AFL-CIO

AMERICA'S UNIONS

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December 23, 2019

The Honorable Charles Grassley, Chairman
The Honorable Ron Wyden, Ranking Member
Committee on Finance
United States Senate
Washington, D.C. 20510

The Honorable Lamar Alexander, Chairman
The Honorable Patty Murray, Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate
Washington, D.C. 20510

Dear Senators Grassley, Alexander, Wyden, and Murray:

In our November 27, 2019 statement, the AFL-CIO Working Group on Retirement Security unequivocally rejected the Grassley-Alexander Multiemployer Pension Recapitalization and Reform Plan ("the Proposal") because it would not only injure the retirees and active participants it purports to help, but also could precipitate the collapse of all multiemployer pension plans. It is imperative that Congress act quickly to pass legislation to protect retirees' hard-earned benefits and stabilize the multiemployer pension system, so we now detail our numerous objections to the Proposal so they are included in the legislative record as the Senate moves forward.

Before going into these details, however, we must remark on a glaring omission that alone makes this proposal unworthy of consideration. That is, the proposal provides no federal assistance whatsoever. It relies solely on draconian PBGC premium increases and new taxes, the so-called stakeholder and retiree "copayments." This unsound and inequitable approach would spread the threat of insolvency to the many stronger plans that are not currently in need of federal assistance, ultimately causing the implosion of the entire multiemployer pension system, triggering economic hardship for the plans' individual participants and retirees, and rippling throughout entire industries and communities. The numerous problems with the proposal we identify below pale in the face of this unacceptable omission of federal funds.

I. Special Partitions

At the heart of the proposal is a special partition, the mechanism for supporting the most financially troubled plans. We do not have a per se objection to the notion of partition to relieve the most financially troubled plans of liabilities that are blocking their recovery efforts, but particular features of this new special partition are completely unacceptable.

A. Required across-the-board 10% benefit cut. A mandated general rule for plan benefit redesign is not equitable, reasonable or even acceptable. In many cases, accruals for active participants were cut or frozen years before the special partition. These workers continued to fund the plan through their negotiated wage package, yet the Proposal would require even greater sacrifice with yet another benefit reduction before their plan can even be considered for support. Trustees of partitioned plans should have discretion to reduce benefits up to 10%, as part of their solvency program (with suitable protections for older and disabled participants), but there is no justification for Congress to dictate the extent and applicability of any future reductions.

B. Limitation on future accruals. It is unreasonable to impose such a limitation on all ongoing plans that benefit from the special partition. Constraining an original plan once it emerges from declining status, or a stronger plan with which an original plan merges, is unjustifiable. Each plan's trustees are in the best position to determine the reasonable and affordable plan design options that will help the pension plan achieve its solvency, rehabilitation or funding improvement goals.

C. Extra fees for benefit improvements. Consistent with the need to implement a realistic recovery plan, benefit increases should be allowed for critical and declining plans on the same basis as for endangered plans—that is, if they are paid for with contributions not counted toward recovery and will not impede the recovery. This is so because it may be necessary for a plan's survival to offer some benefit growth, for example, for participant groups that generate extra contributions. Moreover, the provision requiring special payments to PBGC if benefits are increased has no logical applicability once the original plan recovers to critical status, or to any plan with which it merges.

D. Governance of Original (Partitioned) Plan. Plan trustees, who are both management and labor representatives, may be tempting and easy targets, but they are not the cause of plans' financial trouble. They bear no responsibility for the Wall Street financial crisis that exacerbated the decline of multiemployer pension plans or the industry deregulation, failed trade policies, and other changes in the economy that prompted the closing and bankruptcy of so many contributing employers to multiemployer plans. Just like other fiduciaries, such as those responsible for single employer plans, universities, foundations, museums, and other public charities, multiemployer pension trustees work with expert advisers to set investment policy and monitor the professionals who manage the plans' investments. Moreover, it was federal tax law that prevented pension trustees from taking advantage of the 1990s robust economy to build extra plan reserves.

Therefore, we see no justification for giving the PBGC new authority to appoint a special trustee to the original plan, especially since that trustee would have greater authority than any other trustee. Should it become necessary to remove and replace plan trustees because they have breached their fiduciary duty, the Department of Labor has clear authority to enforce ERISA's fiduciary rules.

II. PBGC Premium Increases

A. Plan premiums. The proposed premium increases, which are paid out of plan assets, are wildly excessive and destructive--$80 for the per-participant flat-rate premium and up to $250 per participant for a new "variable-rate" premium. Given how the variable-rate premium would be assessed, almost every multiemployer pension plan would be subject to its full amount. This means that the standard annual PBGC premium at the start of the new regime would be $330 per participant—an astronomical 1000% hike—with disastrous results. Plan administration costs would soar, and the funds available to provide benefits would be depleted. Plans covering low-wage workers, with their correspondingly low contribution rates and low benefits, would be the hardest hit.

B. Stakeholder "co-payments". The $30 per employee levy on unions is a direct tax, and the notion that unions should be taxed to fund troubled plans is nonsensical. It is based on the specious premise that unions are responsible for plans' financial plight when, in fact, pension plans are separate entities from their sponsoring unions, managed by joint employer-union fiduciary boards of trustees. Unions are not for-profit enterprises. They dedicate the dues money they receive from their members to representing those members. Making a union liable means making the members liable.

