

The Multiemployer Pension Plan Crisis: *The History, Legislation, and What's Next?*



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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.



Dear Reader:

The U.S. Chamber of Commerce is a well-regarded thought and advocacy leader for the private, employer-provided retirement system in the U. S. An integral piece of this retirement system is the multiemployer pension plan system that covers over 10 million workers.

With members that include sponsors of multiemployer pension plans, the Chamber has historically been at the forefront of multiemployer plan reform and has been engaged in the Pension Protection Act of 2006, the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, and, most recently, the Multiemployer Pension Reform Act of 2014. The Chamber continues to work to ensure the viability of the multiemployer system. This report is a step in that process.

Without substantive and timely multiemployer plan reform, many employers—including many small, family-owned businesses—are in danger of bankruptcy. Without real reform to the multiemployer system and resolutions to the underlying problems, more employers will be forced into bankruptcy and more workers will be left without a secure retirement.

I would like to acknowledge our collaboration with Morgan, Lewis & Bockius LLP in creating a report that includes not just an overview of the current multiemployer crisis but also an in-depth analysis of the events leading up to the crisis, attempts to fix it, and the current proposals to address the crisis. This report will be helpful to those who are new to the issue, those who are experienced in the issue, and to all of us who are working to find a resolution.

It is my pleasure to present this report and invite you to join the Chamber in finding a viable solution to the multiemployer pension plan crisis.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel K. Johnson".

Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits Division

EXECUTIVE SUMMARY

There is a looming pension crisis in the U.S. that unless addressed quickly by the federal government could jeopardize the retirement security of hundreds of thousands—if not millions—of Americans. Multiemployer pension plans provide pension benefits to over 10 million Americans in industries as diverse as construction, mining, trucking, and retail and a significant number of these plans find themselves in seriously distressed financial condition. If these funds become insolvent—and the timeframe for that insolvency ranges from 2 to 8 years—the results could be devastating for retirees, for current employees, for the companies that contribute to the plans, and for the communities in which companies and beneficiaries reside.

The financial crisis is not limited to one region or industry. It potentially will affect companies, workers, retirees, and communities throughout the U. S. and would include states as diverse as Ohio, Texas, New York, Wisconsin, Kentucky, West Virginia, Kansas, and North Carolina.

The narrative is bleak. A recent report found that 114 multiemployer defined benefit plans (out of approximately 1,400 nationally), covering 1.3 million workers, are underfunded by \$36.4 billion. Without a solution, most of these plans will be bankrupt within the next 5 to 20 years. Moreover, the federal agency that backstops pension benefits—the Pension Benefit Guaranty Corporation (PBGC)—is itself in financial distress. It is projected that the PBGC could be insolvent in a mere five years and, if that occurs, the retirement security of multiemployer plan beneficiaries could be wiped out entirely. Action is needed now to avert this pending crisis.

This report chronicles how the multiemployer pension plan system arrived at this point. It provides a history of the multiemployer plan system, the demographic issues that have plagued it, and attempts to fix it. Additionally, the report identifies several initiatives to resolve the crisis. Ultimately, however, the report presents a strong case for why Congress and the Administration need to act now.

Although many multiemployer plans were fully funded in the 1980s and 1990s, this euphoria came to an end in 2000, when the price of technology stocks fell drastically. Many multiemployer plans had ridden the wave of these dot-com companies to historic highs in asset levels, but when the market crashed and investment returns were disastrous, plans were hit twice as hard because of their declining contribution bases. Moreover, the 2008 global recession led funding levels in most plans to plummet. For those plans that had not sufficiently recovered from the bursting of the dot-com bubble, 2008 proved catastrophic.

National and global financial events exacerbated the financial troubles of multiemployer plans that already faced significant demographic and financial pressures. Shrinking industries and declining union participation eroded the contribution base of many plans. Between 1983 and 2016, the number of unionized workers dropped by almost half. Moreover, there has been increased competition facing contributing employers and their employees. Due to competition and fewer unionized workers, untenable ratios of inactive-to-active participants were created. Many plans now see ratios of one active worker for every two, three, or even five retirees. As expected, industries with high inactive-to-active retiree ratios experience the lowest average

funding levels. Due to all of these factors, certain plans will enter a “death spiral” where there is no realistic chance of recovery.

There have been several attempts to address the multiemployer pension funding problem. In 1980, Congress passed the Multiemployer Pension Plan Amendments Act (MPPAA), which was designed to discourage employers from leaving financially troubled multiemployer plans by implementing a withdrawal liability. Although the introduction of withdrawal liability was supposed to prevent withdrawing employers from shifting pension obligations to remaining employers, the biggest problem is that many withdrawing employers do not have the financial means to satisfy their withdrawal liability.

In 2006, Congress passed the Pension Protection Act (PPA). The purpose of the PPA is to give plan trustees more flexibility in dealing with funding while at the same time forcing them to identify and correct existing and potential funding issues in time to prevent further funding level deterioration and stabilize the plans’ finances. While PPA did provide additional tools, it was not enough for those underfunded plans with a declining active population base and severe negative cash-flow problems.

Recognizing that some plans could not avoid insolvency without drastic changes in the law, Congress passed the Multiemployer Pension Reform Act (MPRA) in 2014. MPRA created three new tools to help plans stave off insolvency: plan mergers, plan partitioning, and benefit suspensions. Most notably, for the first time under the Employee Retirement Income Security Act of 1974 (ERISA), Congress allowed plans that were in severe financial distress to reduce benefits that had already accrued, including benefits that were in pay status.

In addition, plan trustees have also implemented strategies to solve plans’ funding issues. These strategies include; reductions to future benefit accruals, increased employer contributions, new funding policies, and a “two-pool withdrawal liability method.”

While the legislation has provided benefit to some plans and some of these strategies have been helpful, the funding issues for the most underfunded plans remain. If these plans fail, the impact will affect individuals, businesses, the retirement system and entire communities. If the largest underfunded plans become insolvent, they will bankrupt the PBGC. The subsequent benefit cuts that follow will also have deep impacts on the communities where participants live. Retirees will see their standard of living reduced. In addition, the insolvencies could bankrupt employers, potentially leaving workers without income.

Reduced spending by workers and retirees will be felt by businesses, and less money will be paid to local government in sales and other taxes. While tax revenue decreases, the demand for social programs will increase, because many retirees and workers could lose their homes and/or have difficulty paying for medical costs. This will cause many to become reliant on social programs that have to be funded by taxpayers at a time when tax revenue will decline.

Consequently, new ideas and proposals are being discussed. Some are purely legislative proposals, whereas others deal with new pension plan designs. Solutions will not be easy, but they are necessary to address the looming crisis that will affect us all.

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OVERVIEW OF CURRENT MULTIEMPLOYER PENSION PLAN FUNDING PROBLEM

Since the beginning of the last decade, many multiemployer defined benefit pension plans have seen their funding level erode to the point that their ability to pay pension benefits into the future is severely threatened. While the majority of multiemployer plans are sufficiently funded, several distressed plans are facing insolvency within the next 5 to 15 years. Some of the most underfunded plans cover hundreds of thousands of participants. If they fail, the economic impact will be disastrous for the U.S. economy as a whole and for certain industries. In addition to the direct impact to contributing employer companies, many secondary businesses will fail and retirees living on a fixed income will see their benefits significantly reduced, resulting in additional stresses on already strapped social service programs and reduced revenues to state and local governments.

There are several reasons for this pending funding crisis. There have been shifts in U.S. regulatory and trade policies over the years, which have resulted in increased competition for businesses in certain industries. The number of employees covered by collective bargaining agreements (CBA) in these industries has declined precipitously. This has resulted in a change in demographics, where many plans have two or more retired participants receiving pension benefits for every one active participant on whose behalf the plan is receiving contributions.

The increased ratio of retirees to active employees has led to negative cash flow; many plans are paying significantly more in pension benefits than they are receiving in employer contributions. This negative cash flow can only be made up through investment returns. However, not only can market returns not be predicted, but taking an overly aggressive approach in investing pension plan assets in the hope that outsized investment gains will be realized is risky and raises other potential legal concerns.

Severe market downturns at the beginning of this century and in 2008 exacerbated the problem for many plans because they compounded the effect of the already existing negative cash flow. Many plans have seen their contribution base further eroded by contributing employers that left the plan due to bankruptcy with little or no remaining assets to pay their share of the plan's unfunded liability. The employees of these employers are referred to as "orphans," and the cost for funding their benefits was placed on those employers who remained behind.

Historically, there were only three ways for multiemployer pension plans to improve their funding: (1) reduce future benefit accruals, thus saving costs; (2) increase employer contributions; and (3) obtain investment returns above the rate assumed by the plan actuary.

While many plans have reduced future benefit accruals, the savings yielded from doing so have generally not been sufficient to materially improve funding. This is because the liabilities that jeopardize pension plans mostly relate to past service (i.e., benefits that have already accrued and in many cases are already being paid to retirees). Until recently, there has been a blanket prohibition against reducing benefits already accrued, so plans reduced future accruals. Plans have also consistently increased employer contributions. However, plans in some industries have

increased employer contribution rates to the point that employers cannot be competitive or are on the brink of bankruptcy. Investment returns cannot be predicted, and historically have not provided the type of returns that would be needed to cure most plans' underfunding.

Despite changes in the law designed to provide multiemployer plans with greater flexibility in dealing with funding problems, there is nothing that exists under current law that will save the multiemployer system's most underfunded plans. The risk is not theoretical; some projections show the Pension Benefit Guaranty Corporation (PBGC), the government entity designed to be a backstop for multiemployer pension plans that need financial assistance, will itself become insolvent by 2025. It has become increasingly clear that additional legislative solutions are necessary if the largest and most underfunded plans are to be saved. If these plans become insolvent, the negative repercussions will be felt throughout the U.S. economy.

Current Statistics

As of 2014, there were a total of 1,403 multiemployer defined benefit plans, covering 10.1 million participants.¹ Approximately 4 million were active participants, while a little over 6 million were retired participants. It is estimated that more than 1 million defined benefit plan participants are in plans that have serious funding issues.² The gap between plans with severe funding issues (known as "critical-status plans") and those that are not in critical status continues to widen.³

According to an August 2017 analysis conducted by the actuarial firm Cheiron, 114 multiemployer defined benefit plans (out of approximately 1,400 nationally), covering 1.3 million workers, are underfunded by \$36.4 billion. Participants covered by plans in the coal, trucking, manufacturing, service, retail, and food industries are, and will continue to be, at the center of the funding crisis. Unless a solution is found, most of these plans will go insolvent during the next 5 to 20 years.⁴

In 2016, 167 multiemployer plans filed notices with the Department of Labor (DOL) advising that they were in "critical status" (critical-status plans are sometimes referred to as being in the "red zone").⁵ As of 2012, the funding ratio for plans in critical status was 37.1% based on the market value of assets and 62.5% based on the actuarial value of assets. The aggregate underfunding on a market value basis was \$166 billion, and on an actuarial basis \$65 billion.⁶ The difference between market value and actuarial value is explained in the "Funding Rules" section of this paper.

In 2016, an additional 83 multiemployer plans filed notices with the DOL advising they were in critical and declining status. Critical and declining status plans are plans in critical status, but, which, have been certified as facing impending insolvency. These plans generally have the highest ratios of inactive-to-active participants and the most severe negative cash flow.

As assets decline and money continues to flow out of these plans, investment income is insufficient to offset the negative cash flow. Since the market crash of 2008, plans that find themselves in critical and declining status have not only failed to improve their funded percentage, but have seen their funded percentage continue to decline to the point that their only

hope of survival is to reduce benefits to retirees who are already receiving benefits (referred to as benefits in “pay status”).

