans – There were a large number of “green” status plans that applied one or both of the special funding rules. Notices from many of these plans explained that the relief provided a buffer against future adverse experience and made it easier to avoid endangered or critical status in future years.

¹¹¹ IRS guidance provides that the effects of the special amortization rules need not be reflected in the 2009 Schedule MB, as long as the plan reflects those effects in an attachment to the 2010 Schedule MB.

¹¹² An additional \$20 billion in credit balances for the 2009 plan year is attributable to plans that did not report a change in their 2009 credit balance on the 2010 Form 5500 annual report.

¹¹³ In some cases, the increase may be due to other sources, such as a plan merger or additional contributions not previously reported.

¹¹⁴ It is not known how many plans with plan years beginning late in 2010 filed certifications that took into account PRA 2010 relief. In addition, IRS guidance permits plans to re-certify their 2010 zone status before the end of the 2010 plan year: PBGC received 25 notices indicating the plan was recertifying its status for the 2010 plan year to take into account the special funding rules. About 23 of these re-certifications indicated that the plan moved into “green” status from endangered, seriously endangered, or critical status. Other notices described the special rules as first having an effect on the plan’s status in 2011 or later plan years.

Assessing the Effects of PPA on Plan Decision-Making

In light of the substantial economic and market dislocations that have occurred since the enactment of PPA, the repeated changes in legal funding requirements since enactment, and the substantial lag before plan information is reported to the ERISA agencies, one cannot draw conclusions about the effects of PPA with confidence.

Some things we do know. Many plans have since 2008 become subject to the additional funding requirements under PPA's endangered and critical status rules, which compel the adoption of FIPs and RPs as a means toward orderly funding recovery. For the 2011 plan year, 41% of all plans were subject to these additional requirements. See Table 15. These requirements were in part responsible for the nearly 275 plans that reported reductions in future benefit accruals and/or past adjustable benefits in 2010. Disciplined increases in contributions have also been an outcome of FIPs and RPs. PPA has restricted plans in critical status (nearly 30% of all plans in 2010 and 25% of all plans in 2011) from payments of lump sums otherwise available under plan terms. It has also restricted benefit increases under plans in endangered or critical status. Many plans are beginning to report that they are making scheduled progress under the requirements of their funding improvement or rehabilitation plans. We also know that plans have widely benefitted from PPA provisions (such as automatic amortization extensions and the excise tax exemption for funding deficiencies) that helped relieve employers and participants from excessive funding pressures.

PBGC's projection model provides additional support for the view that PPA authorities will improve future funding status for some plans. PBGC ran a series of simulations on a broad range of potential future economic scenarios to assess the effects of PPA (assuming no sunset) and funding relief enacted in 2010 on multiemployer plans. These were compared to simulations that did not include the PPA tools and authorities. There are many uncertainties about the extent to which plans will use the tools and authorities under PPA over the coming years to improve their financial standing, and about our ability to predict that use. Nonetheless, the simulations that included the PPA authorities (and funding relief in 2010) projected significantly better average 2022 funding levels, supporting the view that PPA authorities should continue to help in the future.¹¹⁵

¹¹⁵ For information on ME-PIMS, see [PBGC 2012 Exposure Report](#).

Further Steps to Strengthen Plans and Protect Pensioners

The nation's approximately 1,500 multiemployer defined benefit plans cover more than 10 million participants and beneficiaries. For decades, multiemployer plans have been an important source of retirement security, a mechanism to facilitate portability of pension benefits for millions of workers, and a useful way for small businesses to provide meaningful retirement benefits without the burdens of individual plan sponsorship.

The 2008 financial crisis and ensuing recession have had a harmful effect on the funding status of most plans, which has been exacerbated by a declining number of active participants. Data available through late 2012 indicate that a majority of participants –52%– are in moderately or severely distressed plans.¹⁴⁵

The condition of multiemployer plans varies widely. Many plans have adjusted their income and expenses to respond to the funding challenges of the past few years and appear to be sustainable over the longer-term using the tools already provided under PPA.¹⁴⁶ With the economic recovery may come an increase in the hours worked for which contributions are made and restoration of asset values, returning these plans to a sound financial footing.

For many other plans, however, funding levels remain depressed. These plans face sharp funding improvement requirements and have limited tools for restoring fiscal balance. The deteriorating financial condition of some critical status plans indicates that, without further changes, they will never recover and will become insolvent over time. Achieving long-term sustainability for this substantial minority of multiemployer plans is of paramount importance to the participants and contributing employers of such plans.

Participants and their families in once healthy multiemployer plans may face pension losses in the future if the financial status of their plans deteriorates further. Contribution increases negotiated by active participants are often used to fund the benefits of retired and separated vested participants, in some cases including large numbers of “orphan” participants whose employers have withdrawn from the plan. At some point, contributing employers in some plans may face a financial burden so high that they cannot continue their multiemployer contribution obligations and stay in business.

Furthermore, policymakers cannot ignore the possibility that the PBGC may be unable to meet its obligations to multiemployer beneficiaries in the future.

Stakeholders cannot ignore the danger to plans, contributing employers and participants and beneficiaries: unless steps are taken to provide additional tools for the trustees of multiemployer plans to stabilize the financial conditions of their plans, more costly and intrusive intervention may ultimately be necessary. That is a result everyone surely wants to avoid.

¹⁴⁵ As described earlier in this report, under PPA, there are several triggers for “critical” status, including a funded percentage of less than 65% and projected insolvency during the next 7 years, or a projected accumulated funding deficiency or insolvency within 4 years. Plans with a funded percentage of less than 80% or with a projected funding deficiency within the next 7 years are in “endangered” status; plans that have both are “seriously endangered.” Plans that are in neither endangered nor critical status are in “green” status.

¹⁴⁶ Funding relief enacted in 2009 and 2010 has helped many plans postpone the strain of increased contributions, reduced benefits, and impending funding deficiencies.

In PPA, Congress gave plans in financial trouble and the bargaining parties associated with those plans significant new tools and incentives to get the plans back on a sounder financial footing. For some plans, those tools will be insufficient to do the job. Before the PPA changes sunset at the end of 2014, it is critical that all stakeholders undertake a serious effort to identify the current and potential future problems faced by multiemployer plans and to work to identify the best ways to address them.

Those efforts have already begun. The representatives of the ERISA agencies and Congressional staff are prepared to engage in ongoing discussion of these critical issues as Congress prepares to consider multiemployer funding rules in advance of the sunset of the PPA provisions.

Individuals and groups working in the multiemployer plan community, such as the National Coordinating Committee for Multiemployer Plans (NCCMP), stakeholders from the major pension funds, and the American Academy of Actuaries Multiemployer Pension Plans Subcommittee, have suggested a range of possible tools and approaches for strengthening these plans. Some of these ideas have been reflected in recent legislative initiatives; others arise from suggestions raised by constituencies in various discussions that have been held. Presently there is no consensus among the various constituencies concerning which approaches are desirable or effective.

Advances in pension policy benefit from a collaborative process among stakeholders, the Administration and Congress, to provide trustees, employers, and unions the tools to deal with the financial and other challenges they face. Ultimately such an approach can restore fiscal stability to multiemployer plans and the thousands of small and large businesses and millions of workers and retirees that depend on them.

Limitations of This Report

Since the PPA was enacted and its funding provisions took effect, there have been significant unforeseen changes to the economy and to financial markets. Some of the requirements for improving funding under PPA were modified by subsequent funding relief legislation due to the stock market downturn of 2008.

The ability of plans to defer actions that would normally have been required under PPA for 2009 has delayed the implementation of PPA. While this report includes information about the numbers of plans that applied for funding relief under WRERA and PRA 2010 and the possible impact on some PPA provisions, information on the actual effects of this relief on plans will generally not be available to the ERISA agencies until later years. This is because the data available to the ERISA agencies provide only preliminary indication of how plans are responding to the new rules: most of the data for this report is drawn from the 2010 Form 5500 series annual report filings (the last plan year for which we have complete data for all plans).¹⁴⁷ Thus, plans that entered endangered or critical status for the first time in the 2008 or 2009 plan year were only beginning to implement actions to improve their funding status.

For example, many of the tools available to plans in endangered and critical status – such as contribution increases and reductions in future accruals (and reductions in adjustable benefits in the case of critical status plans) – are subject generally to collective bargaining over schedules provided by the plans' boards of trustees. Due to multiple-year collective bargaining agreements, the outcome of such bargaining – *i.e.*, the extent to which these tools will be employed – will not be known for several years to come when new collective bargaining agreements are entered into. The effects of those changes on the operation and status of plans will be reported in future Form 5500 filings. However, to the extent that PPA provisions were implemented in 2009 or 2010 – *e.g.*, plans used the 5-year automatic amortization extension extensively following the market downturn – they are reported here.

Because multiemployer plans are not required to report any information to the ERISA agencies about many of their participating employers that are small businesses (and very little about any participating employers other than significant contributors), the report provides only general information on this subject. The ERISA agencies consulted with both government and private sector researchers working with small business issues, but found many of these avenues of investigation unfruitful with respect to the questions posed by section 221(a) of PPA. In lieu of more precise information, this report gathers data from trade associations and industry representatives, as well as available data from the National Compensation Survey of DOL's Bureau of Labor Statistics. Additional information about participating employers would be useful to inform future analysis and understanding of the issues affecting multiemployer plans.

¹⁴⁷ Many plans file the Form 5500 as late as nine and one-half (9½) months after the end of the plan year (making use of a 2½ month extension under the law). For example, for a plan with a plan year that begins January 1, 2009, the extended deadline for filing the Form 5500 is October 15, 2010; in addition, much of the data reported relates to the plan's status as of January 1, 2009. Similarly, for a plan with a plan year that begins December 1, 2010, the extended deadline for filing the Form 5500 is September 15, 2012, with data generally reported as of December 1, 2010. Limited supplemental data for more recent periods include funding status certifications submitted by plans to the IRS for the 2008 through 2011 plan years.

Acknowledgements

This report represents the efforts of many individuals from many Federal agencies. The analysis and discussion were undertaken by an interagency working group composed of career Federal staff from the Department of Labor, the Pension Benefit Guaranty Corporation, and the Department of the Treasury. From the Department of the Treasury: Harlan Weller, Linda Marshall, Jamie Dvoretzky, William Evans, Yaguo Zhang, Diane Bloom, Steven Klubock; from the PBGC: John Thompson, Marc Ness, Bruce Perlin, Eric Field, William James, James Bloch, Gail Sevin; from the Department of Labor: career staff from the Employee Benefits Security Administration. The Form 5500 data for the report were generally assembled by the Policy Research and Analysis Department and the Multiemployer Program Division, at PBGC, with input from the IRS/Department of the Treasury and the Department of Labor. Data from other sources were compiled by staff of the Department of Labor and the IRS/Department of the Treasury. The principal drafter of the report was Constance Markakis, attorney in the Legislative Department of PBGC.

The working group consulted extensively with individuals and organizations outside government that have an interest in multiemployer plans and retirement security generally. These include, but are not limited to, the National Coordinating Committee for Multiemployer Plans (NCCMP), the American Academy of Actuaries Multiemployer Pension Plans Subcommittee, and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA). Of course, these organizations are not responsible for the information contained in the report.

EXHIBIT H

CENTRAL STATES, SOUTHEAST AND)
SOUTHWEST AREAS PENSION FUND and)
CHARLES A. WHOBREY, as Trustee,) Case No. 24-cv-663
)
Plaintiffs,) Judge Thomas M. Durkin
v.)
) Magistrate Judge Jeannice W. Appenteng
STEELCASE INC. and SC TRANSPORT, INC.,)
)
Defendants.)

SC TRANSPORT, INC. and STEELCASE INC.,)
)
Plaintiffs,) Case No. 24-cv-677
 v.)
) Judge Thomas M. Durkin
 CENTRAL STATES, SOUTHEAST AND)
 SOUTHWEST AREAS PENSION FUND,) Magistrate Judge Jeannice W. Appenteng
)
Defendant.)