On top of that, the workers would end up paying the similar new $30 charge imposed on employers, because their employers would treat the charge as part of the wage package that they will offset by cuts to that package.

C. Retiree "co-payments". The proposal is an untenably large direct annual tax—up to 10% of the monthly benefit—on retirees whose pension plan is in the yellow or red (including dark red) zone, if it is frozen or insolvent, or subject to the special partition. Moreover, this tax would be on top of whatever accrual or benefit cuts the plans adopted as part of their recovery efforts and, in the case of partitioned plans, a mandatory 10% benefit cut. Taxing retirees' modest fixed incomes, is exploitative and fundamentally unfair.

III. Changes in Funding Requirements

A. Discount rate. The Proposal's mandated arbitrarily low and volatile discount rate for valuing plan liabilities would make plans prohibitively expensive. Furthermore, it would be keyed to fluctuating corporate bond rates, warping plans' financial forecasts and projections, as well as introducing unsupportable uncertainty into the collectively bargained contribution arrangements. Neither result is tolerable, as illustrated by the disturbing consequences of this approach for single employer pension plans.

B. Zone rule changes. The most serious problem with the new zone rules comes from elsewhere in the proposal: the arbitrarily low and volatile discount rate prescribed for plan funding. The new discount rate would be used to sort plans into green, yellow or red zones, and would assign a great many more multiemployer pension plans to a financially troubled status. This would broadly compel unnecessary and painful cuts in existing benefits and future accruals.

Moreover, the "Technical Explanation" leaves several features of the zone rule changes unclear. Specifically, there is no apparent functional difference for dividing the top tier of plans into two levels, "unrestricted" and "stable." Also, and of greater importance, it is not clear whether critical-status plans that employ all reasonable corrective measures, but cannot achieve the prescribed degree of improvement within the stipulated time, still have the alternative of adopting a rehabilitation plan that will enable them to take longer to leave the red zone to remain critical but forestall insolvency. If these safety valves are no longer available, more plans will be destined to fail.

IV. Withdrawal Liability

We object to the proposed changes to the withdrawal liability rules in their entirety. They would only cause confusion and consternation for plans, contributing employers, and those companies that do business with contributing employers—to no benefit whatsoever. No one would gain from these changes, other than the lawyers and other professionals whose billable hours, when representing plans and employers in withdrawal liability disputes, would increase.

A. Liability valuation assumptions. The Proposal calls for an employer's withdrawal liability to be determined based on the actuarial assumptions used for plan funding, rather than the plan actuary's best-estimate assumptions. Given the Proposal's mandated discount rate assumption for plan funding, this change would not only increase withdrawal liability in many, perhaps most cases but also would add volatility to its calculation. This is an undesirable and unproductive outcome because it will diminish plans' ability to attract new employers and maintain a healthy pool of assets for the long term.

B. Cap on payments. Without apparent reason, for plans that are, in aggregate, more than 60% funded, this provision arbitrarily reduces the number of annual installments payable by a withdrawn employer. By reducing what a withdrawing employer must pay on its allocated debt to the plan, this provision increases the amount left for the remaining employers to fund, a burden they may not be able to withstand.

C. Mass withdrawal. The Proposal would eliminate the existing rule that when all employers withdraw within a 3-year period, withdrawal liability is recalculated in accordance with PBGC rules. This re-calculation increases the amount due, since there will be no further recourse to employer contributions. The elimination of this rule will leave plans that have been abandoned by all employers at greater financial risk.

D. Lump sum prepayment. The Proposal mandates that any lump sum prepayment of withdrawal liability be calculated using the plan's funding discount rate, unless there is a settlement based solely on the employer's financial condition. There could be any number of reasons, however, why trustees, as plan fiduciaries, determine that it is prudent to settle a withdrawal liability claim rather than litigate or accept a reduced total amount in periodic payments. There is no rationale for restricting their options for maximizing the amounts the plans collect.

E. Special-industry rules. While the Proposal correctly preserves the special definition of "withdrawal" for the building and construction industry, it fails to maintain the comparable special definition for the entertainment industry, the option for plans in other industries to adopt similar approaches with PBGC approval, the retail-food industry standards for partial withdrawal, or the separate provisions for the United Mine Workers Pension Fund. This is a fatal omission.

V. Compelled Plan Mergers and Terminations

A. Forced plan consolidations. The Proposal would provide the PBGC with unbridled authority to merge or take over plans with fewer than 5,000 participants. Although the Proposal says the agency "may use this authority to reduce administrative expenses of insolvent and terminated plans," it does not limit the exercise of that power to those situations.

B. Forced terminations. The Proposal requires that a plan projected to become insolvent within the next five years be amended to terminate, unless it applies for the special partition. Among other things, a terminated plan would be compelled to reduce all benefits to the PBGC-guaranteed level. Since the special partition would be available only for plans that apply within one year of the new law's enactment, all multiemployer plans that face short-term insolvency after that would be forced to terminate, even if they have the prospect of recovery through the critical or declining status process. This is hardly a productive result for workers' retirement income security.

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As the legislative record developed in the House of Representatives makes clear, the costs of Congress's failure to act to address the looming multiemployer pension crisis will be catastrophic. But, as we said in our November 27, 2019 statement, Congress must act wisely with a solution that is viable and constructive over the long-term. As we have detailed, the Proposal in no way meets that test.

Sincerely,

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