For some plans, even reductions in benefits to retirees are not enough to stave off insolvency. Plans such as Central States, Southeast and Southwest Areas Pension Fund (Central States) and the United Mine Workers of America 1974 Pension Plan (UMWA Plan) are nearing the point of no return. Sometimes referred to as the “death spiral,” these plans’ negative cash flow is so severe that they will have to shift their assets away from investments that can provide long-term growth to investments that preserve cash to pay benefits.

When this happens, insolvency is no longer a matter of “if” but of “when,” and by most accounts, “when” is before the end of the next decade. Therefore, without a viable resolution, in less than 10 years there will be significant benefit cuts for current retirees, active participants without retirement benefits, and employers bankrupted because of pension obligations.

The PBGC “Backstop” Is in Danger

The funding crisis for multiemployer plans is exacerbated because the Pension Benefit Guaranty Corporation’s multiemployer program is itself in crisis. The PBGC is a federal agency created by Employee Retirement Income Security Act of 1974 (ERISA) to protect the benefits of participants in private-sector defined benefit plans. PBGC insures both single-employer and multiemployer defined benefit plans, but under two separate programs.

The PBGC’s multiemployer program is funded from premiums paid by multiemployer pension plans and interest income on U.S. Department of the Treasury (Treasury) debt. There is no taxpayer funding.⁷

ERISA Section 4002 reads, in part, “The U. S. is not liable for any obligation or liability incurred by the corporation [PBGC].” Unlike public-sector plans that are completely financed by American taxpayers, multiemployer plans have always paid their own way, with U.S. businesses bearing the bulk of the cost.⁸

The crisis in the PBGC multiemployer program has been recent and swift. Until 2003, the PBGC multiemployer program operated with a surplus. As of 2017, the multiemployer program has a \$65 billion deficit.⁹ This drastic increase in liabilities is directly due to the insolvency and projected insolvency of plans in industries that have been adversely affected by regulatory and trade policies. PBGC noted that in 2017 there were 19 plans newly classified as probable claims against the insurance program as they either terminated or are expected to run out of money within the next decade. The liabilities represent the present value of \$141 million in financial assistance to 72 insolvent multiemployer plans, up from the previous year’s payments of \$113 million to 65 plans.¹⁰

In addition, employers have seen a steady increase in premiums. In the 10 years starting in plan year 2007, premiums have increased \$20 per participant and are now set at \$28 per participant for plan year 2018. Despite these increases, the PBGC maximum benefit payout has remained relatively low and is currently \$1,251 per year.

As contributing employers to these plans failed, funding levels plummeted. Remaining employers see their long-term viability threatened by ever-increasing pension liability brought on by employers that went bankrupt, liquidated, or otherwise went out of business. When employers stop contributing to a pension fund, all remaining employers are required to pick up the slack and assume proportionate liability for the payments owed to the exited employer's "orphan" employees. As employers leave the pool of contributors, each remaining employer's percentage of the growing funding deficit gets larger. This is known as the "last man standing" rule and was established to protect plan participants from the consequences of employer withdrawals. The "last man standing" rule has rendered multiemployer plans unstable as nobody wants to be the last man standing. This provides incentive for even healthy employers to leave, and puts the PBGC in the role of the ultimate "last man."¹¹

Given the deficit between total assets and the present value of liabilities, PBGC projects that there is a greater than 50% chance that the multiemployer plan program will run out of money by 2025, and a greater than 90% chance that it will run out of money by the end of 2035.¹² Absent a dramatic increase in premiums that multiemployer plans pay (which would further undermine many plans' funding levels and is thus likely not feasible), or a change in how the PBGC is funded, pension plans facing impending insolvency (or even those that are already insolvent and receiving PBGC financial assistance) cannot rely on assistance from PBGC beyond the next 10 years.

The pressure the projected plan insolvencies will place on the PBGC will be catastrophic, absent congressional action. In 2014, the Center for Retirement Research in Boston College delivered an ominous assessment of the situation:

The actuarial model projects that it is more likely than not that the program [PBGC] will be insolvent by 2022, with a 90-percent chance of insolvency by 2025. Once the fund is exhausted, the PBGC would have to rely on annual premium receipts and would be forced to pay only a fraction of its paltry guaranteed benefit. One estimate is that a retiree who once received a monthly benefit of \$2,000 and whose benefit was reduced to \$1,251 under the PBGC guarantee would see the monthly benefit decline to \$125. The exhaustion of the multiemployer insurance fund could also undermine confidence in the entire system.¹³

MULTIEMPLOYER DEFINED BENEFIT PENSION PLAN BASICS

Private-sector multiemployer defined benefit pension plans are plans jointly sponsored by a labor union(s) and a group of employers. Such plans usually cover employees working in a common industry such as, for example, coal, construction, food, maritime, textile, trucking, etc. Many multiemployer plans cover employees working at a particular craft within an industry, such as electricians, bricklayers, and truck drivers. While most plans are "local plans" and cover employees working in a specific geographical area, there are also "national plans," which cover employees working in crafts or trades throughout the U.S. Many of the industries in which multiemployer plans prevail have high worker mobility and/or seasonal employment.

Due to the migratory nature of the work, employees frequently work for more than one employer during their careers. Oftentimes, employees would not work long enough for one employer to vest in a benefit under that specific employer's pension plan; however, multiemployer plans allow employees to move from employer to employer and still earn service credit under the multiemployer plan, provided the employers for which the employee works participate in the multiemployer plan.

Multiemployer plans are established via collective bargaining between a union and two or more employers. Ordinarily, the union and the employers will enter into a collective bargaining agreement which is negotiated between local, regional, or national unions and individual employers or an association of employers bargaining as a group. The collective bargaining agreement establishes the employer's obligation to contribute to the plan, identifies the bargaining unit to which the collective bargaining agreement applies, and sets the rate and basis on which employers pay contributions to the plan. The contribution rate is usually a specific sum per hour or unit of time worked by or paid to the employee.

Negotiations over pension contribution rates are not done in a vacuum. The union and employers also must negotiate contribution rates to other multiemployer benefit plans (health and welfare, vacation, defined contribution pension, etc.) as well as wages. The combination of wages and benefit plan contributions is commonly referred to as the "wage and benefit package" or the "total package." Thus while pension plan funding is a factor that bargaining parties must take into account during negotiations, they also must be cognizant of ever-increasing medical inflation and its impact on medical costs as well as employees' desire to receive increases in their hourly wage. As many employers operate on thin profit margins, addressing these competing factors can be complex. Compounding the complexity is that, once negotiated, the pension contribution rate is often subject to review and approval by the plan's trustees.

STATUTES GOVERNING MULTIEMPLOYER PENSION PLANS

Labor Management Relations Act

The Labor Management Relations Act (LMRA), commonly known as the Taft-Hartley Act, requires employers to pay contributions into a trust fund that must be jointly administered by an equal number of union and employer representatives. The obligation to contribute must be set forth in a written document (usually a collective bargaining agreement), and the contributions must be used for the sole purpose of providing benefits to employees.¹⁴

Employee Retirement Income Security Act

The union and employer representatives who manage the pension plan and administer the trust are called trustees. As trustees of the monies deposited into the trust, the trustees are fiduciaries to the participants (both active employees and retirees) covered by the pension plan. The fiduciary duties to which the trustees must adhere are established under the Employee Retirement Income Security Act of 1974¹⁵ and are enforced by the U.S. Department of Labor's Employee Benefits Security Administration. ERISA requires the trustees to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting

in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with a like aim.”¹⁶ This is known as the “prudent expert” rule and is the standard to which all fiduciary decisions are held.

Internal Revenue Code

While a plan’s trustees generally have the discretion to determine the amount of benefits a plan will provide, there are other plan features that must comply with the requirements of the Internal Revenue Code of 1986 (Code).¹⁷ One such requirement is that, in general, a plan cannot be amended to reduce accrued benefits, optional forms of payment, early retirement benefits, and retirement-type subsidies.¹⁸ This is known as the anti-cutback rule, which until recently was the lynchpin of the federal pension system. Amendments are generally allowed to reduce future benefit accruals, as well as optional forms of payment, early retirement benefits, and retirement-type subsidies that accrue after the date of the amendment.¹⁹

The anti-cutback rule, which has been a backbone of federal pension law since ERISA’s inception in 1976, has been considerably weakened by passage of the Pension Protection Act of 2006 (PPA) and the Multiemployer Pension Reform Act of 2014 (MPRA). The weakening of the anti-cutback rule has been in direct response to the pending funding crisis of certain multiemployer plans and has been helpful to many plans trying to avoid insolvency. However, MPRA has not been entirely successful, as there are many severely underfunded plans that are going to need additional help from Congress to survive.

Funding Rules

ERISA’s and the Code’s minimum funding rules require multiemployer plans to maintain a funding standard account. The funding standard account gets debited for charges related to benefit accruals, investment losses, and other negative plan experience. Credits are given for employer contributions, investment gains, and other positive plan experience. The minimum required contribution to a multiemployer plan is the amount needed, if any, to balance the accumulated credits and accumulated debits to the funding standard account. If the debits exceed the credits, there is a negative balance, and contributing employers must pay the amount necessary to balance the account. The liability is allocated to all of the plan’s contributing employers.

If participating employers do not make the contribution necessary to balance the funding standard account, the plan has a minimum funding deficiency and contributing employers can be assessed excise taxes on top of having to make up the deficiency. On the other hand, if the plan was overfunded, it would have to increase benefits in order to prevent paying an excise tax on the overfunding.

The calculations related to determining the amount in a multiemployer plan’s funding standard account are performed by an actuary. The plan must use a specific funding method to determine the elements included in its funding standard account for a given year. Such elements include the plan’s normal cost and the supplemental cost. Normal cost is the cost of future benefits allocated to the year under the plan’s funding method. Supplemental cost is generally the costs attributable

to past service liability or to investment returns that were less than those assumed by the actuary. The supplemental costs are amortized over a specified period of years by debiting the funding standard account over that period. If experience is good, there can also be actuarial gains that result in credits being made to the funding standard account.²⁰ When calculating debits and credits to the funding standard account, the plan actuary must use reasonable actuarial assumptions.

Actuaries calculate plan funding using both actuarial values and market values. Actuarial values are computed by the plan's actuary to predict how much money a plan needs to set aside to pay future retirees. Actuaries cannot use market values for this prediction, because market values fluctuate from day to day as the stock market rises and falls. An actuary predicts the long-term performance of the plan's investments by using mathematics to smooth out year-to-year market variations. This means that when investment performance is bad for a given year, the actuary will not recognize the entire loss in the year it occurs, but rather will "smooth" the loss by recognizing a portion each year for a period of years. Investment gains are treated similarly.

The actuary uses this smoothing method to create an actuarial value of the plan's assets, which is the likely value of the investments based on typical long-term investment results. Market value is the actual value of the plan's assets on any given day without regard to any smoothing and provides a more realistic view of a plan's financial condition.

As of 2012, the funding ratio for plans in critical status was 62.5% based on the actuarial value of plan assets. Under normal circumstances, such a ratio would not be disastrous; if the plan's investment earnings matched or exceeded its actuarial assumed rate of return and if the trustees made changes to benefits, a plan in critical status could be expected to right itself. The actuarial assumed rate of return is the rate the actuary assumes the plan's investment will earn annually, and generally ranges from 7% to 8%. Unfortunately, many plans have seen their contribution bases erode to the point where their cash flow is so negative they cannot earn their way out of critical status. As of June 30, 2017, the aggregate funding percentage of plans in critical status fell to 60%, whereas the funded percentage of non-critical status plans was almost 90%.²¹

THE CURRENT FUNDING CRISIS IS BEING DRIVEN BY A SMALL PERCENTAGE OF PLANS WITH COMMON CHARACTERISTICS

Multiemployer defined benefit pension plans are not a monolith. The most recent surveys illustrate that, as of today, many plans are structurally stable and well managed. In fact, a Milliman study recently reported that "in the first six months of 2017, the aggregate funding percentage for all multiemployer pensions climbed from 77% to 81%, reducing the system's shortfall by \$21 billion—an improvement driven largely by favorable investment returns."²² According to the study, the estimated investment returns have outpaced actuarial assumptions, reflecting the strong performance of the U.S. stock market.