I. SCT's arguments regarding the Rehabilitation Plan are waived and incorrect.

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reduction in the rate of future accruals under the default schedule . . . shall not reduce the rate of future accruals below . . . a monthly benefit . . . equal to 1 percent of the contributions required to be made with respect to a participant, *or* the equivalent standard accrual rate for a participant or group of participants under the collective bargaining agreements in effect as of the first day of the initial critical year.” 29 U.S.C. § 1085(e)(6) (emphasis added). Thus, although the clause following the italicized “*or*” contains the phrase “as of the first day of the initial critical year,” that clause refers to the benefit accrual rate in place as of that first day, not the contribution rate then in effect. It is undisputed that since—and for years before—enacting its Rehabilitation Plan, the Fund has not increased its benefit accrual rate (1% of contributions). (Dkt. 36, p. 3.)

SCT is also incorrect that 29 U.S.C. § 1085(f)(1)(B) prohibits the Fund from providing the additional benefit accruals that flow naturally from its 1% benefit accrual formula (*i.e.*, the additional benefit accruals that result from the contribution rate increases). (Dkt. 39, p. 1.) 29 U.S.C. § 1085(f)(1)(B) only restricts a fund operating under a rehabilitation plan from enacting amendments that increase the benefit accrual rate. The Fund’s 1% benefit accrual rate predates the Rehabilitation Plan, so there are no accrual rate increases at issue. As for 29 U.S.C. § 1085(f)(3)(B) (Dkt. 39 at p. 1), it applies to amendments that a fund enacts after being certified to be in critical status but before adopting its rehabilitation plan. There were no such amendments here.

II. SCT is not entitled to its attorneys’ fees or compounded interest.

Despite SCT’s unsupported assertion to the contrary (Dkt. 39, p. 12), an arbitrator’s determination as to whether a party acted in bad faith under 29 C.F.R. § 4221.10(c) is a factual finding. *See, e.g., Trs. of Utah Carpenters’ & Cement Masons’ Pension Tr. v. Loveridge*, 567 F. App’x 659, 661-62 (10th Cir. 2014). In any event, the Fund’s arguments do not come close to constituting bad faith. Indeed, multiple arbitrators have ruled in favor of the Fund, at least in part. (Dkt. 34-26, PageID #3483; Dkt. 34-14, PageID #2274-75, 2287.) That those arbitrators were

reversed by district courts in cases now on appeal before the Seventh Circuit does not change this fact.¹

SCT's argument that it should receive the compound interest that the Fund is entitled to on withdrawal liability judgments (Dkt. 39, pp. 11-12) also fails. Under 29 C.F.R. § 4219.31(d), the interest rate for withdrawal liability overpayments is the same as "the rate for overdue withdrawal liability payments," not the rate for withdrawal liability judgments. Under 29 U.S.C. §§ 1132(g) and 1451(b), withdrawal liability judgments include amounts in addition to the past due withdrawal liability payments (*e.g.*, liquidated damages and attorneys' fees and costs). As such, "the rate for overdue withdrawal liability payments" in 29 C.F.R. § 4219.31(d) cannot be referring to the interest rate for withdrawal liability judgments because the amount of a withdrawal liability judgment is distinct from, and greater than, the amount of an employer's delinquent withdrawal liability payments. Also, the obvious purpose of 29 C.F.R. § 4219.31(d) is to create symmetry between the interest a fund charges for past due withdrawal liability payments and the interest a fund pays an employer for withdrawal liability overpayments. The Fund does not compound interest on past due withdrawal liability payments (Dkt, 34-27, PageID # 3486 & 3518), so it would be improper to compound interest on an employer's withdrawal liability overpayments.

August 7, 2024

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¹ Contrary to SCT's suggestion otherwise (Dkt. 39, p. 6 n. 8), the PBGC reiterated its prior interpretation of 29 U.S.C. § 1085(g)(3) in explaining its final rule by stating that "certain contribution increases would typically result in an increase in an employer's withdrawal liability even though [UVBs] are being reduced by the increased contributions," and that 29 U.S.C. § 1085(g)(3) "mitigate[s] the effect on withdrawal liability." 86 Fed. Reg. 1256, 1264 (Jan. 8, 2021).

EXHIBIT I

the point is that the PPA banned red zone plans from *increasing* benefits in rehabilitation plans (unless they complied with the enumerated and specific requirements in (f)(1)(B)).

Using the chart below as an illustrative example, the Fund’s rehabilitation plan would have been completely compliant if it had maintained the \$1.70 monthly accrued pension benefit per week of work (far right column) under its rehabilitation plan (\$88.40/month per year worked, for an accrued pension of approximately \$32,000 per year after a 30-year career), rather than *increasing* its monthly accrued benefit to as much as \$3.48 (\$180.96/month per year worked, for an accrued pension of approximately \$65,000 per year after a 30-year career) over the following decade (second from right column). In other words, no benefit cut under the rehabilitation plan—but no increase either.

Year	Contribution Increase under Primary Schedule of RP	Weekly Contribution Rate¹²	Monthly Accrued Pension Benefit Per Week Worked	Monthly Benefit Per Week Worked <u>Under SCT’s Position</u>
Pre-RP	N/A	\$170	\$1.70	\$1.70
2008	8%	\$183.50	\$1.84	\$1.70
2009	8%	\$198.00	\$1.98	\$1.70
2010	8%	\$214.00	\$2.14	\$1.70
2011	8%	\$231.00	\$2.31	\$1.70
2012	8%	\$249.50	\$2.50	\$1.70
2013	6%	\$264.50	\$2.65	\$1.70
2014	6%	\$280.50	\$2.81	\$1.70
2015	6%	\$297.50	\$2.98	\$1.70
2016	4%	\$309.50	\$3.10	\$1.70
2017	4%	\$322.00	\$3.22	\$1.70
2018	4%	\$334.50	\$3.35	\$1.70
2019	4%	\$348.00	\$3.48	\$1.70

Third, the Fund has made the breathtaking claim that Congress “expected” it to increase benefits as employer contribution rates rose, as illustrated in the chart above. (Dkt. 34-15, PageID

¹² Contribution rates through 2017 are from the Fund’s Primary Schedule rate increases under one of SCT’s collective bargaining agreements. See Dkt. 34-20, PageID 2967, 2976-77.

EXHIBIT J

EXHIBIT B

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

SC TRANSPORT INC. and	)	
STEELCASE, INC.,	)	
	)	
<i>Claimants,</i>	)	AAA Case No. 01-20-0000-4151
v.	)	
	)	Hon. Wayne R. Andersen (ret.)
CENTRAL STATES, SOUTHEAST AND	)	Arbitrator
SOUTHWEST AREAS PENSION FUND,	)	
	)	
<i>Respondent.</i>	)	

**THE FUND’S RESPONSE IN OPPOSITION TO
SCT’S MOTION FOR SUMMARY JUDGMENT**

This case involves the issue of which highest contribution rate the Fund was allowed to use in calculating the employer’s withdrawal liability payment schedule. 29 U.S.C. § 1085(g)(3) is not a blanket rule that excludes all post-2014 contributions rate increases from withdrawal liability calculations, as SCT argues.¹ Instead, as the Pension Benefit Guaranty Corporation (“PBGC”) has recognized in its proposed and final rulemaking, § 1085(g)(3) addresses only a specific situation in which an employer’s withdrawal liability would increase as a direct result of increased contribution rates that are used to help a plan reduce its underfunding. Consistent with this specific and limited purpose, § 1085(g)(3)(A) and (B) in sum provide that to the extent post-2014 contribution rate increases lead to an increase in future benefit accruals—in other words, the contribution rate increases fund the employees’ pension benefits as opposed to being reserved to correct underfunding—then the plan should include those contribution rate increases when calculating the employer’s withdrawal liability, unless such increases are accomplished by a plan amendment prohibited by § 1085(f)(1)(B).

¹ Unless indicated otherwise, all statutory citations herein refer to “29 U.S.C. § ____.” Also, unless indicated otherwise, capitalized terms and abbreviated terms (such as “SCT”) have the same meaning as they do in the Fund’s motion for summary judgment.

Applying that statutory text here, the contribution rate increases that SCT paid to the Fund from 2015 to 2018 went to funding increased benefit accruals (rather than being used solely to correct underfunding) due to the Fund's longstanding 1% benefit accrual formula. The rate increases were also not the result of a plan amendment prohibited under § 1085(f)(1)(B). Under § 1085(g)(3), therefore, all of SCT's post-2014 contribution rate increases are to be included in the withdrawal liability calculation because they were used to provide an increase in future benefit accruals permitted by § 1085(f)(1)(B). Accordingly, because the Fund properly included SCT's post-2014 contribution rate increases when calculating SCT's withdrawal liability payment schedule, the Fund's withdrawal liability assessment should be affirmed.

Alternatively, under § 1085(g)(3), the portion of SCT's post-2014 contribution rate increases that were attributable to funding additional benefit accruals resulting from those rate increases (as opposed to correcting underfunding) should be included in calculating the withdrawal liability payment schedule. Under this alternative reading of the statute, SCT's withdrawal liability payment schedule would be adjusted so that only the portion of post-2014 contribution rate increases that was attributable to funding contemporaneous benefit accruals is included in calculating that schedule. Either way, SCT's suggested approach of ignoring all of its post-2014 contribution rate increases in calculating the withdrawal liability payment schedule should be rejected.

Worse yet, SCT does not stop there in trying to shrink its withdrawal liability payments. Except for one other employer represented by the same counsel that represents SCT in this case, every other employer to arbitrate this issue against the Fund (including the ten employers who have taken the issue to an arbitration decision) has argued only that post-2014 contributions rates may not be used per § 1085(g)(3) in determining an employer's highest contribution rate, while at

the same time conceding that pre-2015 contribution rates *may* be used, since § 1085(g)(3) did not become effective until December 31, 2014.² However, SCT goes further and argues that the pre-2015 contribution rates it paid after the Fund enacted its Rehabilitation Plan in 2008—and even years of rates it paid *before* the Rehabilitation Plan was enacted—must be disregarded in calculating its withdrawal liability. SCT thus argues that the Fund was required to use a contribution rate in place as of 2004, almost 20 years ago.

This begs the question of why all of the other employers did not argue that any of their pre-2015 contribution rate increases should be excluded in calculating their withdrawal liability payments, even though this argument (if accepted) would have dramatically lowered the employers' withdrawal liability. As demonstrated in this brief, the answer is simple: the argument is not persuasive. If there is any debate to be entertained, it is whether all post-2014 contribution rate increases may be included in calculating SCT's withdrawal liability payment schedule since all such rate increases were used to fund contemporaneous benefit accruals or whether merely the portion of such rate increases that was used to fund such benefit accruals may be included. Either way, the Arbitrator should therefore deny SCT's summary judgment motion.

ARGUMENT

I. The Arbitrator should reject SCT's argument regarding the highest contribution rate and enter a ruling consistent with the Fund's primary or alternative argument.

A. SCT misstates the general rule stated in § 1085(g)(3)(A) by claiming that contribution rate increases are excluded merely because they are set forth in the rehabilitation plan, as the statute's express language excludes such rate increases only to the extent they are made in order to enable the plan to meet the requirement of the rehabilitation plan.

Under § 1399(c)(1)(C)(i)(II), the highest contribution rate at which an employer had an obligation to contribute during the 10 plan years ending with the year in which it withdrew is the

² The decisions issued in those ten arbitrations are attached to SCT's motion for summary judgment.

rate used to calculate an employer's withdrawal liability payments. The parties agree that the issue in this case is what highest contribution rate the Fund was allowed to use under § 1399(c)(1)(C)(i)(II) and the related provision of § 1085(g)(3) in calculating SCT's withdrawal liability payments. (SCT's MSJ at 5.)