During the 1980s and 1990s, many plans were fully funded.²³ This was primarily due to a soaring stock market. While most multiemployer plans' actuaries assume that annual investment returns will be in the 7% to 8% range, investment returns were well above those percentages for

many plans in the 1990s. The surging stock market seemed like a blessing at the time. However, the outsized investment returns masked a significant problem.

While pension assets increased at historical rates, union membership nationally was in a steady decline. Private-sector union membership in 1983 was 12 million. By 2015, that number had fallen to 7.6 million.²⁴ Thus, while pension plans assets were increasing thanks to the stock market, many plans' contribution bases were declining. With fewer contributions coming in, plans relied more heavily on investment returns to keep assets growing.

Today, almost half of all union members are between 45 and 64 years old.²⁵ As these workers age into retirement, there are not enough younger union workers to replace them. This exacerbates negative cash flow and essentially requires some plans to earn annual investment returns that are likely unrealistic based on the investment markets' cyclical nature. Moreover, as mentioned above, funds were not able to "bank" these extra returns because they would be subject to an excise tax.

The euphoria of the 1990s came to an end in 2000, when the price of technology stocks fell drastically. Many multiemployer plans had ridden the wave of these dot-com companies to historic highs in asset levels, but when the market crashed and investment returns were disastrous, plans were hit twice as hard because of their declining contribution bases. By the mid-2000s, most plans had recovered, but several plans remained in dire straits. While very few industries were immune from funding issues, certain plans in industries that had seen a significant decline in active participants, such as trucking, or in industries with cyclical work, like construction, did not recover. In 2008, a global recession rocked the investment markets, causing funding levels in most plans to plummet. For those plans that had not sufficiently recovered from the dot-com bubble burst a few years earlier, 2008 was catastrophic.

Although the investment markets have had favorable returns in recent years, many plans' funding levels have continued to deteriorate. Since passage of MPRA in December 2014, 15 multiemployer defined benefit plans have filed applications with the Treasury Department to reduce benefits to avoid insolvency. As of December 2017, Treasury has approved only 4 of the 15 applications. These 15 applicants currently account for only 1.35% of multiemployer defined benefits plans, but cover roughly 5% of all multiemployer defined benefits plan participants. These plans represent a segment of multiemployer pension plans that are failing and that, although in the minority, could cause the entire multiemployer pension system to crumble if additional legislative action is not taken.

What does a plan facing impending solvency look like? By looking broadly at the plans and industries they are in we can identify many of the conditions and events that lead a plan down the path to critical and declining status, and eventual insolvency.

Shrinking Industries and Declining Union Roles

The Bureau of Labor Statistics (BLS) reports that in 1983, there were approximately 12 million American workers covered by a collective bargaining agreement, which represented 16.8% of

the American workforce. By 2016, the number had fallen to about 7.6 million, or 6.4% of the workforce.²⁶

From 2000 to 2015, union membership in the transportation sector, alone, declined by 6.7 percentage points. Union membership rates in construction, manufacturing, and wholesale and retail trade also declined over that period.²⁷

Unionized workers on average are older than nonunion workers. In 2015, nearly half of union members were between 45 and 64 years old, but only about one-third of nonunion members belonged in this age group. Workers aged 45 to 64 were heavily represented in the manufacturing and transportation industries, which also had relatively high unionization rates. Furthermore, the lowest union membership rate is among workers aged 16 to 24 (4.4 %), which makes the systemic replacement of older union members with younger members impracticable.²⁸

Competition and Economic Factors Impacting Contributing Employers

Increased competition facing contributing employers and their employees is another factor leading to declining pension plan funding levels. There has been an onslaught of new competition in the last half century caused in part by changes in U.S. regulatory and trade policy. These policy changes have contributed to the hollowing out of entire industries and their associated retirement plans.

For example, the United Furniture Workers Pension Fund A (Furniture Workers Fund) was crippled by an influx of imported goods. In 1999, the furniture and related products industry had 537,000 workers. By 2010, the industry had only 251,000 workers.²⁹ Some of this attrition was caused by the 2008 financial crisis, but not all of it. Between 1981 and 2009, a period that coincides with significant increases in importation by foreign manufacturers, 35 contributing employers to the Furniture Workers Fund filed for bankruptcy protection and withdrew from the plan.

In the trucking industry, the competition was domestic in origin, but similarly dramatic. In 1980, Congress deregulated the trucking industry, allowing companies to compete in a free and open market. While the deregulation of the trucking industry has been beneficial for economy and the American consumer, deregulation has significantly impacted trucking companies that participate in multiemployer plans.

Researchers at the Center of Retirement Research at Boston College summarized the effects, noting “of the 50 largest employers that participated in the Central States Fund in 1980, only four remain in business today. More than 600 trucking companies have gone bankrupt and thousands have gone out of business without filing for bankruptcy. As a result, roughly 50 cents of every benefit dollar goes to pay benefits to “orphaned” participants, those left behind when employers exit.”³⁰ Even though an employer leaves, the fund—meaning the remaining employers—is still responsible for paying the benefits due to all participants in the plan. The orphan participants constitute a significant share of total multiemployer participants and are much likelier to participate in severely underfunded plans.

Plan Demographics—The Inactive-to-Active Participant Ratio

As competition and demographic shifts reduced the participant populations in plans, untenable ratios of inactive-to-active participants were created. New York State Teamsters Conference Pension & Retirement Fund (New York State Fund) provides a vivid illustration.

In 1990, the New York State Fund had 23,883 active participants and 10,150 retired participants, for a ratio of more than two active participants for every one retired participant. By 2000, the ratio was reduced to almost one to one, as the number of active participants declined to 16,827, and the number of retired participants increased to 14,198. As of January 1, 2016, there were 11,576 active participants, compared to 15,936 retired participants, reversing the ratio of active to retired participants in a single career span.³¹

According to a survey of multiemployer plans, 87% of beneficiaries in critical and declining plans were inactive (either already retired or entitled to a benefit at some time in the future but are no longer working), compared with 63% in non-critical and declining plans.³²

The survey also found some correlation between average plan funding levels by industry and inactive-to-active retiree ratios. Plans from the manufacturing sector had the lowest average funding levels at 79% and the highest inactive-to-active ratio at 5.8 retirees per active employee. Transportation sector plans fared a little better with funding levels averaging 81% but with a much more manageable inactive to retiree ratio of 2.9:1. Compared to those plans, construction sector plans are 89% funded on average and have an average ratio of 1.6:1.³³ As ratios worsen, and the rate of negative cash flow grows, employer contribution rate increases have little overall effect on plan funding. Instead plans must rely more heavily on investment returns.

Financial Pressure

Plans with negative cash flow can survive only if the investment return outpaces the benefit payments. During the 1980s and 1990s many multiemployer pension plans rode the bull market gains, thereby masking ominous trends in the growing retiree population. When the tech bubble burst in 2000, many plans, which had been relying on investment returns to cover negative cash flows, had to pay benefits directly from plan assets. As they did so, plan funding levels dropped, and plans had a lower asset base with which to invest. Since the negative cash flow problems for many plans did not improve, they were forced to seek higher investment returns to bridge the gap between the amount of money coming into the plan and the amount going out.

As a plan's assets dwindle, however, trustees are forced to shift investments out of equities and into more conservative investment vehicles to preserve cash to pay benefits for as long as possible. Such investments generally provide for little growth, so there is no opportunity for the asset base to grow. If the trustees were to continue to leave assets invested in equities, a sharp downturn in equity markets could cause a plan to go insolvent much sooner than anticipated and to provide trustees with little time for corrective action or to request the PBGC's assistance. In such circumstances, trustees are at risk of a fiduciary breach claim for imprudently investing the assets of the plan. Accordingly, trustees will almost always err on the side of making assets last

longer to avoid potential legal liability. This approach generally leads a plan to enter the death spiral where there is no realistic chance of recovery.

The 2008 financial crisis was a disaster for multiemployer plans. Just prior to 2008, 80% of plans had funding levels in excess of 80% (referred to as the “green zone”), whereas only 9% of plans were in critical status, or the “red zone.” By 2009, in the wake of the market collapse, the percentage of green zone plans plummeted to 38%, while the percentage of plans in the red zone increased to 30%. Over time, as the investment markets rebounded, many plans were able to claw their way back into the green zone. While some plans are just now returning to their pre-2008 funding levels, virtually all funding improvements have come exclusively from positive investment performance. This suggests that nothing has changed demographically, and that these plans will remain vulnerable to investment market conditions, which are unpredictable.

ATTEMPTS TO FIX THE MULTIEMPLOYER PENSION PLAN FUNDING PROBLEM

Given the negative cash flow and diminishing contribution bases of plans that are facing impending insolvency and the PBGC’s precarious financial condition, finding a solution to the funding woes of many plans will not be easy. Congress and trustees of pension plans have attempted to address multiemployer funding issues in the past, especially within the last several years. These attempts have helped some plans, but additional measures will be needed to save some of the most underfunded plans.

Multiemployer Pension Plan Amendment Act

In 1980, Congress passed the Multiemployer Pension Plan Amendments Act (MPPAA).³⁴ MPPAA amended ERISA and was designed to discourage employers from exiting financially troubled multiemployer plans. Congress recognized that when a contributing employer stopped contributing to an underfunded multiemployer plan, the unfunded liability related to the departing employer was absorbed by the plan’s remaining contributing employers. Although in 1980 most multiemployer pension plans were not facing funding issues as severe as those today, withdrawing employers increased pension costs for employers that remained, and in many cases threatened their financial viability. Withdrawing employers also caused multiemployer plans’ contribution bases to erode.

Prior to MPPAA, an employer that withdrew from a multiemployer plan did not have to pay anything to the plan unless the plan was terminated within 5 years of the employer’s withdrawal. Even then, the employer’s liability was limited to no more than 30% of the employer’s net worth. Under MPPAA, an employer that totally or partially withdraws from a multiemployer pension plan must pay “withdrawal liability.”³⁵ An employer’s withdrawal liability is the amount of the employer’s proportionate share of the plan’s unfunded vested benefits or liabilities, or UVBs (i.e., the withdrawing employer’s proportionate share of the deficit between the amount of the plan’s vested benefits and the plan’s assets).

When an employer withdraws from an underfunded multiemployer plan, MPPAA requires the plan’s trustees to (1) determine the amount of withdrawal liability, (2) notify the employer of the

amount of that liability, and (3) collect that liability. Generally, in order to determine an employer's withdrawal liability, a portion of the plan's UVBs is first allocated to the employer, generally in proportion to the employer's share of plan contributions for a previous period. The amount of UVBs allocable to the employer is then subject to various reductions and adjustments.

ERISA sets forth the amount of annual withdrawal liability payments the employer must make directly to the plan. Generally speaking, ERISA calls for annual payments to continue until the employer pays the liability in full, but caps the annual payments at 20 years. Thus, it is possible for an employer that does pay withdrawal liability for 20 years to still not pay off all of its unfunded liability. When this happens, other employers must make up the difference.

An employer's annual withdrawal liability payment amount is generally structured to approximate the employer's annual contributions to the plan. The amount is equal to the employer's highest recent average number of contribution base units, or CBUs (essentially, the amount of contribution paid to the plan) multiplied by the employer's highest contribution rate in the past 10 years. An employer can prepay its liability or attempt to negotiate the amount with the plan. There are additional withdrawal liability rules applicable to certain industries, exemptions for certain sales of assets, employer and plan disputes, and plan terminations following mass employer withdrawals.

Although the introduction of withdrawal liability was supposed to prevent withdrawing employers from shifting pension obligations to the remaining employers, MPPAA has not always worked as intended. The biggest problem is that many withdrawing employers do not have the financial means to satisfy their withdrawal liability. Employers often withdraw when they are going out of business or when they file for bankruptcy. When this happens, it is difficult, if not impossible, for the plan to collect the employer's withdrawal liability. As a result, some plan participants with vested benefits may have worked for an employer that no longer participates in the plan. The liability for these "orphaned" participants has devastating effects on plan funding and is a major contributor to the funding issues that many plans face today.

Pension Protection Act of 2006

In 2006, Congress passed the Pension Protection Act. The PPA amended ERISA and the Code to make certain changes to multiemployer funding rules. These changes were designed to give plan trustees more flexibility in dealing with funding while at the same time forcing them to identify and correct existing and potential funding issues in time to prevent further funding level deterioration and stabilize the plans' finances.³⁶ The PPA requires a multiemployer plan's actuary to provide an annual certification to the Internal Revenue Service of the plan's funded status. The certification specifies that the plan falls into one of three categories: endangered status, critical status, or neither.

Endangered-Status Plans

A plan is generally in endangered status, also known as the “yellow zone,” if the plan’s funded percentage is less than 80%, or the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years. A plan’s funded percentage for purposes of the PPA certification is determined by dividing the value of plan assets by the accrued liability of the plan. The trustees of a plan in endangered status are required to adopt a funding improvement plan.

A funding improvement plan consists of a list of options, or range of options, for the trustees to propose to the union and the employers (the bargaining parties). The funding improvement plan is formulated to provide, based on anticipated experience and reasonable actuarial assumptions, for the plan to attain “applicable benchmarks” by the end of the funding improvement period. The range of options generally is a combination of contribution rate increases or reductions in future benefit accruals that would allow the plan to obtain a statutorily specified increase in the funded percentage and not have an accumulated funded percentage by the end of the funding improvement period, which is generally 10 years.

Many plans certified as endangered in the early years of the PPA were able to fix their funding problems and now are in neither endangered nor critical status (known as the “green zone”). Other plans were not so fortunate, and their status deteriorated from endangered to critical. It should be noted that the PPA did not allow plans in endangered status to make any changes to benefits that were not already allowed under pre-PPA rules. In other words, trustees of endangered plans are not allowed to violate the anti-cutback rule of ERISA and the Code, and can only reduce future accruals and eliminate other protected benefits on a prospective basis. This led some trustees to take the counterintuitive action of allowing their plans to fall into critical status, because there was more statutory flexibility under the critical status rules to address funding problems.

Critical-Status Plans

A plan is in critical status if the plan:

- (1) is less than 65% funded and will either have a minimum funding deficiency in 5 years or be insolvent in 7 years; or
- (2) will have a funding deficiency in 4 years; or
- (3) will be insolvent within 5 years; or
- (4) the liability for inactive participants is greater than the liability for active participants, and contributions are less than the plan’s normal cost, and there is an expected funding deficiency in 5 years.

Trustees of plans in critical status are required to adopt a rehabilitation plan. Unlike endangered plans, critical-status plans whose trustees adopt and follow a rehabilitation plan generally do not have to meet the minimum funding rules of ERISA and the Code.

A rehabilitation plan is a plan that consists of a range of options for the trustees to propose to the bargaining parties, formulated to provide (based on anticipated experience and reasonable

actuarial assumptions) for the plan to cease to be in critical status by the end of the rehabilitation period, which is generally 10 years. Options include reductions in plan expenditures, reductions in future benefit accruals, increases in contributions, or any combination of such actions. The rehabilitation plan must be updated annually, and the plan must show that it is making scheduled progress toward emerging from critical status.

If the trustees determine that, based on reasonable actuarial assumptions, the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period, the plan must include reasonable measures to emerge from critical status at a later time or to forestall possible insolvency. If a multiemployer plan fails to make scheduled progress under the rehabilitation plan for three consecutive plan years or fails to meet the requirements applicable to plans in critical status by the end of the rehabilitation period, for excise tax purposes the plan is treated as having a funding deficiency equal either to the amount of the contributions necessary to leave critical status or make scheduled progress or to the plan's actual funding deficiency, if any. Plans may apply for a funding waiver if the case failure is due to reasonable cause and not willful neglect.

The PPA allows trustees of critical-status plans to make changes to benefits that endangered-plan trustees cannot. They are allowed to reduce or eliminate benefits that were previously protected by the anti-cutback rule. Critical-status plans can be amended to reduce or eliminate certain adjustable benefits, including post-retirement benefits, subsidized optional forms of payment, disability benefits not yet in pay status, early retirement benefits or retirement subsidies and benefit increases adopted less than 60 months before the plan entered critical status. In addition, critical-status plans that provide for payment of benefits in the form of a lump sum are required to cease paying lump-sum benefits on the date they enter critical status.

The ability to eliminate or reduce previously protected benefits was heretofore unprecedented, and many plans in critical status have taken advantage of these new rules and are projected to emerge from critical status or to forestall possible insolvency because of them. However, for those underfunded plans with a declining active population base and severe negative cash-flow problems, the savings generated by eliminating these adjustable benefits were not great enough to improve the plans' funded percentages.

Compounding the problem is that after cutting benefits to the maximum extent possible, there was little else that could be done to reduce costs. That left employer contribution rate increases as the only viable option to improve funding. Over the years, however, many plans have found that annual increases in employer contribution rates are not so viable because employers cannot absorb the costs. Out-of-control pension costs threaten employers' very survival.

Multiemployer Pension Reform Act of 2014

Although the investment markets have had favorable returns in recent years, many plans' funding levels continue to deteriorate. Under the PPA, a prohibition against reducing accrued benefits on a retroactive basis remained. Recognizing that some plans could not avoid insolvency without drastic changes in the law, Congress passed the Multiemployer Pension Reform Act in 2014.³⁷ MPRA changed the multiemployer defined benefit plan landscape.

The law created three new tools to help plans stave off insolvency. Most notably, for the first time under ERISA, Congress allowed plans that were in severe financial distress to reduce benefits that had already accrued, including benefits that were in pay status (these reductions are referred to as “benefit suspensions” under MPRA). This was a landmark change and a radical departure from what was previously allowed. MPRA also revised ERISA’s existing merger and partition rules.

Critical and Declining Status

MPRA created a new funding status called “critical and declining” for those plans that were the most deeply troubled. A “critical and declining” plan is one that meets one of the statutory requirements for critical status *and* is actuarially projected to become insolvent within 14 years (or within 19 years if more than two-thirds of its participants are inactive or retired). A plan that is in “critical and declining” status can file an application with Treasury to reduce or suspend benefits that have already accrued and that are in pay status (i.e., are already being paid to retirees and beneficiaries). MPRA provides for the following three mechanisms to help critical and declining plans avoid insolvency:

PBGC-Facilitated Plan Mergers

Mergers can improve a financially troubled plan’s funding issues. By transferring its assets to a more financially stable plan, the weaker plan can lessen or eliminate the effect of negative cash flow while gaining a larger asset base with which to invest. Generally, however, a trustee’s decision to merge is subject to the fiduciary duty provisions of ERISA.³⁸ These fiduciary duties are applied to the trustees of both plans involved in a contemplated merger. The trustees of both plans have to determine that a merger would be in the best interest of their respective participants. Both plans’ trustees have to examine the financial condition of their respective plans before and after the merger, as well as the viability of the surviving plan post-merger.

Because generally one of the plans in the proposed merger is in worse financial condition than the other, finding a good merger partner was and is sometimes difficult. For example, the trustees of a financially sound plan will likely not want to merge with a plan that is projected to become insolvent because of the affect the poorly funded plan would have on the funded level of the financially sound plan. Traditionally, a merger between a stronger plan and a weaker plan—but not one facing insolvency—would have the benefit of a larger asset base in which to obtain investment gains.

Under MPRA, the PBGC can facilitate mergers between two or more plans, including providing financial assistance. By providing financial assistance, the PBGC can alleviate the healthier plan’s financial/fiduciary concerns, which might make the healthier plans more willing to merge. Upon a plan’s request, the PBGC may facilitate a merger if PBGC determines the merger is in the interests of the participants and beneficiaries of at least one of the plans, and the merger is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. The PBGC may provide assistance to a plan such as training, technical assistance, mediation, communication with stakeholders, and support with related requests to

other governmental agencies. MPRA allows trustees of plans in “critical and declining” status to apply for both a facilitated merger and a benefit suspension.

The PBGC may also provide financial assistance to facilitate a merger if one or more of the plans in the merger is in “critical and declining status”; the PBGC reasonably expects that financial assistance will reduce its expected long-term loss with respect to the plans involved and, the PBGC reasonably expects that the financial assistance is necessary for the merged plan to become or remain solvent; the PBGC certifies its ability to meet existing financial obligations will not be impaired by providing the financial assistance; and the assistance is paid from the PBGC’s fund for basic benefits guaranteed for multiemployer plans.

PBGC Plan Partitions

MPRA also expanded ERISA’s partition rules, which previously allowed only the PBGC to partition plans that suffered significant contribution losses as a result of employer bankruptcies. In a partition, PBGC gives approval to divide a severely underfunded plan into two plans. Generally, the liability for orphaned participants is transferred to a new plan, which is technically insolvent from inception. The PBGC pays the orphan benefits up to the PBGC guaranteed amount. The original plan remains as is, and the goal is to restore its financial health.

A plan in critical and declining status may submit coordinated applications to the PBGC for a partition and to Treasury for a benefit suspension.

The PBGC may order a partition if the following conditions are satisfied:

- (1) the plan is in critical and declining status;
- (2) the PBGC determines that the plan has taken all reasonable measures to avoid insolvency, including the maximum benefit suspensions as discussed above;
- (3) the PBGC reasonably expects that the partition will reduce its expected long-term loss with respect to the plan and partition is necessary for the plan to remain solvent;
- (4) the PBGC certifies to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by such partition; and
- (5) the cost arising from such partition is paid exclusively from the PBGC’s fund for basic benefits guaranteed for multiemployer plans.

Suspension of Benefits

MPRA allows trustees of plans in critical and declining status to apply to Treasury to suspend (temporarily or permanently) participants’ accrued pension benefits, including those already in pay status. MPRA defines “suspension of benefits” as the “the temporary or permanent reduction of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not in pay status at the time of the suspension of benefits.”

A plan may suspend benefits only if the plan’s actuary certifies that the plan is projected to avoid insolvency if the benefit suspensions are implemented.

Benefit suspensions are subject to the following limitations:

- (1) a participant or beneficiary's monthly benefit cannot be reduced below 110% of the PBGC-guaranteed amount;
- (2) participants and beneficiaries aged 75 and older at the date of suspension have limitations on the suspension;
- (3) participants and beneficiaries aged 80 and older at the date of suspension are exempt from suspensions;
- (4) disability pensions are exempt from suspensions; and
- (5) benefit suspensions must be reasonably implemented to avoid plan insolvency.

MPRA also includes a list of factors the plan may consider to ensure the benefit suspensions are equitably distributed among the participants and beneficiaries, including age, number of years to retirement, and the participants' benefit history.

MPRA requires plans with 10,000 or more participants to select a retiree representative to act as an advocate for the interests of the retirees and inactive participants during the suspension application process. The plan must pay for all reasonable legal, actuarial, and other costs the representative incurs.

Benefit Suspension Application Rules

In order to suspend benefits, the trustees must submit a detailed application to Treasury and demonstrate that the plan meets the statutory requirements. Once Treasury accepts the application for review, it has 225 days to render a decision or the application is automatically deemed approved. Treasury will generally request additional information and pose questions to the plan's attorneys and actuaries regarding the application.