SCT argues that § 1085(g)(3)(A) sets forth a general rule that pension funds must exclude post-2014 contribution rate increases "required by a rehabilitation plan" when determining the highest contribution rate for purposes of calculating withdrawal liability payments. (SCT's MSJ at 5-6.) Similarly, SCT argues that § 1085(g)(3)(A) requires the Fund to "exclude (*i.e.*, 'disregard') from the [highest contribution rate] '[a]ny' rate increases required by, or made to effectuate, its Rehab Plan." (SCT's MSJ at 6.) Yet, § 1085(g)(3)(A) does not say either of these things. Instead, it states that any post-2014 "increase in the contribution rate . . . that is *required or made in order to enable the plan to meet the requirement of the . . . rehabilitation plan* shall be disregarded . . . in determining the highest contribution rate under section 1399(c) of this title" § 1085(g)(3)(A) (emphasis added). As shown in the Fund's motion for summary judgment (Fund's MSJ at 17-19), the meaning of "requirement of the . . . rehabilitation plan" in § 1085(g)(3)(A) is clear, as Congress used the almost identical phrase "requirements of such rehabilitation plan" in § 1085(e)(3)(A)(ii). There, Congress referred to the "requirements" for plans to emerge from critical status or forestall possible insolvency. § 1085(e)(3)(A)(i)-(ii). "[I]dential words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quotations omitted)). As such, when Congress used the phrase "requirement of the . . . rehabilitation plan" in § 1085(g)(3)(A), it intended that phrase to have the same meaning as "requirements of such rehabilitation plan" in § 1085(e)(3)(A)(ii). Thus, when § 1085(g)(3)(A) states that contribution rate increases are to be included in determining an employer's highest

contribution rate unless the rate increases are “required or made in order to enable the plan to meet the requirement of the . . . rehabilitation plan,” the quoted language is not referring to all contribution rate increases paid under a pension fund’s rehabilitation plan. Instead, it is referring to contribution rate increases that help a pension fund meet the rehabilitation plan’s requirements as described in § 1085(e)(3)(A), *i.e.*, emerging from critical status or forestalling insolvency.

Thus, the correct reading of § 1085(g)(3)(A) is that to the extent post-2014 contribution rate increases go towards paying for the additional benefits or benefit accruals stemming from those rate increases (and provided that the additional benefits or benefit accruals do not stem from a rehabilitation plan amendment that is not compliant with § 1085(f)(1)(B) (*see* Part I.B below)), then those rate increases are to be included in calculating withdrawal liability payments. This is because to the extent such contribution rate increases go to funding contemporaneous benefit accruals—and, thus, do not go to reducing a pension fund’s unfunded vested benefits—the rate increases do not help a pension fund meet the requirements of its rehabilitation plan, *i.e.*, emerging from critical status or forestalling insolvency. Due to the Fund’s longstanding 1% benefit accrual formula (under which every contribution rate increase leads to additional benefit accruals), each post-2014 contribution rate increase has gone (at least to an extent) to funding additional benefit accruals resulting from the contribution rate increases themselves. Thus, while there can be a debate over whether § 1085(g)(3) allows the entirety of any post-2014 contribution rate increases that go to funding corresponding benefit accruals to be included in calculating an employer’s withdrawal liability payments (as under the Fund’s primary argument (*see* Fund’s MSJ at 11-16)) or whether only the portion of such rate increases that goes toward funding the corresponding benefit accruals is to be included (as under the Fund’s alternative argument (*see id.* at 16-23)),

SCT's position that the entirety of all post-2014 contribution rate increases must be wholly excluded is incorrect.

B. SCT's interpretation of § 1085(g)(3)(B) ignores the plain language of the section and indeed rewrites that language.

As discussed, § 1085(g)(3)(A) provides the general rule that “[a]ny increase in the contribution rate . . . that is required or made in order to enable the plan to meet the requirement of the . . . rehabilitation plan shall be disregarded in” calculating withdrawal liability payments under § 1399(c)(1)(C)(i). § 1085(g)(3)(A). The next subsection, § 1085(g)(3)(B), then sets forth a “special rule,” which states that any post-2014 “increase in the contribution rate . . . shall be deemed to be required or made in order to enable the plan to meet the requirement of the . . . rehabilitation plan except for increases in contribution requirements” for which “additional contributions are used to provide an increase in benefits, including an increase in future benefit accruals, permitted by . . . subsection (f)(1)(B).” § 1085(g)(3)(B). Subsection (f)(1)(B) provides as follows:

Special rules for before increases. A plan may not be amended after the date of the adoption of a rehabilitation plan under subsection (e) so as to increase benefits, including future benefit accruals, unless the plan actuary certifies that such increase is paid for out of additional contributions not contemplated by the rehabilitation plan, and, after taking into account the benefit increase, the multiemployer plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan.

§ 1085(f)(1)(B).

Here, SCT reads § 1085(g)(3)(B) as only allowing plans to include post-2014 contribution rate increases in the withdrawal liability payment calculation if those rate increases are used to fund additional benefits or benefit accruals implemented pursuant to an amendment and accompanying actuarial certification under § 1085(f)(1)(B). (SCT's MSJ at 8-9.) That is, SCT appears to be arguing that “permitted by subsection . . . (f)(1)(B)” in § 1085(g)(3)(B) really means

something akin to “pursuant to an amendment and accompanying actuarial certification that complies with subsection . . . (f)(1)(B).” But that is not what the plain language of § 1085(g)(3)(B)—“permitted by”—states. Further, in drafting other MPRA provisions, Congress used restrictive language of the type that SCT is reading into the statute, and Congress’ exclusion of such language in § 1085(g)(3)(B) undermines SCT’s interpretation. *See, e.g.*, § 1085(c)(5)(A)(i) (stating that “paragraphs (3)(B) and (4)(B) *shall apply only if* the plan’s actuary certifies” (emphasis added)). It is “generally presum[ed] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020). Thus, to paraphrase *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006), “Congress’ rejection of the very language that would have achieved the result” that SCT “urges here weighs heavily against [SCT’s] interpretation.” In short, SCT’s interpretation of § 1085(g)(3)(B) cannot be squared with the statute’s plain text. In contrast, the Fund’s interpretation of § 1085(g)(3)(B)—*i.e.*, contribution rate increases that go to funding benefit/benefit accrual increases pursuant to benefit accrual formulas that existed before a pension fund’s rehabilitation/funding improvement plan was enacted may be included in calculating withdrawal liability payments—aligns with § 1085(g)(3)(B)’s plain text.

SCT attempts to advance its position regarding § 1085(g)(3)(B) by raising a few textual arguments, but none of them are persuasive. First, SCT relies on an unreported case from the District of South Carolina to argue that “permitted by” in § 1085(g)(3)(B) should not be read to mean “not prohibited.” (SCT’s MSJ at 10 (citing *Carbone v. Zen 333 Inc.*, No. 16-cv-0108, 2016 WL 7383920, at *4-5 (D.S.C. Dec. 21, 2016).) In *Carbone*, the court analyzed the parties’ opposing interpretations of a South Carolina statute that contained the phrase “required or permitted to do so by state or federal law,” including the defendant’s interpretation that “permitted”

meant “not prohibited.” *Id.* at *3 (citing S.C. Code § 41-10-40(C)). The court stated that “both interpretations appear[ed] plausible” in light of the “plain meaning of the word ‘permitted.’” *Id.* at *5. However, given the specific context of that state statute and its remedial purposes for employees, the court disagreed with the defendant’s interpretation. *Id.* at *5.

The statute at issue in this case—§ 1085(g)(3)(B)—differs substantially from the state statute in *Carbone* because § 1085(g)(3)(B) does not require the court to conduct a searching inquiry for whether *any* “state or federal law” permits the increased benefit accrual, but only whether the increased benefit accruals are “permitted by” § 1085(f)(1)(B). Furthermore, unlike the defendant’s interpretation in *Carbone*, which would have undercut the remedial nature of the South Carolina statute, the Fund’s interpretation is fully consistent with the PPA’s and MPRA’s goal of improving the solvency of multiemployer pension funds, because that goal is furthered if pension funds can include benefit-bearing contribution rate increases in the withdrawal liability payment calculation. *See Trs. of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co.*, 692 F.3d 127, 130-131 (2d Cir. 2012) (emphasizing PPA’s goal of protecting multiemployer pension plans); *King v. United States*, 159 Fed. Cl. 450, 457 (Fed. Cl. 2022) (emphasizing MPRA’s goal of helping pension funds avoid insolvency); *see also* Methods for Computing Withdrawal Liability, 86 Fed. Reg. 1256, 1258, 1264 (Jan. 8, 2021) (attached as Ex. A to the Fund’s MSJ). In other words, to the extent the phrase “permitted by” in § 1085(g)(3)(B) can be considered ambiguous, the Fund’s (not SCT’s) interpretation should be adopted because the Fund’s interpretation aligns with PPA and MPRA’s goals. *See Reves v. Ernst & Young*, 494 U.S. 56, 74 (1990) (interpreting ambiguous statutory exception in accordance with the statutory purpose).

SCT also cites to *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983) (SCT’s MSJ at 10), which interpreted the phrase “permitted by law” in a debt collection statute (the FDCPA) in a

manner similar to that advocated by SCT. However, other courts construing the words “permitted by law” in the FDCPA statute have disagreed with *West*, with some interpreting the phrase as not requiring express permission from another statute, but instead only requiring that another statute “authorizes or allows, *in however general a fashion*, the fees or charges in question.” *Johnson v. Riddle*, 305 F.3d 1107, 1118 (10th Cir. 2002) (emphasis added); *see also Fox v. Ocwen Loan Servicing, LLC*, No. 20-cv-80060, 2020 WL 13075842, at *3 (S.D. Fla. Mar. 2, 2020) (stating that “[c]ourts disagree about the meaning of the phrase ‘permitted by law’” in the FDCPA). Here, at the very least, § 1085(f)(1)(B) permits “in a general fashion” the inclusion of post-2014 contribution rate increases that are not part of an amendment to a pension fund’s rehabilitation plan (such as the post-2014 benefit-bearing rate increases here that are the result of the Fund’s 1% benefit formula, which predates the Fund’s Rehabilitation Plan) because § 1085(f)(1)(B) is only concerned with prohibiting certain rehabilitation plan amendments.

Second, SCT argues that the benefit-bearing exception in § 1085(g)(3)(B) should be read narrowly to allow pension funds to include post-2014 contribution rate increases in the withdrawal liability payment calculation only if those rate increases were implemented via a § 1085(f)(1)(B) amendment because, as SCT argues, “statutory exceptions must be construed narrowly.” (SCT’s MSJ at 9 (citing *Maracich v. Spears*, 570 U.S. 48, 60 (2013), *Comm’r v. Clark*, 489 U.S. 726, 727 (1989), and *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).) But that interpretative canon should not be blindly followed when the specific words Congress used express its intent. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (explaining that canons are not conclusive if they “would conflict with the intent embodied in the statute Congress wrote”). Specifically, when Congress has used language that has a “plain meaning” and “aligns with [the statute’s] purpose,” then it is not appropriate to “limit the applicability of the exception in a way

that is contrary to the intent of the statute.” *Da Silva v. Attorney General*, 948 F.3d 629, 636-37 (3d Cir. 2020). Here, the words “permitted by” in § 1085(g)(3)(B) and the words “[a] plan may not be amended *after* the date of the adoption of a rehabilitation plan” in § 1085(f)(1)(B) (emphasis added), when read together, plainly mean that the exception in § 1085(g)(3)(B) that allows pension funds to include benefit-bearing rate increases in the withdrawal liability calculation only becomes inapplicable if the rate increases were implemented as part of a *post*-rehabilitation plan amendment prohibited by § 1085(f)(1)(B). §§ 1085(g)(3)(B) and (f)(1)(B) (emphasis added).

In any event, SCT’s insistence on the interpretative canon that “statutory exceptions should be construed narrowly” is ironic because the relevant provision of MPRA instructing pension funds to disregard certain contribution rate increases—§ 1085(g)(3)—is *itself* an exception to the general rule that plans should calculate the withdrawal liability payment schedule by simply using “the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.” § 1399(c)(1)(C)(i)(II). SCT’s broad reading of § 1085(g)(3) would all but swallow whole the rule of § 1399(c)(1)(C)(i)(II) for endangered-status and critical-status plans.

Thus, the phrase “permitted by” should be interpreted based on its ordinary meaning. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1750 (2020) (following the general rule that courts should construe words according to their ordinary meaning). As the Fund explained in its motion (Fund’s MSJ at 12), the ordinary meaning of “permitted” is “not prohibited.” Applying that ordinary meaning here, when § 1085(g)(3)(B) refers to future benefit accruals “permitted by” § 1085(f)(1)(B), the benefit accruals at issue should be considered “permitted” if they are not prohibited by § 1085(f)(1)(B). As such, certain types of benefit accruals—such as those resulting from a preexisting and longstanding benefit formula—are “permitted by” § 1085(f)(1)(B) because

they were not accomplished via a rehabilitation plan amendment prohibited by § 1085(f)(1)(B). In sum, the benefit-bearing rate increases that SCT paid after 2014 should be included in the withdrawal liability calculation based on the plain terms of MPPAA, as amended by MPRA.