If Treasury rejects a plan's application, the plan may challenge the denial in court. If Treasury approves a plan's application, the suspension is subject to a participant and beneficiary vote within 30 days of the approval. If a majority of all participants and beneficiaries (not simply a majority of those who vote) do not actively vote to reject the suspensions, the suspensions are approved. Suspensions may not take effect until after the vote, and Treasury issues final authorization. If the participants and beneficiaries vote to reject the suspensions, Treasury, in consultation with the DOL and PBGC, must determine whether the plan is "systemically important." A plan is "systemically important" if the plan's insolvency will result in \$1 billion or more in projected PBGC liabilities. If a plan is deemed systemically important and suspensions were not approved by the participants, Treasury has the discretion either to accept the terms of the proposal or to modify the benefit suspensions in some other manner projected to avoid plan insolvency.

Since the passage of MPRA, 15 multiemployer defined benefit plans have filed applications with the Treasury Department to reduce benefits to avoid insolvency. As of December 2017, Treasury has approved only 4 of the 15 applications. These 15 applicants currently account for only 1.35%

of multiemployer defined benefits plans, but cover roughly 5% of all multiemployer defined benefits plan participants. These plans represent a segment of failing multiemployer pension plans that, although in the minority, could cause the entire multiemployer pension system to crumble if additional legislative action is not taken. Details on these applications are provided in “MPRA Suspension Applications to Date” in this paper.

Individual Plan Initiatives

Over the past 15 years, trustees of financially troubled plans have employed numerous strategies to solve plans’ funding issues. While some of these strategies have been helpful, most of these plans’ funding issues remain.

Reductions to Future Benefit Accruals and Increased Employer Contributions

The PPA requires trustees to take an active and forward-looking approach in managing their plans. Plans in critical and endangered status have to take corrective action. As part of that corrective action, plans can continue to reduce future benefit accruals and increase contributions. Critical-status plans can also reduce and eliminate adjustable benefits for those participants that have not retired.

Prior to the PPA, trustees had limited options to combat underfunding issues. Most plans had to solve funding problems by: (1) reducing the future benefit accruals of the active participants; and/or (2) requiring employers to increase their contributions.³⁹ While these strategies were sometimes successful, for employers in industries like coal, trucking, manufacturing, and bakery, continued contribution increases became unsustainable.

Many trustees now recognize that they can no longer feasibly cut benefits for active employees and raise employer contributions. Employers and bargaining unit groups have left plans at alarming rates over the last decade as contribution rates have steadily increased and plans have repeatedly reduced benefits for active participants. Additional contribution increases are not sustainable in many industries, and threaten the employers’ competitiveness, and in some cases, their existence. Losing employers would further erode the stream of contribution revenue on which a plan relies and exacerbate the negative cash flow problem for severely underfunded plans.

For example, in 1980 the Central States Pension Fund had approximately 12,000 employers; by July 2015 the number was down to 1,800.⁴⁰ Between 2010 and 2014, Central States experienced approximately 260 involuntary employer withdrawals as a result of employer bankruptcies. During this same period, the New York State Fund also had a significant number of employers leave, negatively affecting its funding level.⁴¹ In December 2013, the New England Teamsters & Trucking Industry Pension Fund (New England Teamsters Fund) reported that in order to avoid filing bankruptcy, one of its 10 largest employers negotiated an agreement with the International Brotherhood of Teamsters to temporarily cease pension contributions, with a subsequent resumption at a significantly reduced level. Another large employer emerged from bankruptcy and notified the Fund that it was unable to pay its current contributions.⁴²

Funding Policies

Some trustees have adopted policies with strict rules on the acceptance of employer contributions to ensure that the bargaining parties, i.e., the union and the employer, do not negotiate a CBA containing pension provisions that would adversely affect plan funding. These trustees have drafted policies or included rules in the plans' governing documents explicitly reserving sole discretion to reject a particular CBA if it is not in compliance with the policy or if it is deemed economically bad for the plan. While some plans have had such policies for many years, others are now just implementing them.

For example, the Board of Trustees of the Western Conference of Teamsters Pension Trust Fund does not allow CBAs that permit or require pension contributions for non-bargaining unit members or CBAs that limit the employees on whose behalf contributions are to be made.

The Trustees of the Central States Pension Fund have taken a similar but more aggressive position. They reserved discretion in the Fund's trust agreement to reject any CBA it determines to be unlawful or would "threaten to cause economic harm to, and/or impairment of the actuarial soundness of, the Fund, and/or that continued participation by the Employer is not in the best interest of the Fund."⁴³

Two-Pool Withdrawal Liability Method

Some trustees have requested approval from the PBGC to adopt an alternative method to calculate withdrawal liability called the "two-pool withdrawal liability method" (the two-pool method). Under the two-pool method, the plan maintains two withdrawal liability pools for contributing employers: one new pool for new employers and current employers that elect to pay off their existing withdrawal liability and transition over; and a second old pool for existing employers who, for a variety of reasons, decide not to trigger a withdrawal and remain in the plan.

Usually, an employer that is not contributing or does not owe withdrawal liability to the plan can qualify to be in the new pool. If a new employer enters the plan, it would automatically enter the new pool. When an already contributing employer moves from the old pool to the new pool, it generally agrees to withdraw from the existing withdrawal liability pool, to adhere to a withdrawal liability payment schedule, and to reenter the plan through the new pool for contributions made and benefits earned after that date.

Over the past few years, PBGC has received a number of requests from plans looking to implement the two-pool method.⁴⁴ The Central States Pension Fund, the New England Teamsters Fund, the New York State Fund, and the Bakery and Confectionery Union & Industry International Pension Fund have received PBGC approval to use the two-pool method. In order to encourage employer participation in the new pool, the trustees offer favorable settlement terms to satisfy withdrawal liability, but the extent of the relief is related to the employer's sustained commitment and continued contributions to the Fund.

The two-pool method has the potential to provide significant benefits to some plans. Trustees that have implemented the two-pool method believe it helps retain contributing employers that might otherwise withdraw.⁴⁵ A plan's long-term funding is affected by the strength of its base of contributing employers. Often times, a plan's more financially stable employers become frustrated as other employers withdraw from the plan. These withdrawals transfer costs and liability to the remaining employers over time in the form of higher contributions and increased reallocated withdrawal liability. This trend encourages healthy employers to withdraw before additional financial responsibility shifts to them, which ultimately places financial stress on the plan. The two-pool method offers an opportunity for healthy employers to remain in a plan while insulating them from the less financially stable employers.⁴⁶

Despite its potential benefits, to date the two-pool method has not attracted new employers. It is a relatively new concept, however, and may be helpful in conjunction with other strategies, such as mergers and partitions.

DEVELOPMENTS UNDER THE MULTIEMPLOYER PENSION REFORM ACT OF 2014

Since its passage almost three years ago, MPRA has been criticized in part because of the manner in which it was enacted but more substantively because of the law's allowance for reductions to accrued benefits, including benefits already in pay status. Additionally, critics claim that implementation of MPRA failed to provide relief to the one plan that arguably was the primary focus of Congressional concern: the Central States Fund. Supporters assert, however, that absent benefit reductions, there are some plans that cannot avoid insolvency and thus will result in benefit reductions for most participants far greater than proposed under the rescue plan, since participants' benefits will be reduced to the PBGC guarantees. That the PBGC itself is projected to become insolvent only complicates things.

MPRA Suspension Applications to Date

As of December 2017, 15 plans covering a variety of industries, including transportation, furniture, machinery, and bricklaying, have applied to Treasury to suspend benefits, while four of those same plans submitted coordinating partition applications to the PBGC.⁴⁷

Treasury has denied the following MPRA applications:

- Automotive Industries Pension Plan;
- Central States, Southeast and Southwest Areas Pension Fund (Central States);
- Iron Workers Local Union 16 Pension Fund;
- Road Carriers Local 707 Pension Fund (Local 707 Pension Fund); and
- Teamsters Local 469 Pension Plan.

The following plans withdrew their applications prior to Treasury's issuance of a ruling:

- Alaska Ironworkers Pension Plan;
- Bricklayers & Allied Craftsmen Local No. 7 Pension Plan;
- Bricklayers and Allied Craftsmen Local No. 5 Pension Plan (Bricklayers Local 5 Pension Plan);
- Local 805 Pension and Retirement Plan (Local 805 Pension Fund); and
- Southwest Ohio Regional Council of Carpenters Pension Plan.

The following application is under review:

- Western States Office & Professional Employees Pension Fund.

Treasury has approved the following applications:

- Iron Workers Local 17 Pension Fund;
- United Furniture Workers Pension Fund A (Furniture Workers Fund);
- New York State Teamsters Conference Pension & Retirement Fund (New York State Fund); and
- International Association of Machinists Motor City Pension Fund (Motor City Fund).

MPRA Application Denials

Central States Pension Fund

Treasury denied Central States Pension Fund's suspension application in May 2016. The Central States Pension Fund's application was the first application submitted under MPRA. Central States, the largest multiemployer pension plan in the country with close to 400,000 total participants, roughly half of whom currently receive annual benefits totaling close to \$3 billion,⁴⁸ has been reeling from investment losses stemming from the 2008 financial crisis. When Central States submitted its MPRA application, it had \$16.8 billion in assets against \$35 billion in liabilities. In 2015, the Fund was certified to be in critical and declining status, at 47.7% funded and projected to go insolvent by 2026.

Decades ago, the Fund had four active workers for every retiree or inactive member. But, like many other Teamster plans, that ratio reversed to approximately five retirees for every one active worker, as a decline in membership due to the deregulation of the trucking industry and two economic catastrophes in the 2000s resulted in far fewer active workers paying into the plan than receiving benefits. The Fund's retirees currently earn \$1,128 per month on average, although that total includes workers with tenures of all different lengths. The longest-tenured workers receive about \$2,400 a month.

Treasury rejected the Central States Pension Fund's application because it failed to satisfy several MPRA technical requirements.⁴⁹

According to Treasury, the Fund did not meet the following statutory requirements:

- (1) to use reasonable investment return assumptions;
- (2) to use a reasonable entry age assumption;
- (3) to equitably distribute the suspensions; or
- (4) to draft its suspension notices to be understandable by the average plan participant.

Many commentators were shocked that Treasury denied the Central States application, because it is one of the largest and most financially troubled plans in the multiemployer system. Many believe MPRA was passed specifically to save Central States, on the grounds that if the plan went insolvent it would effectively bankrupt the PBGC's multiemployer plan insurance program. On the same day that Treasury rejected Central States' application, Treasury Secretary Jacob J. Lew sent a letter to Congress wherein he advised that the larger funding issues facing Central States and other multiemployer plans remain unsolved, especially as the PBGC is simultaneously heading toward insolvency. Secretary Lew's letter explained that Treasury's rejection of the application may have provided participants with some short-term relief but pointed out that even larger cuts may be required in the future for the Fund to meet MPRA's requirements.⁵⁰

Central States' executive director, Thomas Nyhan, said the decision was disappointing because the trustees believed "the rescue plan provided the only realistic solution to avoiding insolvency." Nyhan said the Fund's retirees would have been better off with the cuts than they would be if the plan became insolvent. Given PBGC's looming insolvency, Nyhan noted that without the PBGC safety net, the Fund's participants could see their pension benefits reduced to "virtually nothing."⁵¹

As of this writing, the Fund has posted the following sobering message on its website:

Although the decision to request approval of a pension rescue plan was very difficult for the Fund's Trustees, we are disappointed in Treasury's decision and strongly disagree with the reasons expressed by Treasury for denying our rescue plan application. Central States' proposed rescue plan was a proposal of last resort, and clearly not an option that the Trustees preferred. It was, however, based on a realistic assessment that benefit reductions under a rescue plan were the only available, practical way to avoid the hardship and countless personal tragedies that will result if the Pension Fund runs out of money.