C. The Arbitrator should follow *Pack Expo* or, alternatively, *Event Media* because the interpretations of the statute in those awards are more persuasive than the arbitration awards relied upon by SCT.

SCT also argues that relevant arbitral authority “overwhelmingly supports” its arguments. (SCT’s MSJ at 11.) But, SCT’s summary of those arbitration awards (SCT’s MSJ at 11-13) is misleading. Specifically, SCT notes that of the ten arbitration awards that have been issued to date relating to the highest contribution rate issue (*i.e.*, the issue of whether the Fund may include post-2014 contribution increases in the calculation of withdrawal liability payments) eight of those awards have held that the Fund may not do so. (SCT’s MSJ at 11.) However, of those eight decisions, four rejecting the Fund’s arguments were entered by the same arbitrator, Mark Irvings (*SourceOne*, *Valley Exposition*, *WestRock*, and *Silgan*). Similarly, two of the eight decisions rejecting the Fund’s arguments were entered by Arbitrator Elliott Shriftman (*Royal Ice Cream* and *Darling Ingredients*). In reality, then, only four arbitrators (Arbitrator Irvings, Arbitrator Shriftman, Judith La Manna in *Rail Terminal*, and Mark Grossman in *Freeman*) have rejected the Fund’s arguments, while two arbitrators (Timothy Hott in *Pack Expo* and Richard McNeil in *Event Media*) have adopted the Fund’s primary or alternative argument.

Further, although SCT relies heavily on Arbitrator Irvings’ decision in *WestRock* and Arbitrator Shriftman’s decision in *Royal Ice Cream*, these decisions are flawed. In *Westrock*, for instance, Arbitrator Irvings correctly found that § 1085(f)(1)(B) does not prohibit the post-2014 contribution rate increases at issue, as he did in his other three decisions. *See WestRock Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 01-19-0001-7005 (January 2, 2023),

at pp. 23-24. In line with the analysis set forth in Part I.B above, this finding should have meant that the Fund succeeds—*i.e.*, that the post-2014 contribution rate increases were to be included in determining the highest contribution rate used in calculating the employer’s withdrawal liability payments. However, Arbitrator Irvings incorrectly read § 1085(g)(3)(B)’s “permitted by subsection . . . (f)(1)(B)” language to mean that a plan may *only* include contribution rate increases if those increases were provided for in an amendment of the type described in § 1085(f)(1)(B). *See WestRock*, at pp. 23-24. As discussed above, § 1085(f)(1)(B) contains only a narrow prohibition, and if that narrow prohibition does not apply to an employer’s post-2014 contribution rate increases paid to the Fund (as Arbitrator Irvings correctly found), that means that § 1085(f)(1)(B) permits the increase in question. Arbitrator Irvings’ other three decisions (*Silgan*, *Valley Exposition*, and *SourceOne*) were incorrectly decided for the same reason.

Arbitrator Shriftman’s decision in *Royal Ice Cream* similarly strays from the text of the statute. Specifically, he found inapplicable § 1085(g)(3)(B)’s language that post-2014 contribution rate increases may be included in calculating an employer’s withdrawal liability payments where the corresponding “additional contributions are used to provide an increase in benefits, including an increase in future benefit accruals, permitted by subsection . . . (f)(1)(B).” Yet, in reaching that conclusion Arbitration Shriftman failed to analyze the text of § 1085(g)(3)(B) or engage with the Fund’s argument that, as used in § 1085(g)(3)(B), the phrase “permitted by subsection . . . (f)(1)(B)” means “not prohibited by subsection (f)(1)(B).” Indeed, instead of analyzing whether the employer’s post-2014 contribution rate increases were “permitted by” § 1085(f)(1)(B)—which is the relevant inquiry for purposes of that section—Arbitrator Shriftman focused on whether § 1085(f)(1)(B) *applied* to the employer’s post-2014 contribution rate increases. That is, just like SCT does here, Arbitrator Shriftman assumed that because the employer’s post-2014 contribution

rate increases were not due to an amendment and accompanying actuarial certification under § 1085(f)(1)(B)—and instead were due to the Fund’s long-standing 1% benefit accrual formula—that automatically meant that those contribution rate increases were not to be included under § 1085(g)(3)(B). *Royal Ice Cream Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 01-21-003-7893 (March 31, 2023), at p. 52; *accord Darling Ingredients, Inc. and Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 01-21-0017-1659 (May 12, 2023), at pp. 41-42. This assumption was incorrect because § 1085(g)(3)(B) refers to contribution rate increases that lead to “an increase in benefits, including an increase in future benefit accruals, permitted by subsection . . . (f)(1)(B),” and not, say, to contribution rate increases “pursuant to an amendment and accompanying actuarial certification that complies with subsection . . . (f)(1)(B).”

Arbitrator La Manna’s and Arbitrator Grossman’s decisions in *Rail Terminal* and *Freeman*, respectively, are also not persuasive. In discussing the highest contribution rate issue in *Rail Terminal*, Arbitrator La Manna did not engage with the Fund’s arguments and only dedicated one paragraph to the issue. *See Rail Terminal Servs., LLC v. Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 01-19-0002-4493 (Jan. 31, 2020), at p. 24. As for *Freeman*, Arbitrator Grossman summarily concluded that any contribution rate increase in accordance with a schedule set forth in a rehabilitation plan must have been made to meet the “requirement of . . . the rehabilitation plan” within the meaning of § 1085(g)(3)(A), without engaging with the Fund’s statutory arguments explaining why this was not the case. *Freeman Expositions, LLC v. Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 01-21-0003-5722 (Sept. 6, 2022), at p. 27. Accordingly, the *Rail Terminal* and *Freeman* decisions should not persuade the Arbitrator.

In contrast, for the reasons explained in the Fund’s motion, the decisions by Arbitrator McNeill in *Event Media* (Fund’s MSJ at 21-22) and Arbitrator Hott in *Pack Expo* (Fund’s MSJ at

15-16) both interpreted § 1085(g)(3) in sound fashion, albeit with slightly different results (one siding with the Fund’s primary argument and one siding with the Fund’s alternative argument). With respect to the *Event Media* decision, SCT suggests that Arbitrator McNeill relied on a “mistaken understanding” of § 1085(e)(6), but SCT does not explain what that alleged misunderstanding of the text was. (SCT’s MSJ at 12 n.6.) SCT also questions Arbitrator McNeill’s reliance on Congress’ policy considerations underlying MPPAA, PPA, and MPRA (*id.*), but SCT does not even attempt to argue that Arbitrator McNeill was incorrect when he noted that the overarching purpose of the relevant statutory provisions was “the security and stabilization of employee pensions.” *Event Media, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 01-21-0002-7024 (Oct. 6, 2022), at p. 8 (Ex. E to Fund’s MSJ). Further, although SCT is correct that policy considerations are generally not relevant in interpreting unambiguous statutory language, here (as shown in Parts I.A and I.B above), the plain language of § 1085(g)(3) supports the Fund’s position, not SCT’s position. And, to the extent the Arbitrator deems § 1085(g)(3)’s language ambiguous, the purpose of MPPAA, PPA, and MPRA (all three of which § 1085(g)(3) is a part of) should be used to help interpret that language. *See Reves*, 494 U.S. at 74.

As for *Pack Expo*, SCT suggests that Arbitrator Hott did not perform a careful analysis of the applicable law. But, as explained in the Fund’s motion (Fund’s MSJ at 15-16), Arbitrator Hott did analyze the applicable law, albeit succinctly. Specifically, in accepting the Fund’s argument, Arbitrator Hott noted that the Fund had not adopted any amendments “to increase benefits or future benefit accruals” since adopting its Rehabilitation Plan in 2008. *Pack Expo Servs., LLC v. Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 01-21-0002-7027 (Oct. 27, 2022), at p. 3 (Ex. D to Fund’s MSJ). He then went on to hold that because the “Fund’s benefit accrual formula” led to “additional benefit accruals,” the employer’s “post-2014 contribution rate increases were

benefit bearing in nature, thus meeting the requirements of the referenced statute.” *Id.* at pp. 5-6. That is, “the additional contributions resulting from [the employer’s] post-2014 contribution rate increases corresponded to ‘an increase in benefits, including an increase in future benefit accruals’ within the meaning of” § 1085(g)(3)(B). *Id.* at p. 6. Thus, as Arbitrator Hott correctly held, “the correct application of 29 U.S.C. § 1085(g)(3)(B) requires that all of” the employer’s “post-2014 contribution rate increases be included” in determining the employer’s “withdrawal liability payment schedule.” *Id.* at p. 5.

Finally, SCT’s speculative arguments about which employers the Fund has or has not settled with, and the reasons why (SCT’s MSJ at 12-13), are irrelevant to the issues presented here. *See* Fed. R. Evid. 408(a). In sum, the Arbitrator should adopt the Fund’s primary argument for the reasons stated in *Pack Expo* or, at the very least, adopt the Fund’s alternative argument for the reasons stated in *Event Media*.

D. The PBGC has interpreted § 1085(g)(3) consistent with the Fund’s alternative argument, and SCT’s assertions to the contrary are incorrect.

As noted in the Fund’s motion (Fund’s MSJ at 19-21), the PBGC, in proposing rules relating to § 1085(g)(3), stated that, for pension funds that have adopted rehabilitation plans, “certain contribution increases typically result in an increase in an employer’s withdrawal liability even though unfunded vested benefits are being reduced by the increased contributions.” 84 Fed. Reg. 2075, 2081 (Feb. 6, 2019) (Ex. B to Fund’s MSJ). The PBGC then went on to note that § 1085(g)(3) “mitigate[s] this effect on withdrawal liability by providing that . . . contribution increases that are required or made to enable the plan to meet the requirements of the . . . rehabilitation plan are disregarded in determining” withdrawal liability payment schedules. *Id.* In other words, under the PBGC’s interpretation, § 1085(g)(3) requires that a pension fund, in determining the highest contribution rate, exclude post-2014 contribution rate increases only to the

extent those increases go to reducing a pension fund's unfunded vested benefits (*i.e.*, to the extent they do not go towards funding the additional benefit accruals resulting from such increases).

Consistent with this interpretation, the PBGC's initial proposed rule in 2019 stated that, in determining an employer's highest contribution rate, pension funds could include post-2014 contribution rate increases to the extent it was actuarially determined that the resulting increased contributions were used to provide an increase in future benefit accruals. *Id.* at 2081. Notably, the PBGC also equated the non-benefit-bearing portion of post-2014 contribution rate increases with "required surcharges" and noted that § 1085(g)(2) has the same mitigating effect on those surcharges (which are never benefit bearing) as § 1085(g)(3) has on the non-benefit-bearing portion of post-2014 contribution rate increases (*i.e.*, the portion that goes to reducing a plan's underfunding). *Id.* at 2081.

SCT claims that the fact that the PBGC did not adopt its initial proposed rule "strongly support[s]" SCT's position regarding the meaning of § 1085(g)(3). (SCT's MSJ at 14.) Yet, nothing in the final rule that the PBGC implemented contradicts the PBGC's above interpretation of § 1085(g)(3). As noted in the Fund's motion, the final rule simply tracks the language of § 1085(g)(3) itself and, as such, the text of the final rule does not contain any interpretation of the statute. (Fund's MSJ at 20.) Further, although the PBGC did note that three commenters disagreed with the proposed rule, which commenters argued (as SCT does) that the proposed rule conflicted with the statute, the PBGC also noted that other commenters had complained that the proposed rule's requirement that the benefit-bearing portion of contribution rate increases be determined actuarially could impose undue expense on pension funds. 86 Fed. Reg. at 1265. Indeed, with respect to the final rule that the PBGC ultimately implemented, the PBGC explained that the final rule would reduce costs for multiemployer pension funds and even calculated approximately how

much the final rule would reduce costs for such funds. *Id.* at 1269-70. Given the PBGC's sensitivity to costs for distressed plans and the PBGC's likening of the portion of contribution rate increases that are used to reduce underfunding to non-benefit-bearing surcharges, the logical conclusion is that the PBGC adopted its final rule instead of adopting its proposed rule simply because of the additional costs that would be placed upon multiemployer pension funds by needing to actuarially determine the benefit-bearing portion under the proposed rule.

More importantly, as noted in the Fund's motion, the PBGC did not rescind its prior interpretation of § 1085(g)(3) when enacting its final rule. (Fund's MSJ at p. 20.) To the contrary, in adopting its final rule, the PBGC *maintained* that interpretation, *i.e.*, that pension funds are entitled to include in withdrawal liability payment calculations the portion of post-2014 contribution rate increases that goes toward funding a resulting benefit increase. 86 Fed. Reg. at 1264-65. As such, SCT's argument that the PBGC abandoned its interpretation is not correct.

II. The Arbitrator should reject SCT's argument that pre-2015 contribution rate increases should be disregarded in calculating the withdrawal liability payments.

A. SCT's contribution rate increases that became effective during 2008 through 2014 all arose under collective bargaining or related agreements.

As noted in the Fund's motion (Fund's MSJ at 23), although MPRA only applies to post-2014 contribution rate increases, SCT argues that the contribution rate increases that SCT paid between 2008 through 2014—including the \$258.00 weekly rate it paid at the beginning of this period and the \$290.00 weekly rate it paid at the end of that period—should also be disregarded from the calculation of its withdrawal liability payments. Based upon that incorrect argument, SCT argues that the highest contribution rate used to calculate its withdrawal liability payments should be a weekly rate of \$170.00 (a rate that was last paid in December 2004), or, in the alternative, a

weekly rate of \$258.00 (a rate that was last paid in July 2013). (SCT's MSJ at 3; *see also* the Fund's responses to SCT's statement of facts ("RSMF"), ¶¶ 6, 41; SMF, ¶ 6.)

By way of background, until MPRA became effective on December 31, 2014, the only statutory provision regarding an employer's "highest contribution rate" was § 1399(c)(1)(C)(i)(II). That section provides that a pension fund's calculation of the employer's withdrawal liability payments must be based, in part, on "the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs." § 1399(c)(1)(C)(i)(II). The phrase "obligation to contribute" is defined in § 1392(a) as including an "obligation to contribute arising . . . under one or more collective bargaining (or related) agreements"

Given this statutory language, SCT's argument that the \$170.00 or \$258.00 rate should be used in calculating its withdrawal liability payments cannot be correct. As an initial matter, because SCT withdrew from the Fund in 2018 (SMF, ¶¶ 19-21; RSMF, ¶ 70), SCT's withdrawal liability payments must be calculated using the highest contribution rate at which SCT had an obligation to contribute during 2009 through 2018. See § 1399(c)(1)(C)(i)(II). As shown in the Fund's motion (Fund's MSJ at 8-10, 11-23), that rate is either SCT's highest pre-withdrawal rate of \$342.00 (per the Fund's primary argument) or \$320.94 (per the Fund's alternative argument). But, even if the Arbitrator determines that no portion of SCT's post-2014 contribution rate increases may be included in calculating SCT's withdrawal liability payments per § 1085(g)(3)—and thus rejects both the Fund's primary and alternative arguments—SCT's proposed rates of \$170.00 or \$258.00 per week cannot be the correct highest contribution rate because the highest pre-2015 contribution rate that arose under SCT's collective bargaining or related agreements

within the meaning of § 1392(a) is the weekly rate of \$290.00. (RSMF, ¶¶ 54-55, 76; SMF, ¶¶ 6-7, 25.).

More specifically, all of SCT's contribution rate increases during the period of 2008 through 2014 arose under a collective bargaining or related agreement. (*See* SMF, ¶¶ 6-7.) From August 2007 through July 2013, SCT paid the weekly rate of \$258.00. (RSMF, ¶¶ 6, 41, 44; SMF, ¶ 6.) Then, effective August 1, 2013, SCT's weekly contribution rate increased from \$258.00 to \$273.50, and, effective August 1, 2014, SCT's weekly contribution rate increased from \$273.50 to \$290.00. (SMF, ¶ 6; RSMF, ¶ 55.) Both of these rate increases were agreed to and memorialized by SCT and the Union (*i.e.*, the bargaining parties) in the 2013-2018 Drivers' Addendum, through which document the bargaining parties agreed to be bound by the National Master Freight Agreement and a Supplemental Agreement thereto (subject to certain modifications). (SMF, ¶ 7; Ex. 1 to SMF (Sprau Aff.) at Exhibit D thereto (2013-2018 Drivers' Addendum) at CS007446; RSMF, ¶¶ 54-55; SCT's Ex. 25.) The Fund and SCT agree that the National Master Freight Agreement, the Supplemental Agreement, and/or the 2013-2018 Drivers' Addendum constitute a collective bargaining or related agreement. (*See* SCT's MSJ at 17; Fund's MSJ at 24-25; SMF, ¶ 6; RSMF, ¶¶ 54-55.) As such, to the extent the Arbitrator concludes that, under § 1085(g)(3), no portion of any post-2014 contribution rate increases may be included in calculating the withdrawal liability payments, the Arbitrator should hold that SCT's highest pre-2015 contribution rate of \$290.00 should be used in calculating SCT's withdrawal liability payments because this rate arose under a collective bargaining or related agreement and thus was includable under the plain language of §§ 1399(c)(1)(C)(i)(II) and 1392(a)

Despite admitting that the \$290.00 rate was set forth in a collective bargaining or related agreement within the meaning of § 1392(a) (SCT's MSJ at 17; RSMF, ¶¶ 54-55), SCT argues that

that rate did not “arise under” a collective bargaining or related agreement. Specifically, SCT argues that it and the Union had no other choice but to agree to the \$290.00 rate because that rate aligned with the rate increases provided for under the Primary Schedule of the Fund’s Rehabilitation Plan. (SCT’s MSJ at 17.) However, case law makes clear that this argument cannot withstand scrutiny. (*See* Fund’s MSJ at 26-29.)

For example, in *Board of Trustees of Western States Office & Professional Employees Pension Fund v. International Brotherhood of Electrical Workers Local 483*, the employer made the same argument that SCT makes here, *i.e.*, that pre-MPRA contribution rate increases that comply with a rehabilitation plan do not “arise under” a collective bargaining/related agreement and should be excluded from the withdrawal liability calculation. 506 F. Supp. 3d 1078, 1084-85 (D. Or. 2020). After providing an extensive explanation of the PPA’s structure, the court concluded that the “text of 29 U.S.C. § 1085(e) demonstrates that *the parties have choices* and that the inclusion of rehabilitation contribution rates in a [collective bargaining agreement] is subject to bargaining. The statutory language recognizes the distinction between negotiated inclusion of rehabilitation contribution rates and unilaterally imposed rates.” *Id.* at 1086 (emphasis added); *see also id.* at 1088-89 (“[S]ection 1085(e) consistently characterizes post-critical status decision-making regarding rehabilitation schedules as bargaining and as a process in which the employers have choices.”). For this reason, the court rejected the employer’s argument that it was stuck with the schedule of rates that the fund had provided because “an inability to ‘bargain down the rates’ does not mean that the adoption of a given rehabilitation contribution schedule within the [collective bargaining agreement] was not negotiated.” *Id.* at 1085. The employer could have selected a different schedule or exited the plan. *Id.* at 1088. Consequently, the court held that the

fund correctly determined that “pre-MPRA rehabilitation contribution rates included in [collective bargaining agreements] are included in withdrawal liability calculations.” *Id.* at 1090.

After the decision in *Western States Office & Professional Employees*, two more district court decisions reached the same conclusion. In *Association Services of Washington, Inc. v. Western Metal Industry Pension Fund*, a district judge in the Western District of Washington found that an employer’s rates did not “arise from the PPA” and were to be included in calculating the employer’s withdrawal payments, where the employer opted to contribute on a “Preferred Schedule” of contribution rate increases in the fund’s rehabilitation plan and had included those rate increases in an agreement with the fund that was related to a collective bargaining agreement. 563 F. Supp. 3d 1140, 1156 (W.D. Wash. 2021). In *Associated Services*, the court also emphasized the choices the employer had to either participate in accordance with one of the designated schedules, to not adopt a schedule (and pay surcharges), or to exit the plan. *Id.* at 1152-53. And later in 2021, a different district judge in the Western District of Washington sided with a pension fund on this issue, this time noting that the employer included the contribution rates in its collective bargaining agreements “on no fewer than three occasions.” *Bd. of Trs. of the Auto. Machinists Pension Tr. v. Peninsula Truck Lines, Inc.*, No. 21-cv-0064, 2021 WL 5987019, at *4 (W.D. Wash. Dec. 17, 2021).

In an attempt to manufacture some authority for its position, SCT cites to two earlier arbitration opinions—*Domtar* and *Commencement Bay* (SCT’s MSJ at 15, 17-18, 22)—in which employers prevailed. However, both of these cases are distinguishable. As explained in *Western States Office & Professional Employees*, the rates at issue in those two arbitrations “were not included in the [collective bargaining agreements]” and had been imposed by law after the bargaining parties had let their agreements expire without adopting a new agreement that included,

at a minimum, the default schedule of rates. 506 F. Supp. 3d at 1087. In fact, in *Commencement Bay*, which involved multiple issues, the arbitrator concluded that certain contributions that the employer and union had agreed to and which led to increased benefit accruals were properly included in the withdrawal liability calculation. 2017 WL 6025379, at 19 (AAA March 12, 2017).

In short, even if the Arbitrator determines that no portion of SCT's post-2014 contribution rate increases may be included in calculating SCT's withdrawal liability payments per § 1085(g)(3)—and thus rejects both the Fund's primary and alternative arguments—SCT's highest pre-2015 contribution rate of \$290.00 is what should be used in calculating the withdrawal liability payments.

For the sake of completeness, however, the Fund notes that, even if the Arbitrator determines that no portion of SCT's post-2014 contribution rate increases may be included in calculating SCT's withdrawal liability payments per § 1085(g)(3) *and* also determines that, despite the statutory and case law just discussed, the highest pre-2015 contribution rate of \$290.00 (or even the second highest pre-2015 contribution rate of \$273.50) may not be used in calculating SCT's withdrawal liability payments, then the Arbitrator should hold that the withdrawal liability payments should be calculated using the \$258.00 rate that SCT paid from August 2007 through July 2013, not the \$170.00 rate that it paid in 2004. There are two reasons for this. First, after the Rehabilitation Plan was enacted, SCT agreed to pay the \$258.00 rate under a collective bargaining/related agreement. Thus, that rate may be included in calculating SCT's withdrawal liability payments under §§ 1399(c)(1)(C)(i)(II) and 1392(a). Specifically, in September 2008, SCT and the Union executed a letter of understanding under which SCT agreed to contribute to the Fund at a rate of \$258.00 per week, effective August 1, 2008 through July 31, 2013. (RSMF, ¶ 51.) That letter of understanding stated that “[t]he agreement for contribution rates . . . ha[d] been

reached in the context of a collective bargaining agreement (2008 SC Transport Drivers' Addendum) between SC Transport and the [Union]." (See SCT's Ex. 22 (the Letter of Understanding).) Then, in November 2008, SCT and the Union executed the 2008 drivers' addendum, which set forth the \$258.00 rate. (See RMSF, ¶ 51; SCT's Ex. 23.) Thus, by SCT's own admission, the \$258.00 rate was set forth in a collective bargaining and/or related agreement within the meaning of § 1392(a).

Yet, SCT argues that the \$258.00 rate did not arise under a collective bargaining or related agreement because SCT and the Union were allegedly "coerced" and "forced" by the Fund to sign said agreement. (SCT's MSJ at 16.) That is not true. In 2008, the Fund provided SCT (and the Union) with the option of either adopting the \$258.00 rate for the next five years with the understanding that this would comply with the Primary Schedule of the Fund's Rehabilitation Plan or adopting the Default Schedule of the Rehabilitation Plan. (RSMF, ¶¶ 49-50, 53.) SCT also had the option to withdraw from the Fund. In short, SCT had options for how to address the pension issue, and they chose to remain a participating employer in the Fund and continue to pay the \$258.00 rate.