Since the Central States Pension Fund submitted its application, its funding percentage has decreased to approximately 42.1%, with an estimated insolvency date of 2025. Its liabilities have increased to approximately \$39 billion, and its assets have decreased to \$16.1 billion.⁵²

Road Carriers Local 707 Pension Fund

Treasury and the PBGC denied the Road Carriers Local 707 Pension Fund's coordinated partition and suspension applications in June 2016.⁵³ The Fund, a Teamster plan based in Hempstead, New York, is currently insolvent and receives financial support from the PBGC in the amount of \$1.7 million per month to pay benefits.⁵⁴

At the time the Fund submitted its applications in February and March 2016, it was less than 5% funded and had only \$24.5 million in assets, a 2:1 retiree-to-active participant ratio, and only nine remaining contributing employers.⁵⁵

The trustees had already reduced benefit levels for those in pay status and filed the Fund's notice of insolvency with the PBGC, informing the Corporation that it would become insolvent and require financial support beginning in February 2017. Like many other Teamster plans, this Fund has never been able to recover from a combination of trucking deregulation, little to no growth in the trucking industry, an increasing retiree population, bankrupt employers failing to pay their withdrawal liability, and the two financial crises in the 2000s.

In its denial of the partition request, PBGC concluded that the Fund failed to demonstrate that it would remain solvent following a partition, and that its application was based on unreasonably optimistic assumptions related to active participants and future contribution levels, including those of the Fund's dominant employer, YRC Worldwide.⁵⁶ Treasury also denied the Fund's suspension application, mainly because the projection of solvency in the application was based on the implementation of a partition, which the PBGC denied.⁵⁷

Other MPRA Application Denials and Withdrawals

The applications of the Automotive Industries Pension Plan, the Ironworkers Local Union 16 Pension Fund, and the Teamsters Local 469 Pension Plan were all rejected, because they did not meet MPRA's technical requirements. According to Treasury's denial letters, these plans' applications were denied because the proposed suspensions were not reasonably estimated to avoid insolvency, the actuarial assumptions and methods (i.e., assumptions about mortality rates, hours of service, and spousal survivor benefits) were unreasonable, and/or assumptions about the return on investment were unreasonable.⁵⁸

On the other hand, a few plans, such as the Alaska Ironworkers Pension Plan and the Bricklayers & Allied Craftsmen Local No. 5 and No. 7 Pension Plans, made the strategic decision to withdraw their applications from Treasury consideration before the Department could issue its decision.⁵⁹ These plans likely withdrew their applications based on discussions with Treasury. To date, three of the four plans that received Treasury's approval withdrew their initial applications and resubmitted revised applications after consultation with Treasury.⁶⁰ The recent approvals may give these plans hope that Treasury will approve a refiled application.

MPRA Application Approvals

Treasury has now approved four plans' applications to suspend benefits under MPRA. Three of these approvals have occurred under President Donald Trump's administration and may indicate a changing trend in the review and approval process at Treasury.

Iron Workers Local 17 Pension Fund

On December 16, 2016, Treasury issued its first MPRA suspension application approval to the Iron Workers Local 17 Pension Fund based in Cleveland, Ohio.⁶¹ At the time the Fund submitted its application, it was 44.3% funded with approximately \$84 million in assets and \$263 million in liabilities and was projected to become insolvent in 2024.⁶² This Fund was one of the smaller plans to submit an application, with a little fewer than 2000 participants and a 1:2 active-to-retired-worker population ratio.

The Fund's proposed suspensions generally involved reducing accrued benefits and eliminating early retirement subsidies and extra benefit credits indefinitely. Benefits were generally estimated to be reduced between 20% and 60%. Under the proposed suspensions, 52%, or 1,029 of the plan's 1,995 participants, will not have their retirement benefits cut. More than 30% of participants will see benefits cut by at least 20%. Specifically, 30 participants will see extreme cuts between 50% and 60%; 115 participants will see cuts between 40% and 50%; 191 will see cuts between 30% and 40%; and 265 will see cuts between 20% and 30%. Another 168 participants will see benefits cut by 10% or less. The suspension will reduce the average monthly benefit for all participants by 20%, from \$1,401 to \$1,120. With these proposed suspensions, the Fund's actuaries estimated that the Fund will remain solvent through April 2055.

United Furniture Workers Pension Fund A

In July 2017, the Furniture Workers Pension Fund A, based in Nashville, Tennessee, became the second plan to receive Treasury's approval to suspend benefits.⁶³ The Fund has approximately 10,000 participants and also received approval for a partition from the PBGC effective in September 2017.⁶⁴ At the time the Fund submitted its suspension plan, it had assets of approximately \$55 million and almost \$200 million in liabilities, was approximately 30.6% funded, and was projected to become insolvent by 2021.⁶⁵ As with other plans facing insolvency, the plan's funding had slowly deteriorated over the years due to its inability to recover from the market downturns in 2000 and 2008 and to competitive pressures caused by increased furniture imports from overseas, the loss of some of its larger contributing employers, the further decline of its active participant base, and its inability to attract new contributing employers in the industry.

In the Fund's application, its trustees estimated that 2,800 participants would receive on average a reduction of 12.7%, and 7,100 participants would receive no reductions because they were protected under MPRA (i.e., they were over age 80, disabled, etc.).⁶⁶ The reductions were estimated to range from 0% to 62%.⁶⁷

In the Fund's partition application, the trustees proposed to partition to the successor plan 100% of the liability associated with the terminated vested participants and 56% of the liability associated with those in paid status (retirees, beneficiaries, and disabled participants).⁶⁸ The PBGC generally would become responsible for paying the partitioned liabilities in the successor plan. The trustees estimated that this would be the minimum amount of liability necessary to transfer to the PBGC to relieve some of the financial burden and to remain solvent for the

30-year period required under MPRA.

New York State Teamsters Conference Pension & Retirement Fund

The New York State Teamsters Conference Pension & Retirement Fund was the third and largest plan to receive Treasury approval.⁶⁹ Like the other two successful plans before it, this plan withdrew its original application and submitted a new one.

Over the past 35 years, this Fund faced a significant deterioration in its contribution base. In 1990, the Fund had 37,953 total participants, with an active population of approximately 23,883 workers and a retiree and terminated vested population of 14,070.⁷⁰ The Fund had almost 500 contributing employers and received \$60 million in annual contributions, while paying about \$46.9 million in annual benefits.

At the time the Fund submitted its revised application to Treasury in May 2017, it had almost the same number of participants (34,459); however, it now had two retirees for every active worker, and only 184 contributing employers. The Fund was receiving \$118.7 million in annual contributions but paying approximately \$280.1 million in annual retiree benefits. While almost fully funded in 2000, as of January 1, 2017, the plan was 37.8% funded, with \$1.28 billion in assets and \$3.39 billion in liabilities.

In its application, the trustees proposed a 19% reduction for all active participants and a 29% benefit reduction for all inactive participants. It was estimated that nearly 28% of participants would not see any cuts due to MPRA's protections.

International Association of Machinists Motor City Pension Fund

On November 6, 2017, the Troy, Michigan-based International Association of Machinists Motor City Pension Fund (Motor City Fund) became the fourth plan to receive Treasury's approval to suspend benefits.⁷¹ This Fund became the first one to receive Treasury's approval without undergoing a resubmission process.

Over the last 15-plus years, the Motor City Fund's finances have been affected by the same factors plaguing other plans seeking MPRA relief—loss of contributing employers, a decrease in active participants, and an inability to recover from the economic catastrophes of the 2000s.⁷² In 2006, the Fund was 74% funded with a market value of assets of approximately \$84 million and about \$111 million in liabilities.

Since then, the Fund's demographics and asset base have declined. The Fund has experienced numerous employer withdrawals over the years. The Fund had 20 contributing employers in 2012, 16 in 2015, and 11 in 2016, and is currently down to five. As of June 30, 2016, the Fund was about 58% funded with only \$51 million in assets and about \$101 million in liabilities. It pays out \$8.69 million in benefits to its retirees annually, while receiving only \$1.6 million in employer contributions. Unbelievably, it has almost eight inactive participants receiving benefits per every one active worker. Without the benefit suspensions, the Fund is projected to be insolvent by the end of the 2026 plan year.

Under the Fund's suspension plan, monthly benefits payable to participants in pay status as of January 1, 2018, would be reduced to 110% of the PBGC-guaranteed amount, which is the maximum reduction allowed under MPRA. The reduction applies to benefits earned up to January 1, 2018. Accruals after January 1, 2018, will return to 0.5% of credited contributions. As of December 2017, the Fund was in the process of submitting its proposal to its 1,134 members for voting.

IS MPRA WORKING?

MPRA has been neither an unmitigated disaster nor a panacea for multiemployer pension plans. Many commentators and, without a doubt, most plan participants are unhappy with MPRA because it allows plan trustees to violate the most basic tenet of ERISA: that once a benefit is earned, it cannot be taken away. There is little doubt, however, that prior to MPRA there was nothing some plans could do to avoid insolvency given the anti-cutback rule and the unsustainability of employer contribution increases. For plans that have recently reduced benefits, there is now hope that they will provide benefits for at least the next 30 years and perhaps in perpetuity. For other plans like Central States and the UMWA Pension Plan to survive, additional legislative action will need to be taken.

Yes

MPRA now allows plans to reduce accrued benefits, which are by far the highest expense most plans have. It is virtually impossible for a plan with severe funding issues to reduce costs sufficiently when reductions are limited to future accruals. While there is a cost to providing future service credit, it is the past liabilities, many of which are unfunded but still owed, that normally sink a pension plan. With limited cost-cutting measures available pre-MPRA, plan trustees looked to employers to pay more and more every year. Now that well has run dry and the ability to cut accrued benefits is the last tool available for some plans to avoid insolvency.

The MPRA application process also appears to be getting more streamlined. The first several MPRA applications were denied because Treasury was not comfortable with the actuarial and investment assumptions that plans were making in proposing their benefit suspensions. Treasury has since issued new regulations governing suspension applications and has demonstrated a willingness to engage plan advisors during Treasury's review process. This allows for the exchange of information and the tweaking of certain assumptions that make it easier for the plan to demonstrate that suspensions will avoid insolvency for at least 30 years, which is what is required for Treasury to approve an application.

Treasury has now approved four MPRA applications, with the Motor City Pension Fund being the first plan to obtain an approval on its initial application. This could possibly bode well for future applications.

No

Although Treasury seems to have implemented a process that may ultimately result in more suspension application approvals, the process is still lengthy and expensive. This is partly attributable to Treasury's use of its own actuarial and investment assumptions when reviewing and evaluating a plan's suspension application. By substituting its own assumptions for those of the plans' actuaries, Treasury adds a layer of complexity that slows the process and makes it more expensive.

MPRA's statutory text does not require (or authorize) Treasury to make such a detailed review of suspension applications. The statute authorizes Treasury to review applications to determine if the plan is eligible for the suspension and has satisfied the requirements of MPRA. In fact, the statute specifically says that when evaluating an application, Treasury must accept the trustees' determinations unless the plan's determinations are clearly erroneous.

While MPRA allows plans to make drastic reductions in costs by reducing accrued benefits, nothing in MPRA helps to infuse new money into the plans. Ultimately, some of the larger and most underfunded plans will need a new income stream in addition to benefit cuts to avoid insolvency. A combination of new money and benefit reductions could stop the bleeding from negative cash flow and allow a plan to earn its way out of critical and declining status. There is nothing in MPRA that helps on the income side of the equation.