Second, SCT also paid the \$258.00 rate *before* entering into the 2008 agreement that SCT claims it was coerced into executing. (SCT's MSJ at 16; RSMF, ¶¶ 6, 41, 44, 46.) Specifically, SCT began paying that rate in August 2007 pursuant to rate increases set forth in the National Master Freight Agreement.³ (RSMF, ¶ 6; SCT's Ex. 3.) SCT asserts that those rate increases (including the rate increase to \$258.00) did not technically arise under that agreement because in 2003, SCT and the Union executed an addendum that stated that the rate during the term of that

³ SCT fails to mention that it also paid the following weekly contribution rates under the National Master Freight Agreement: \$194.00 from January 2005 through July 2005; \$218.00 from August 2005 through July 2006; and \$242.00 from August 2006 through July 2007. (RSMF, ¶ 6.)

agreement (September 20, 2003 through March 31, 2008) would stay at \$170 per week. (SCT's MSJ at 16.) However, that addendum was not effective because the Fund did not even receive it from SCT until 2008. (RSMF, ¶¶ 6, 44.) And, even if one assumes (incorrectly) that the addendum became effective when the Fund received it, SCT still had paid the \$258.00 rate under the National Master Freight Agreement for months prior to when the Fund had received the addendum (including from August 2007 through April 2008 (RSMF, ¶ 6; SCT's MSJ at 16)).

In any event, even if the Arbitrator determines that no portion of SCT's post-2014 contribution rate increases may be included in calculating SCT's withdrawal liability payments per § 1085(g)(3)—and thus rejects both the Fund's primary and alternative arguments—SCT's highest pre-2015 contribution rate of \$290.00 (not \$258.00 or \$170.00) is what should be used in calculating the withdrawal liability payments.

B. SCT's benefit-bearing contribution rate increases were not surcharges (which are never benefit-bearing) and thus should not be treated the same as surcharges when calculating withdrawal liability payments.

SCT also argues that its pre-2015 contribution rate increases should be disregarded because pre-MPRA surcharges and pre-MPRA contribution rate increases “have the same remedial purpose” and should thus be “treated the same.” (SCT's MSJ at 21.) More specifically, SCT argues that the intended purpose of both those surcharges and contribution rate increases were to help restore plan funding, and that, therefore, they are functionally indistinguishable. (*Id.*). That argument is wrong. Again, § 1399(c)(1)(C)(i)(II) states that a pension fund's calculation of the employer's withdrawal liability payment must be based on “the highest contribution rate at which the employer had an obligation to contribute . . . ,” and § 1392(a) defines “obligation to contribute” as an “obligation to contribute arising . . . under one or more collective bargaining (or related) agreements” Given this statutory language, it is not surprising that when the employers in the

three district court decisions discussed in Part II.A above made the same argument that SCT is now making (*i.e.*, equating surcharges and rehabilitation plan contribution rate increases), it was rejected each time. *See Associated Servs.*, 563 F. Supp. 3d at 1154-55; *W. States Office & Prof'l Emps.*, 506 F. Supp. 3d at 1086-87; *Peninsula Truck*, 2021 WL 5987019, at *5. As the court in *Peninsula Truck* noted, a “PPA-mandated surcharge occurs automatically,” while contribution rate increases, on the other hand, “are the subject of the collective bargaining process.” 2021 WL 5987019, at *5. That is, unlike surcharges, contribution rate increases are set forth in and arise under collective bargaining or related agreements within the meaning of § 1392(a). Further, surcharges are different from contribution rates in that they are based on a percentage of total employer contributions and are, thus, not a “rate” at all. 2021 WL 5987019, at *5. As a result, it makes no sense to consider surcharges when determining the employer’s “highest contribution rate” under § 1399(c)(1)(C)(i)(II).⁴

Additionally, it is undisputed that PPA-mandated surcharges can never be benefit bearing. *See* § 1085(e)(7)(E). (SCT’s MSJ at 21-22; Fund’s MSJ at 13.) Therefore, it makes sense that surcharges should not be included for purposes of calculating an employer’s withdrawal liability, even before Congress made that clear in MPRA, *see* § 1085(g)(2) (added as part of MPRA), as surcharges (like withdrawal liability) already go to reduce a pension fund’s unfunded vested benefits. In contrast, contribution rate increases can be (and in this case were) benefit-bearing; thus, including benefit-bearing contribution rate increases (or at the very least the benefit-bearing

⁴ As explained in *Western States Office & Professional Employees*, 506 F. Supp. 3d at 1087-88, Arbitrator Jaffe’s decision in *Commencement Bay* is also distinguishable on this point. Although Arbitrator Jaffe found that a pre-MPRA contribution rate increase should be disregarded for purposes of withdrawal liability, that rate increase was imposed by law after the bargaining parties had let their agreements expire without adopting a new agreement. *See Commencement Bay*, 2017 WL 6025379, at 18 (explaining that a rate increase was similar to a surcharge because it had been imposed automatically). No automatic surcharges or rate increases are at issue here.

portion of such increases) in the calculation of withdrawal liability payments is proper. The Third Circuit's decision in *Board of Trustees of the IBT Local 863 Pension Fund v. C & S Wholesale Grocers, Inc.* (cited in SCT's MSJ at 21), which excluded surcharges from the withdrawal liability calculation, is fully consistent with this approach. *See* 802 F.3d 534, 545 (3d Cir. 2015) ("[T]he statute distinguishes between surcharges and contribution rates.").

III. SCT's equitable and policy arguments should be rejected.

In support of SCT's argument that certain contribution rate increases should be excluded from the calculation of its withdrawal liability payment amount, SCT also makes equitable and policy arguments that are purportedly rooted in the policies behind MPPAA and Congress' desire to have employers pay their "fair share" of a plan's underfunding. (SCT's MSJ at 18-20.) SCT makes this appeal to equity to argue that its withdrawal liability has "more than double[d]" under the Fund's assessment. (*Id.* at 2, 5.) However, SCT does not even attempt to provide any calculations or data to establish that its withdrawal liability "more than doubled." SCT also insists that under Supreme Court precedent, withdrawal liability payments should approximate the employer's "regular (pre-rehabilitation plan) funding prior to withdrawal." (*Id.* at 20 (citing *Bay Area Laundry Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 196-97 (1997)).) However, *Ferbar* cannot possibly stand for that proposition because the Supreme Court decided that case nearly 10 years before the PPA was enacted and, thus, before the concept of "rehabilitation plans" ever existed.

SCT also suggests that it should only be responsible for the "unfunded liabilities attributable to its own employees," and not those of "withdrawn and bankrupt employers." (SCT's MSJ at 20.) This argument is flawed because it does not reflect the law. Specifically, some pension funds calculate withdrawal liability using the "direct attribution" method, which is based on the

withdrawing employer's specific impact on plan underfunding (the Fund employs this method for a specific type of "New Employer" under its plan document). *See* § 1391(c)(4). But, the "direct attribution" method is just one method of calculating withdrawal liability. For decades, the Fund has used another method, the "modified presumptive" method, for almost all of its withdrawn employers, including SCT. *See Cent. States, Se. & Sw. Areas Pension Fund v. Safeway, Inc.*, 229 F.3d 605, 608 (7th Cir. 2000) (explaining the Fund's use of the modified presumptive method set forth in § 1391(c)(2), (c)(5)(C)). This "modified presumptive" method is set forth in the relevant statute, is detailed in the Fund's Plan, and has also been explained in case law. Given this, SCT cannot seriously argue that it is unfair that the Fund uses this calculation method or that SCT's withdrawal liability should be subject to a different calculation method. In sum, the Arbitrator should reject SCT's equity and policy arguments.

IV. SCT's argument that the Fund's Rehabilitation Plan unlawfully increased benefits finds no support in the statute and is devoid of merit.

As discussed in the Fund's motion (Fund's MSJ at 29), despite SCT's voluntary participation in the Fund for more than a decade after the Fund was first certified as being in "critical status," SCT now cries foul at the Fund's preservation of its longstanding 1% benefit accrual formula in its Rehabilitation Plan. (SCT's MSJ at 22-27.) The Arbitrator should reject this argument as immaterial to the narrow issues of the determination and calculation of the highest contribution rate and withdrawal liability payments at issue in this Arbitration.

More specifically, this is not the right forum for an employer's complaints about allegedly "unlawful" features of a pension fund's rehabilitation plan. (*See* Fund's MSJ at 29.) As discussed in the Fund's motion (*id.*), withdrawal liability arbitrations such as this one are governed by § 1401 and its applicable regulations. Section 1401(a) limits withdrawal liability arbitrations to disputes concerning determinations made under §§ 1381 through 1399 (*i.e.*, the MPPAA sections

addressing withdrawals and the calculation of withdrawal liability). Because SCT's challenge to the legality of the Fund's 1% benefit formula and the Rehabilitation Plan does not directly challenge the Fund's withdrawal liability determination under §§ 1381 through 1399, that challenge should be ignored as outside the jurisdiction of this Arbitration. If SCT had concerns about the Fund's benefit formula or Rehabilitation Plan during the time it was a contributing employer, it could have made that known to the Fund's employer-side trustees (as the Fund's trustees are composed of employer-side and union-side trustees). Or, it could have possibly sought relief in court. *See* § 1132(a)(10)(B) (providing standing to contributing employers for certain PPA-related disputes).

But even if any of SCT's arguments about the Fund's benefit formula are arbitrable, they are wrong. First, SCT seems to argue that the PPA required pension funds to adopt *both* revised benefit structures and revised contribution structures. (SCT's MSJ at 23-27.) Yet, as noted in the Fund's motion (Fund's MSJ at 30), the PPA did not require pension funds in critical status to do both—rather, the PPA required these pension funds to adopt “revised benefit structures, revised contribution structures, *or both*” to attempt to help increase their funding levels. § 1085(e)(1)(B)(i) (emphasis added); *see also* § 1085(e)(3)(A)(i) (stating that rehabilitation plans could include “reductions in future benefit accruals *or* increases in contributions, if agreed to by the bargaining parties, *or any combination* of such actions” (emphasis added)); § 1085(e)(1)(B)(i) (pension funds to provide bargaining parties with options including “1 or more schedules showing revised benefit structures, revised contribution structures, or both.”). In other words, Congress did not require benefit accruals to be reduced as part of a rehabilitation plan. Rather, Congress gave plans flexibility to formulate a rehabilitation plan, and plan sponsors could use their “reasonably

anticipated experience and reasonable actuarial assumptions” in adopting the rehabilitation plan.
§ 1085(e)(3)(A)(i).

SCT cites to dicta to suggest that pension funds are required to *both* reduce benefits and increase contributions in their rehabilitation plans. (SCT’s MSJ at 24-25.) But, those statements are inconsistent with the actual text of the PPA. For example, SCT cites *C & S Wholesale Grocers*, 802 F.3d at 538 (3d Cir. 2015) (SCT’s MSJ at 25), in which the court stated that rehabilitation plans “must set forth new schedules of reduced benefits and increased contributions . . .” However, in making that statement, the court was quoting dicta from another case, *Honerkamp*, 692 F.3d at 131 (2d Cir. 2012) (also cited in SCT’s MSJ at 25), in which the court was simply attempting to summarize the language of § 1085(e)(3)(A). As discussed above, § 1085(e)(3)(A)(i) plainly provides that a rehabilitation plan “may include reductions in plan expenditures . . . , reductions in future benefit accruals *or*”—not *and*—“increases in contributions” (emphasis added). § 1085(e)(3)(A)(i). Thus, the court in *Honerkamp* simply made a mistake in summarizing the statute. The court in another case cited by SCT, *Bakery & Confectionary Union & Industry International Pension Fund v. Just Born II, Inc.*, 888 F.3d 696, 698 (4th Cir. 2018) (SCT’s MSJ at 24), made a similar mistake in summarizing § 1085(e)(3)(A). Simple mistakes in dicta do not change the statute’s plain text, and that text is clear that a pension fund’s rehabilitation plan can decrease benefits or increase contributions but need not do both.