Benefit cuts alone do not appear to be sufficient to address the payment of the orphan liability some plans have. MPRA has been unable to save two of the largest and most underfunded plans: Central States and the UMWA Plan. Central States' application was denied, and the UMWA Plan's benefit levels do not seem to make it a candidate for benefit suspensions under MPRA because it is already paying out benefits in many cases that are below the minimum amount allowed under MPRA. PBGC's projected insolvency is in part based on the liabilities it sees coming from these two plans. Although other legislative proposals have been made to provide relief to the UMWA Plan, nothing has been passed to date.

MPRA has been helpful to some plans and may prove helpful to others. But MPRA will not save Central States, the UMWA Pension Plan, and the other most severely underfunded plans because it provides no additional funding mechanism, which these plans will require. For these plans, and the more than 1 million participants in them, additional legislation is needed in short order.

WHAT HAPPENS IF NOTHING HAPPENS?

Central States, the UMWA Plan, and other plans approaching insolvency are not in a position to impose additional benefit cuts or employer contribution increases. These plans generally have no realistic expectation that any new employers will enter the plan. As assets dwindle, the trustees' fiduciary duty limits their ability to diversify the plan's investments.⁷³ Now begins the death spiral, the inexorable slow march that will see the assets depleted while benefits are still due and owing.

If insolvency occurs, participants will receive significant cuts in payments, because PBGC insurance covers only a fraction of the promised pension benefit payment. For example, a Local 707 Pension Fund participant with 30 years of service once received approximately \$48,000 a year from the plan. Since the plan's insolvency, that participant receives only \$12,870 per year from the PBGC, which is the maximum guaranteed amount. This reduction obviously puts participants in a difficult position.

Many cannot return to work because of age and health issues, not to mention potential skill and certification gaps. As a result, they will have to find other ways to make up for the reduction, including liquidating their assets, relying on family members, and looking to the government, and by extension the taxpayer, through the use of Medicare, Medicaid, Social Security, Supplemental Nutrition Assistance Program benefits, and other social safety net programs.

The failure of the largest and most underfunded plans will ultimately bankrupt the PBGC. In its FY 2016 Projections report, the PBGC stated that the multiemployer insurance program is likely to run out of money by the end of 2025. The PBGC Multiemployer Program's 2016 deficit of \$59 billion increased to \$65.1 billion in 2017 and is expected to explode to \$80 billion by 2026.⁷⁴ Once the multiemployer program is bankrupt, participant payments will be cut even further and may even cease. As such, the scenario described above will become even direr.

A failure of this magnitude in the multiemployer system will damage the entire economy—not just employers in the multiemployer plan system. Insolvencies and the subsequent benefit cuts that follow also have deep impacts on the communities where participants live. Retirees will see their standard of living reduced. At a minimum, they will have less income to spend in local economies. The reduced spending will be felt by businesses, especially in small communities. Less money spent by retirees also means less paid to local government in sales and other taxes. When tax revenue decreases, the demand for social programs will increase, because many retirees will likely lose their homes and/or have difficulty paying for medical expenses. This will cause many to become reliant on social programs that have to be funded by taxpayers at a time when tax revenue will be declining. Simply put, pension plan insolvencies and a PBGC collapse will have a cumulative negative effect on entire communities. Individuals, government, and businesses will all suffer unless a solution is found.

POTENTIAL SOLUTIONS

Several proposals have been designed to address the multiemployer pension plan funding problem. Some are purely legislative proposals, whereas others deal with new pension plan designs. The most widely considered of the proposals are discussed below.

PBGC Takeover of Critical and Declining Status Plans

The prospect of the PBGC taking over all plans that are classified as critical and declining has some appeal. After all, the PBGC was established in 1974 to provide insurance to private pension plans, including multiemployer plans. If the PBGC's mission is to provide assistance to financially troubled multiemployer plans, the plans in the worse shape should look to PBGC to not only help pay benefits if necessary, but to operate the plan as well.

Proponents of a complete PBGC takeover of critical and declining plans cite these primary reasons for their position—PBGC-operated plans will save money by reducing administrative expenses; or the threat of a PBGC takeover will provide an incentive for trustees to ensure adequate funding, because their jobs will be at risk otherwise.⁷⁵

When a single-employer defined benefit pension plan goes insolvent, the PBGC takes over the operation of the plan. When a multiemployer plan goes insolvent, the PBGC offers financial assistance in the form of a loan. Not only are these loans almost never repaid, but the plan continues to operate under the pre-insolvency structure. This means that there remains a board of trustees comprised of an equal number of union and employer representatives who are charged with administering the plan in accordance with the fiduciary requirements of ERISA and the tax-qualification requirements of the Code. The trustees hire actuaries, attorneys, accountants, investment consultants, and investment managers to help comply with the various legal requirements. These professional advisors cost money, and therefore even an insolvent plan receiving financial assistance from PBGC has continuing administrative costs.

A PBGC takeover of critical and declining multiemployer plans would likely reduce administrative costs. The costs would not be eliminated, because the PBGC would still need the same actuarial, legal, accounting, and investment advisory services that the plan's trustees use. Nevertheless, many of the advisors would either already be on staff at PBGC, or the services could be provided in a less costly manner due to economies of scale.

However, the PBGC is not currently funded well enough itself to offer any meaningful long-term financial relief to multiemployer plans under its current structure of offering only loans. If the PBGC were to take over the administration of critical and declining plans, PBGC's costs would increase, even if only slightly. More important, plans that are in critical and declining status are not in that condition because of their administrative expenses; rather, they are in critical and declining status primarily because of massive negative cash flow issues brought on by having to pay millions more in benefits to retirees than they receive in contributions for active employees. While a PBGC takeover would most assuredly reduce administrative expenses, a reduction in administrative expenses alone, without shoring up the PBGC's financial condition, would not provide a long-term solution.

Another reason frequently cited by those advocating for PBGC takeovers is that the threat of a takeover will incentivize plan officials to more closely monitor a plan's funding level. This line of thinking assumes that once a plan becomes critical and declining, the PBGC takeover of the plan will cost people their jobs, and therefore, for self-preservation purposes, plan officials will do everything possible to prevent a plan from becoming critical and declining. While it is true that a plan's professional advisors and in-house administration (if any) would not be needed after a PBGC takeover, professional advisors and administrative staff do not have the authority to make decisions for the plan that affect funding.

Those decisions are made by the plan's trustees, who generally are not fulltime plan employees. Being a trustee of a multiemployer plan is often one of the duties of a union official or employer-appointed trustee, but it is not a job in and of itself. Therefore, it is doubtful that very many plan

trustees will lose their jobs if the PBGC were to take over a plan; the professional advisors whose jobs would be at risk are already incentivized to help keep a plan out of critical and declining status, because if their advice is shoddy, the trustees will terminate them. Finally, the PBGC “takeover as incentive/threat” position assumes that critical and declining plans are in that condition because plan officials were not diligent or were asleep at the wheel. This is rarely the case, as changing demographics and stock market returns have been more influenced by government policy and market forces than by trustees’ decisions.

PBGC Funding

There are limited tools available to improve the PBGC’s funded status. Historically, the PBGC multiemployer program has been funded solely through annual premiums that multiemployer plans are required to pay, and not by individual tax payers. Broadening the PBGC’s funding mechanisms to include taxpayer dollars from the general treasury is appealing to some but anathema to others.⁷⁶ Some pundits believe that the federal government has been complicit in the downfall of some multiemployer plans by imposing strict funding rules and deregulating certain industries.⁷⁷ These pundits believe that the government should help fund the PBGC to make up for prior policies that have put the plans at risk. Others believe that American taxpayers, the majority of whom do not participate in multiemployer pension plans, should not be asked to sacrifice for others when they have their own retirements to fund.⁷⁸

Another way to improve PBGC funding is to increase the annual premiums that multiemployer plans pay. This has already been done in recent years, but increases have not been large enough to solve the PBGC’s funding deficit. In 2014, multiemployer plans paid an annual flat rate premium of \$12 per participant. In 2018, multiemployer premiums will be \$28 per participant. Despite more than doubling the premium, the PBGC still projects that there is a 90% chance it will be insolvent by 2035. Even more disturbing is that the PBGC estimates that if premiums were increased to \$120 per participant, its deficit in 2022 would still increase by \$15 billion.⁷⁹

According to the Congressional Budget Office, PBGC premiums would have to be increased to \$232 per participant to achieve a 90% probability of covering its deficit by 2036.⁸⁰ Based on the fair-value estimated deficit of \$101 billion, a \$232 premium increase would cover only 36% of the PBGC’s deficit.⁸¹ Furthermore, raising premiums eightfold would require increasing employer contributions. As many plans are in critical and declining status because employers could not afford the contribution increases required under their rehabilitation plans, it seems unlikely that employers would be able to pay the increases necessary to increase PBGC premiums to a level that would cure the PBGC’s deficit.

Partitioning of Orphans

Orphan participants constitute a significant portion of total multiemployer participants. Approximately 1.6 million of the 10.7 million multiemployer plan participants are orphans.⁸² To relieve severely underfunded plans of the burden of unfunded orphan liability, many practitioners suggest that the liability be transferred to the PBGC via a partition. Once a partition is approved, and the original plan transfers liabilities to the PBGC, the PBGC becomes responsible for paying benefits to the partitioned participants at the PBGC guaranteed level.

Since MPRA's enactment, only the Furniture Workers Fund has successfully applied for a partition.

While partitions can help reduce a plan's underfunding, they are far from a panacea because they rely on the PBGC to pay the partitioned participants' benefits. PBGC is simply not funded well enough to pay all orphaned liabilities for all critical and declining plans. The PBGC funding issue is actually exacerbated in a partition, because PBGC starts paying the partitioned benefits immediately, unlike when the plan as a whole goes insolvent. Absent additional funding, this move would likely accelerate PBGC's projected insolvency.⁸³ Assuming the funding issue could be resolved, the value of partitioning would be to help plans to focus on maximizing contributions to pay for current costs.

Plan Mergers

As discussed previously, MPRA provides the PBGC with the authority to facilitate mergers. Some commentators believe that, with PBGC-assisted mergers or partitions, many plans will be able to recover using contributions from the remaining active employers and employees, which might help preserve plans covering some 800,000 people.⁸⁴ However, it does not appear that many plans have sought PBGC assistance in effectuating mergers under MPRA. This could be because trustees of critical and declining plans have been focused on determining whether a benefit suspension and/or partition application would solve their plans' solvency issues rather than on investigating potential mergers.

The MPRA application process is labor intensive, time consuming, and expensive and requires only the involvement of one board of trustees. It would thus be difficult and time consuming to explore potential mergers or perform a merger study and to prepare a MPRA application at the same time. It is possible that those plans that have had their MPRA applications rejected, or who have withdrawn their applications, may investigate whether a PBGC-facilitated merger with another plan is feasible. However, any solution that requires PBGC funding is not necessarily going to permanently resolve a plan's funding issues because of PBGC's own precarious financial condition. To make plan mergers a viable tool for critical and declining plans, more guidance is needed from Treasury/PBGC and/or Congress.

Benefit Modifications

While the PPA has allowed many plans to make benefit modifications to future accruals and other adjustable benefits, and MPRA now authorizes reductions to benefits in pay status, some are calling for even more flexibility to allow financially troubled plans to make benefit modifications. It is possible that for some deeply troubled plans that are nearing the death spiral, benefit reductions that go beyond those allowed by MPRA may be necessary.