Thus, contrary to SCT’s suggestion otherwise (SCT’s MSJ at 23-27), the Fund’s Rehabilitation Plan complies with the PPA because it provides for revised contribution structures, including through the Primary Schedule (which, in line with § 1085(e)(1)(B)(i), provides for annual contribution rate increases at specified percentages) (SMF, ¶ 14.) Similarly, the Default Schedule provides for both annual contribution rate increases of 4% compounded annually, and

also provides for revised benefit structures under § 1085(e)(1)(B)(i). (*Id.*, ¶¶ 15-16.) Ironically, then, although SCT misinterprets the statute as requiring both revised benefit structures and revised contribution structures, the Fund’s Rehabilitation Plan does in fact contain both.

Additionally, instead of reducing its 1% benefit formula with the adoption of its Rehabilitation Plan, the Fund kept the same benefit formula in place at 1% of total contributions. (RSMF, ¶ 16; SMF, ¶ 9.) Not only was this permissible under the PPA; Congress expected plans to maintain benefit accrual levels in this fashion. Specifically, under § 1085(e)(6), Congress placed limitations on plans’ reductions to participants’ benefit accrual rates. That subsection states that a plan’s default schedule (typically the lowest level of benefits offered by the plan) “shall not reduce the rate of future accruals below . . . a monthly benefit . . . equal to 1 percent of the contributions required to be made with respect to a participant,” unless a “lower” accrual rate was in effect on the “first day” of the initial critical year. § 1085(e)(6)(A)-(B). In other words, because the “1 percent of the contributions” level was already in effect on January 1, 2008, the Fund could not have lowered its rate below 1% in its Default Schedule without running afoul of this PPA subsection.

Although SCT cites § 1085(e)(6), SCT gets its meaning wrong. (SCT’s MSJ at 27.) SCT argues that the Fund was required under § 1085(e)(6) to “freeze[] contributions that can be considered for benefit accruals under the default schedule at the contribution rates in effect before a rehabilitation plan is adopted.” (SCT’s MSJ at 27.) Yet, § 1085(e)(6) says nothing of the sort, as it is focused on the level of the *benefit accrual rate*, not the *contribution rate*. Specifically, § 1085(e)(6) states that “[a]ny reduction in the rate of future accruals under the default schedule . . . shall not reduce the rate of future accruals below . . . a monthly benefit . . . equal to 1 percent of the contributions required to be made with respect to a participant” Further, although the next

clause of § 1085(e)(6)(A) contains the phrase “as of the first day of the initial critical year,” that clause is separate and refers to the *accrual rate* in place as of that first day, not the *contribution rate* in effect then.

In any event, SCT’s argument disregards the fact that the “1 percent of the contributions” level was the *floor* (and not a maximum cap) set by Congress in § 1085(e)(6)(A). And, SCT also ignores that, given the Fund’s 1% benefit accrual formula, both the Primary and the Default Schedules of the Fund’s Rehabilitation Plan provided for benefits at the lowest possible level allowed by Congress. Thus, SCT’s argument that the benefit accruals provided under the Rehabilitation Plan were too high (and thus should have been “frozen” or “suspended”) misses the mark.

Regardless, SCT attempts to support its flawed argument by stating that REDACTED FOR
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initial matter, however, and, ignoring the fact that SCT’s understanding of § 1085(e)(6) is incorrect,⁵ REDACTED FOR CONFIDENTIALITY
PURPOSES immaterial because the Fund’s process of developing and/or designing a rehabilitation plan is not relevant to the statutory questions at issue in this Arbitration. Indeed, SCT previously sought discovery concerning the development/drafting of the Fund’s Rehabilitation Plan, but the Arbitrator denied SCT that discovery because it is irrelevant. (See September 22, 2022 Discovery Order and March 24, 2023 Discovery Order.)

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SCT is also attempting to do an end-around of the discovery ruling that was issued by the Arbitrator in this Arbitration, in which the Arbitrator found that discovery relating to the Fund's process of drafting the Rehabilitation Plan would be irrelevant.

Finally, SCT's related arguments about the Fund being an "outlier" are not based on admissible evidence and are irrelevant in any event. (*See* SCT's SMF at 27-29.) The Fund's benefit formula is not unique among multiemployer pension plans. (*See* RSMF ¶ 87.) SCT also claims to have surveyed a "large number" of rehabilitation plans, "63 in total," and has summarized them in a chart accompanying its brief. (SCT's MSJ at 28; SCT's SMF, ¶ 86; SCT's Exhibit 37.) However, SCT provides no admissible evidence (by affidavit or otherwise) explaining how or why it selected those 63 rehabilitation plans or why it chose to omit other rehabilitation plans. *See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 382 (7th Cir. 2008) (a summary under Federal Rule of Evidence 1006 "requires a proper foundation as to the admissibility of the material that is summarized and a showing that the summary is accurate" (quotations omitted)). An identification of all rehabilitation plans is also not part of the summary judgment record. *See* Fed. R. Evid. 106. And, further, the cited rehabilitation plans involve many complex provisions and

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schedules, and the alleged summary in SCT's simplified exhibit misstate and misconstrue the terms of those rehabilitation plans. (RSMF ¶¶ 86-87.) Indeed, a cursory review of the exhibit found multiple errors. (RSMF ¶ 87.) Accordingly, the chart is not relevant or admissible. *See* Fed. R. Evid. 401; *Judson Atkinson Candies*, 529 F.3d at 382.

Moreover, a discussion of whether other plans reduced benefit accruals necessarily should consider the level at which those other plans provided benefits prior to any benefit cut. If, for example, a plan reduced its benefit accrual rate to 1% of contributions in its rehabilitation plan (*i.e.*, the floor set forth in § 1085(e)(6)), then the plan could be characterized as reducing benefits, even though its benefit formula is the same as the Fund's.

But, ultimately, all of this is beside the point. The issues in this Arbitration are legal issues involving MPPAA. What other pension funds have chosen to do in their rehabilitation plans based on their own unique plan experience, taking into account their own unique employers and bargaining units, is irrelevant to resolving those legal issues. SCT's arguments about the Fund's benefit formula and other pension funds are merely distractions that deflect attention away from the fact that SCT chose, in multiple collective bargaining sessions, to contribute to the Fund at annual rates that would provide its employees with the standard 1% benefit accrual rate. Those annual contribution rate increases should be included in the withdrawal liability calculation.

V. The Ciner Report and the data contained therein is admissible and undisputed, SCT's expert does not even purport to claim that the Ciner Report is unsound, and SCT provides no support for its argument that the Ciner Report should be ignored.

SCT also argues that the report of the Fund's actuarial expert, Daniel Ciner, should be stricken. (SCT's MSJ at 29-32.) SCT first argues that the Ciner Report is irrelevant to the issues in this Arbitration. (SCT's MSJ at 30.) This argument fails because the Ciner Report is relevant—specifically, the report calculates the portions of SCT's post-2014 contribution rate increases that

are attributable to funding contemporaneous benefit accruals and thus that may be included in calculating the withdrawal liability payments under the Fund's alternative argument. SCT cites to Arbitrator Irving's opinion in *Westrock* (SCT's MSJ at 30), but the only reason Arbitrator Irvings found Mr. Ciner's report to be irrelevant is because Arbitrator Irvings rejected the Fund's alternative argument based upon an erroneous interpretation of the statute. *See WestRock*, AAA Case No. 01-19-0001-7005 at p. 27.

SCT also suggests that the Ciner Report is irrelevant because "it was not made part of the liability assessment being challenged in this case." (SCT's MSJ at 30.) Yet, the Ciner Report would not have been a part of SCT's originally assessed withdrawal liability because the report's purpose is to support the alternative argument advanced by the Fund in response to SCT's challenge to the highest contribution rate that the Fund used to calculate its withdrawal liability payments. The withdrawal liability assessment was calculated based on the Fund's primary argument, not its alternative argument.

SCT then argues that the Ciner Report should be stricken because "expert testimony is unnecessary when the parties' dispute concerns solely a question of statutory interpretation, as is the case here." (SCT's MSJ at 30.) But, the Ciner Report contains no interpretations (or even purported interpretations) of the statute. Rather, it calculates the benefit-bearing portions of the post-2014 contribution rate increases for purposes of the Fund's alternative argument.

SCT also argues that the Ciner Report is "obsolete and highly suspect" because Mr. Ciner's "calculations and assumptions fail to account for the \$35.8 billion in [Special Financial Assistance("SFA")] the Fund received from the PBGC" in early 2023. (SCT's MSJ at 31.) But SCT does not even attempt to explain how the SFA the Fund received in 2023 would affect the cost of providing the benefit accruals to the Fund's participants from 2015 through 2018. SCT also

fails to cite to any legal authority, or any regulations implemented by the PBGC with respect to the SFA, that support any argument that the Fund's receipt of the SFA somehow affects the conclusions set forth in the Ciner Report or the legal issues in this case. If SCT had any honest disputes with respect to the validity of the Ciner Report, then SCT's retained actuarial expert would have provided testimony to refute Mr. Ciner's assumptions and calculations. Not surprisingly, SCT's expert report did not even contain a hint of such testimony. Instead, the only admissible evidence in connection to the Fund's alternative argument is the Ciner Report itself, which report explains why Mr. Ciner calculated the relevant figures in the way he did.

Lastly, SCT argues that Mr. Ciner, as an employee of the Fund's enrolled actuary is biased. (SCT's MSJ at 32.) SCT's argument is pure speculation, and again, SCT fails to cite to anything other than the mere fact that Mr. Ciner works for the Fund's enrolled actuary, which is paid by the Fund. SCT's argument boils down to the assertion that no witness testifying on behalf of an entity from whom the witness receives compensation can be trusted to provide honest testimony. But that is plainly not the case. And, if SCT truly disputed the data set forth by Mr. Ciner, SCT's retained actuarial expert would have testified accordingly. He has not. Thus, the Arbitrator should not strike the Ciner Report.

VI. SCT is not entitled to a refund.

SCT seeks an order requiring the Fund to refund all overpayments made by SCT with interest. (SCT's MSJ, cover page). Initially, perfunctory and undeveloped arguments are waived. *See, e.g., Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005). Here, SCT requests a refund but makes no argument for why it is allegedly entitled to a refund (as opposed to a credit) in the event SCT were to prevail in this Arbitration. Thus, SCT has waived any such argument.

Further, SCT has not made any overpayments, as the Fund's calculation of the monthly withdrawal liability payments is correct. In any event, SCT is not entitled to a refund even if it prevails in this Arbitration. Rather, § 1401(d) provides that withdrawal liability payments "shall be made by an employer . . . until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments . . . arising out of the decision of the arbitrator with respect to the determination." Thus, under the statute, even if the Arbitrator were to find that the Fund's calculation of the withdrawal liability payments has been overstated, SCT would not be entitled to a return of any excess amounts that it has overpaid. Instead, any such excess (and applicable interest thereon) would be applied to the future payments as determined by the Arbitrator.

Further, although the regulations give the Arbitrator the option of issuing a refund as opposed to providing a credit, a credit (not a refund) would be the sensible approach here if SCT prevails. Specifically, 29 C.F.R. § 4221.8(a)(2) provides that, where an arbitrator determines an employer has made withdrawal liability overpayments, the award may either order the fund to refund the payments or adjust the post-award payments downward. Here, providing a credit as opposed to a refund is the sensible approach because even if SCT prevails, the amount of its future withdrawal liability payments would far exceed the amount of its alleged overpayments. For example, assuming that the amount of the monthly withdrawal liability payments should be \$64,716.31 (the monthly payment amount using the \$290.00 rate (SMF, ¶ 26), which is the rate that would apply if the Arbitrator rejects the Fund's primary and alternative arguments) and not \$76,320.61 (as the Fund contends), then, through December 2023, SCT will have overpaid \$615,027.90 ($\$76,320.61 - \$64,716.31$) x 53 (the number of payments made through December 2023). This alleged overpayment pales in comparison to \$12,101,949.97, which is the amount of

SCT's remaining 187 payments (*i.e.*, from January 2024 through July 2039) using \$64,716.31 as the payment amount. Accordingly, even if SCT prevails, it should not be awarded a lump sum refund with interest. And, ultimately, SCT's request for a refund is moot because the Fund properly calculated SCT's monthly payment amount.

VII. SCT is not entitled to its attorneys' and costs.

SCT also seeks an award of its attorneys' fees and costs. (SCT's MSJ, cover page.) Yet, SCT makes no argument in support of its request. Thus, SCT has waived any such argument. *See, e.g., Estate of Moreland*, 395 F.3d at 759.

In any event, to be entitled to attorneys' fees and costs, SCT must not only prevail in this Arbitration, but it must also show that the Fund has contested this Arbitration in bad faith. *See* 29 C.F.R. § 4221.10(c). Courts view "bad faith" from an objective standpoint, which turns on whether the party has followed the requirement under Federal Rule of Civil Procedure 11 that the party's position is "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2), (c)(1); *see In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (discussing the objective standard for "bad faith" in the context of Federal Rule 11).

Even if SCT had raised some form of argument regarding fees and costs, the Fund has shown throughout this Arbitration that there is ample support for the Fund's position in the text of the provisions at issue, in other related provisions, and in an overall examination of the relevant statute. Further, as noted by Arbitrator Irvings in *Westrock*, the fact that Fund prevailed in *Pack Expo* and was partially victorious in *Event Media* forecloses any legitimate argument that the Fund is acting in bad faith. *WestRock*, AAA Case No. 01-19-0001-7005, at pp. 28-29. And in any event,

SCT's request for fees and costs is moot because the Fund properly calculated SCT's monthly withdrawal liability payment amount.

CONCLUSION

For the foregoing reasons, the Fund requests that the Arbitrator deny SCT's motion for summary judgment and grant the Fund's motion for summary judgment.

Respectfully submitted,

/s/ Lois J. Yu

Lois J. Yu (ARDC #6321772)

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October 20, 2023

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Lois J. Yu, one of the attorneys for Respondent, hereby certify that on October 20, 2023, I caused the foregoing *The Fund's Response in Opposition to SCT's Motion for Summary Judgment* to be served via email on counsel for Claimants SC Transport, Inc. and Steelcase Inc., as follows:

Brett Swearingen (swearingenb@millerjohnson.com)

Keith E. Eastland (eastlandk@millerjohnson.com)

Attorney for Claimants

/s/ Lois J. Yu

Lois J. Yu (ARDC #6321772)

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October 20, 2023

EXHIBIT K

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

CRANDELL BROS. TRUCKING CO.,	)	
	)	
<i>Claimant,</i>	)	AAA Case No. 01-23-0005-7913
v.	)	
	)	Arbitrator Keith D. Greenberg
CENTRAL STATES PENSION FUND,	)	
	)	
<i>Respondent.</i>	)	

**THE FUND'S RESPONSES TO CLAIMANT'S
FIRST SET OF INTERROGATORIES**

Respondent Central States, Southeast and Southwest Areas Pension Fund (the "Fund"), hereby responds to Claimant's First Set of Interrogatories to the Fund (the "Interrogatories").

GENERAL OBJECTIONS AND RESERVATION

1. The Fund objects to the Interrogatories to the extent they request information or documents protected from discovery by the attorney-client privilege, work product doctrine, and/or any other applicable privilege or immunity.
2. The responses and objections contained herein are made on the basis of information presently known to the Fund and are made without waiving any objections. The Fund reserves its right to supplement or amend its responses, and to assert additional objections, in accordance with applicable rules.

RESPONSES TO INTERROGATORIES

1. Identify the person(s) from the Fund who assisted in answering, or providing information to answer, these interrogatories.

RESPONSE: The Fund identifies the following individual who assisted in answering the Interrogatories:

because the time period for which the information is sought is vague and undefined, as it is unclear whether Crandell is seeking communications prior to the passage of the two acts, post-passage communications, or both.

14. State the Fund's position as to whether the increase in benefit accruals provided under the Fund's Rehabilitation Plan is an "increase [in] benefits" within the meaning of Section 305(f)(1)(B) of ERISA.

RESPONSE: The Fund objects to the phrase "the increase in benefit accruals provided under the Fund's Rehabilitation Plan" as vague and ambiguous. The Fund assumes that the phrase refers to the increases in benefit accruals resulting from the percentage-based contribution rate increases set forth in the Rehabilitation Plan's Primary Schedule.

Subject to and without waiving the foregoing objection, the Fund states that the increases in benefit accruals provided to participants as a result of contribution rate increases under the Primary Schedule were not "increase[s] [in] benefits" within the meaning of 29 U.S.C. § 1085(f)(1)(B).

15. State the Fund's position as to whether the increase in benefit accruals provided under the Fund's Rehabilitation Plan is an "increase in benefits" within the meaning of Section 305(f)(3)(B) of ERISA.

RESPONSE: The Fund objects to the phrase "the increase in benefit accruals provided under the Fund's Rehabilitation Plan" as vague and ambiguous. The Fund assumes that the phrase refers to the increases in benefit accruals resulting from the percentage-based contribution rate increases set forth in the Rehabilitation Plan's Primary Schedule.

Subject to and without waiving the foregoing objection, the Fund states that the increases in benefit accruals provided to participants as a result of contribution rate increases under the Primary Schedule were not an "increase in benefits" within the meaning of 29 U.S.C. § 1085(f)(3)(B).

16. State the Fund's position as to whether the increase in benefit accruals provided under the Fund's Rehabilitation is an "increase in benefits" within the meaning of Section 305(g)(3)(B) of ERISA.

RESPONSE: The Fund objects to the phrase "the increase in benefit accruals provided under the Fund's Rehabilitation Plan" as vague and ambiguous. The Fund assumes that the phrase refers to the increases in benefit accruals resulting from the percentage-based contribution rate increases set forth in the Rehabilitation Plan's Primary Schedule.

Subject to and without waiving the foregoing objection, the Fund states that the increases in benefit accruals provided to participants as a result of contribution rate increases under the Primary Schedule are "increase[s] in benefits" within the meaning of 29 U.S.C. § 1085(g)(3)(B).

Respectfully submitted,

/s/ Lois J. Yu

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May 24, 2024

ATTORNEY FOR RESPONDENT

CERTIFICATION

I, Andrew M. Sprau, in my capacity as Group Manager of Operations Accounting for Central States, Southeast and Southwest Areas Pension Fund, state upon oath that I have read the foregoing responses to the Interrogatories and believe that the responses are truthful and accurate to the best of my knowledge.



Andrew M. Sprau
Group Manager, Operations Accounting
Central States, Southeast and Southwest
Areas Pension Fund

Subscribed and sworn to before me,
a Notary Public, this 24th day of
May, 2024



Notary Public



EXHIBIT L

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

SC TRANSPORT, INC. and	)	
STEELCASE, INC.,	)	
	)	
<i>Claimants,</i>	)	AAA Case No. 01-20-0000-4151
v.	)	
	)	Hon. Wayne R. Andersen (ret.)
CENTRAL STATES, SOUTHEAST AND	)	Arbitrator
SOUTHWEST AREAS PENSION FUND,	)	
	)	
<i>Respondent.</i>	)	

**THE FUND’S RESPONSES TO CLAIMANTS’
SECOND SET OF INTERROGATORIES**

Respondent Central States, Southeast and Southwest Areas Pension Fund (the “Fund”), hereby responds to Claimants’ Second Set of Interrogatories to the Fund (the “Interrogatories”).

GENERAL OBJECTION AND RESERVATION

1. The Fund objects to the Interrogatories, including their Definitions and Instructions, to the extent they request information or documents protected from discovery by the attorney-client privilege, attorney work-product doctrine, and/or any other applicable privilege or immunity.
2. The answers and objections contained herein are made on the basis of information presently known to the Fund and are made without waiving any objections. The Fund reserves its right to supplement or amend its answers, and to assert additional objections, in accordance with applicable rules.
3. All of the answers below are made subject to and without waiving the General Objection and Reservation.

RESPONSES TO INTERROGATORIES

15. With regards to the Fund's contention that the increases in contributing employers' contribution rates required under its rehabilitation plan were "permitted by subsection . . . [305](f)(1)(B)" of ERISA (quoting Section 305(g)(3)(B) of the statute)—

- a. state with specificity all factual and legal bases supporting or refuting the contention,
- b. identify all facts and documents that refer to, relate to, support, or refute each such factual and/or legal bases,
- c. identify all persons with knowledge of any such factual bases, with an explanation of the nature of each such person's knowledge, and
- d. identify all persons substantively involved in the Fund's determination that the increases in contributing employers' contribution rates required under its rehabilitation plan were "permitted by subsection . . . (f)(1)(B)," with an explanation of the nature of each such person's involvement.

RESPONSE: The Fund objects to Interrogatory No. 15, specifically subparts (b) through (d), to the extent it asks the Fund to identify the substance of any documents or communications protected by the attorney-client privilege or work product protection. The Fund also objects to subpart (b) of the Interrogatory as both overbroad and unduly burdensome (and, therefore, not proportional to the needs of this case) because to fully respond to subpart (b), the Fund would arguably have to identify every legal authority (*e.g.*, cases) that supports or refutes its position, which would require the Fund to do Claimants' legal research. The Fund is not required to do legal research for Claimants. *See Ferruccio v. Davis*, No. 19-cv-346, 2020 WL 6706354, at *3 (E.D.N.C. Nov. 13, 2020). Further, "requiring a party to produce relevant legal authorities goes beyond the permissible scope of a contention interrogatory and constitutes protected work product." *Gilmore v. City of Minneapolis*, No. 13-cv-1019, 2014 WL 4722488, at *6 (D. Minn. Sept. 22, 2014).

The Fund also objects to subpart (d) of the Interrogatory as irrelevant and not proportional to the needs of this Arbitration, as the identity of the persons involved in developing the Fund's

contribution rate. In addition, the Fund also objects to the Interrogatory to the extent it seeks any information protected by the attorney-client privilege or work product protection.

22. State the Fund's position as to whether the increase in benefit accruals provided under the Fund's rehabilitation plan is an "increase in benefits" within the meaning of Section 305(g)(3)(B) of ERISA.

RESPONSE: The Fund notes that section 305(g)(3)(B) was added as a part of MPRA and did not become effective until December 31, 2014. From that date onwards, the additional benefit accruals that accrued as a result of SC Transport's contribution rate increases were "increase[s] in benefits" within the meaning of 29 U.S.C. § 1085(g)(3)(B) because part (g)(3)(B) expressly states that an "increase in benefits" includes an "increase in future benefit accruals." 29 U.S.C. § 1085(g)(3)(B).

23. State the Fund's position as to whether the increase in benefit accruals provided under the Fund's rehabilitation plan increased the Fund's long-term underfunding, decreased the Fund's long-term underfunding, or had no effect when compared to a baseline of freezing benefit accruals beginning with the adoption of the Fund's rehabilitation plan in 2008 as described above in Interrogatory No. 18. Please identify all facts and documents that support the Fund's position, and identify all persons with knowledge of any such factual bases, with an explanation of the nature of each such person's knowledge.

RESPONSE: The Fund objects to Interrogatory No. 23 as vague and ambiguous because it is unclear to what benefit accrual formula the phrase "baseline of freezing benefit accruals" refers. Effectively, the Fund has "frozen" benefits at 1% of contributions (via keeping the Fund's 1% benefit accrual formula in place). That is presumably not the type of "freezing" that Claimants are referring to. But, the type of "freezing" Claimants are referring to is unknown to the Fund because Claimants have not identified it.

The Fund also objects to Interrogatory No. 23 as purely speculative/conjectural. The Interrogatory calls for the Fund to say what would or would not have happened if the Fund had implemented a "freezing of benefit accruals" (other than through keeping the Fund's 1% benefit

accrual formula in place). However, the Fund did not implement such a “freezing of benefit accruals” (other than by keeping the Fund’s 1% benefit accrual formula in place), so any statement regarding what would/could have happened would be purely speculative. The Fund also objects to the Interrogatory to the extent it asks the Fund to identify the substance of any documents or communications protected by the attorney-client privilege or work product protection.

Respectfully submitted,

/s/ Lois J. Yu
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October 19, 2022

ATTORNEY FOR RESPONDENT

CERTIFICATION

I, Andrew M. Sprau, in my capacity as Group Manager of Operations Accounting for Central States, Southeast and Southwest Areas Pension Fund, state upon oath that I have read the foregoing responses to the Claimants' Second Set of Interrogatories and believe that the responses are truthful and accurate to the best of my knowledge.



Andrew M. Sprau
Group Manager, Operations Accounting
Central States, Southeast and Southwest
Areas Pension Fund

Subscribed and sworn to before me,
a Notary Public, this 19th day of
October, 2022



Notary Public