The more time that elapses without a workable solution, the bigger the cuts will have to be. These plans' plights are exacerbated by PBGC's underfunded status. It is estimated that if the PBGC becomes insolvent, ongoing premiums that multiemployer plans pay would cover only about 10% of the benefits for which Central State is responsible. This would require participants to take a 90% reduction in their benefits.⁸⁵

In an article for the Heritage Foundation, Rachel Grezler proposed several ideas to improve multiemployer plan funding. First, she suggested creating special rules for critical and declining plans that “have no hope of becoming solvent.” Under the proposal, critical and declining plans would not be allowed to continue adding new liabilities. Instead, they would be required to freeze new benefits and reduce existing benefits, including to those in pay status, similar to MPRA.⁸⁶ The paper also advocates for rules making it easier for plans to reduce benefits prior to becoming insolvent as doing so would prevent older workers in underfunded plans from continuing to receive full benefits, while younger worker accrue very little. The authors suggest that plans looking to make MPRA reductions be able to do so without demonstrating that the reductions will result in the plan’s long-term solvency.⁸⁷ Another concept is to allow the PBGC, on its initiative, to reduce benefits within a plan prior to the plan going insolvent, or to reduce the PBGC guaranty after insolvency. The Heritage Foundation recognizes however, that reductions in the PBGC guaranty alone would not be enough to prevent PBGC insolvency, and that other changes are necessary.

Variable Defined Benefit Plans

While technically a defined benefit plan, a variable defined benefit plan has characteristics of both defined benefit and defined contribution plans. Interestingly, the variable defined benefit plan has been used by multiemployer defined benefit plans with severe funding issues (like the Sheet Metal Workers’ National Pension Fund) to allocate part of the investment risk to employees, as well as by multiemployer 401(k) plans (like the UNITE HERE Local 26 Pension Plan) to shift some investment risk to employers.

Variable defined benefit plans can be designed to be 100% funded.⁸⁸ They are similar to traditional defined benefit plans in that the contributing employers bear the financial obligation and the plan’s assets are invested in a pooled account. They are unlike defined benefit plans in that they spread investment risk among contributing employers and participants and rely on less risky investment assumptions.⁸⁹ The benefit the plan pays is “variable,” because the amount varies depending on actual investment performance.

Basically, the variable defined benefit plan pays the greater of a floor defined benefit and a variable benefit. After taking into account contribution levels, the plan actuary will determine the floor benefit based on plan demographics and a conservative interest assumption (for example 4% to 5%). The floor benefit would also be converted into investment units in the plan’s collective assets, which would be professionally managed. These investment units fluctuate in value annually, increasing in value if the plan’s investment return exceeded the conservative interest assumption (plus a reserve factor) and decline in value if the plan’s investment return falls below the assumption.

At retirement, the employee would receive the greater of the sum of his or her floor benefits or the sum of his or her investment units.⁹⁰ The floor benefit is thus designed to be the minimum that a participant might receive at retirement, but the variable component allows the benefit to increase (within certain specified limits) when investment returns are higher. Extraordinarily

high investment returns above those specified in the plan are placed into reserve to protect against the inevitable negative investment return years.

Proponents of the variable defined benefit plan laud the design's ability to pay an adequate benefit in the form of a life annuity, while at the same time allocating the investment risk among contributing employers and participants. The conservative investment assumption is lower than the traditional 7% to 8% that most defined benefit plans assume, which provides a higher probability that the promised floor benefit will never have to be adjusted because the lower return is more likely to be achieved.⁹¹

Variable defined benefit plans are of recent vintage in the multiemployer arena. While there appear to be benefits to all stakeholders, these plans might be more helpful for younger workers and could possibly become the defined benefit plan of the future. The variable defined benefit plan does not do anything to solve the funding issues of plans that face insolvency today and that jeopardize the retirement security of those near or in retirement.

Composite Plans

Another plan design that has gained traction among multiemployer plan stakeholders and practitioners is the composite plan. The concept of the composite plan was first introduced in 2013 by the National Coordinating Committee for Multiemployer Plans (NCCMP).⁹² Draft legislation language was released by the House Education and Workforce Committee in September 2016, but to date no legislation has been enacted.

Like variable defined benefit plans, composite plans are designed to allocate investment risk to both employers and participants. A composite plan is neither a defined benefit nor a defined contribution plan, but has characteristics of each. Like multiemployer defined benefit plans, the trustees would determine the rate at which benefits accrue and benefits would be paid in the form of an annuity. However, unlike defined benefit plans, the ultimate benefit paid would be variable and depend on the market value of assets.⁹³ Benefit amounts would be adjusted on an annual basis to mitigate the frequency and impact of market fluctuations, projected for a 15-year period.⁹⁴ Composite plans would not have any withdrawal liability and would not be subject to PBGC guarantees. The employers' contribution obligation would be limited to the rates negotiated with the union.⁹⁵

Those advocating for composite plans note that composite plans no longer place the risk of ensuring performance of the investment markets solely on employers, while at the same time providing a mechanism for union workers to receive retirement income for life.⁹⁶ The composite plan design also has its critics. International Brotherhood of Teamsters President James Hoffa believes the composite plans would not be adequately funded under the proposed legislation and the net result would be two underfunded plans.⁹⁷ The Pension Rights Center describes the proposed legislation as a bill that would allow "relatively healthy multiemployer plans with secure adequate benefit structure to transition to two inferior plans."⁹⁸

Loan Program Proposals

In recent months, stakeholders representing both union and management have put forth potential legislative solutions they believe could solve even the most severely underfunded plans' funding problems. Recognizing the uphill political battle procuring a pure tax payer bailout of multiemployer plans would entail, these proposals involve providing loans to pension plans that would be paid back to the U.S. government over time.

Butch-Lewis Act

In November 2017, Senator Sherrod Brown (D-OH) and Representative Richard Neal (D-MA) introduced the Butch-Lewis Act (S. 2147 and H.R. 4444, respectively), which would allow struggling multiemployer pension plans to borrow money from Treasury to remain solvent.

The bill would create a new office within Treasury, known as the Pension Rehabilitation Administration (PRA). The PRA would allow financially troubled plans to borrow money for up to 30 years at low interest rates. The PRA would raise money for the loan program through the sale of Treasury-issued bonds to financial institutions. The 30-year period is supposed to give the borrowing plans ample time to repay the loan, while simultaneously incentivizing it to make smart long-term investments. The legislation would also prohibit the plans from making certain "risky" investments during the loan period. Every 3 years, the plans will have to report back to the PRA and demonstrate they are rehabilitating themselves and avoiding insolvency. The PBGC would also share some responsibility in financing the loan program by providing a plan the funds it requires beyond the loan program to pay benefits.⁹⁹

Curing Troubled Multiemployer Pension Plans: Proposal

A stakeholder group made up of employers and unions has been proactive in formulating its own legislative proposal, and has been actively marketing the proposal to multiemployer plans, the NCCMP, and members of Congress. The proposal is titled "Curing Troubled Multiemployer Pension Plans" and the theme is that saving multiemployer plans will require shared sacrifices. Under this proposal, multiemployer plans will be saved from impending insolvency through a combination of federal loans, benefit reductions, and surcharges to plan participants.

Under the proposal, any plan that is in critical and declining status would be eligible for a federal loan. The plan would submit an application to the Department of Treasury, together with an actuarial certification that the plan is critical and declining and that the loan proceeds would be sufficient to cure the plan's funding issues and that the plan could repay the loan. The loan proceeds would cover the plan's negative cash flow (i.e., the difference between the amount the plan pays in benefits each month, plus administrative expenses and the amount the plan receives in employer contributions).

A plan would be able to take up to three loans. The total amount of the loan would be calculated by the plan's actuary, and would be sufficient to pay five times the projected contribution income and earnings minus benefit payments and administrative expenses. The proposal refers to this amount as the "shortfall." The interest rate on the loan would be 1% and would be paid over

30 years, with interest-only payments during the first 5 years (or 10 years if two loans are necessary, and 15 years if three are needed).

The proposal also requires plans to reduce all benefit payments by 20% within 60 days after the loan application is approved. These benefit reductions would apply to all participants and there would be no protected classes. The reductions would apply even if they resulted in a participant receiving less than the PBGC guarantee. The 20% reduction would also apply to those participants who are not yet receiving benefits. Proponents of the proposal assert that because the loan will cover the shortfall, and the shortfall is calculated using the unreduced benefit amounts, plans will have an opportunity to improve its funded status through investment performance.

After the initial 5-year loan period, the plan's actuary will determine whether the plan is still in critical and declining status. If the plan is still critical and declining, the shortfall is recalculated (again without including benefit reductions) and a new loan amount is calculated and paid in monthly installments. If the plan is no longer in critical and declining status, repayment of the loan principal begins. Benefit reductions would remain in place until the plan is neither in critical or endangered as defined in the PPA.

The Curing Troubled Multiemployer Pension Plans proposal estimates that approximately \$30 billion in loans might be necessary to save underfunded multiemployer plans. In order to reduce the risk of default on the loans (the plans will be paying interest only for 5 to 15 years), a multiemployer plan risk reserve pool (MRRP) would be established. The MRRP would be funded by imposing monthly surcharges on participants and employers, and by increasing PBGC premiums that multiemployer plans pay. PBGC would administer the MRRP and would invest the money in a trust separate from PBGC's other assets.

Draft Federal Credit Proposal

The NCCMP has put forth its own proposal. The NCCMP was instrumental in designing and lobbying for the passage of MPRA and firmly believes that Central States' funding issues would have been resolved if Treasury had approved Central States MPRA application.¹⁰⁰

The NCCMP proposal is similar to the shared sacrifices proposal. The NCCMP's Draft Credit Proposal (DCP) also contemplates federally subsidized 30-year loans at a 1% interest rate. According to NCCMP, it has modeled its program using data from five plans and that each plan demonstrated that it would maintain solvency and be able to repay the loan. The DCP provides for three alternatives to be presented to Congress.

Alternative 1 would require no benefit reductions and the federal government would pay all credit subsidy costs. The credit subsidy cost is the estimated long-term cost to the government of a direct loan or loan guarantee, calculated on a net present value basis and excluding administrative costs. The NCCMP concedes that there is no precedent for any federal credit program that did not require the recipients to restructure their obligations and governance.¹⁰¹ It is thus hard to imagine that Alternative 1 would be adopted given the current political climate.

Alternative 2 requires the same 20% across the board reduction in benefits that the shared sacrifices proposal calls for. Unlike the 20% UPS reductions, which would be used to provide plans with the ability to earn their way back to solvency, the reductions under the DCP would be paid to the government to reduce the cost of the government subsidy. The government would pay any remaining subsidy costs. The NCCMP is on record that it will not support any tax or other payment on the multiemployer plan system to pay for or credit-enhance the loan program because the structure is consistent with the Federal Credit Reform Act.¹⁰²

Alternative 3 also requires a 20% across-the-board benefit reduction, and then requires any additional amounts needed to achieve a zero credit subsidy to the government.¹⁰³

The NCCMP recognizes that for plans like Central States and the UMWA Plan, time is of the essence in passing a solution. Each day that goes by brings both plans closer to the death spiral from which there would likely be no return. The NCCMP believes that its proposal maximizes the probability of success and would be palatable to the government, which makes implementation more likely.

CONCLUSION

Although most multiemployer pension plans are not in endangered or critical status, a significant crisis is looming in the multiemployer system. Most plans have survived last decade's two financial crises and absorbed the impact of a dwindling ratio of active participants to retirees. These plans survived primarily due to a combination of benefit reductions and contribution increases allowed by the Pension Protection Act of 2006, as well as an improving economy. Some plans might be able to survive if they make significant Multiemployer Pension Reform Act of 2014 reductions to benefits in pay status. Those appear to be the fortunate plans.

Unfortunately, some plans are nearing the death spiral, where even maximum reductions under the Multiemployer Pension Reform Act of 2014 will not be sufficient to stave off insolvency. At the same time, the gap between those critical and declining plans and healthier funds continues to widen, while the Pension Benefit Guaranty Corporation's insolvency is quickly approaching. If these plans fail, the negative effects will be felt by the participants and their families, local economies, and U.S. taxpayers as a whole.

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