

VIA ELECTRONIC DELIVERY (MultiemployerReform2019@finance.senate.gov)

The Honorable Charles Grassley
Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lamar Alexander
Chairman
Senate Committee on Health, Education, Labor
and Pensions
428 Dirksen Senate Office Building
Washington, DC 20510

January 21, 2020

Dear Chairmen Grassley and Alexander,

The U.S. Chamber of Commerce (“Chamber”) and the Association of Food and Dairy Retailers, Wholesalers and Manufacturers (“Food Association”) commend you on your effort on the Multiemployer Pension Recapitalization and Reform Plan (“MPRRP”). We look forward to discussing and working with Congress to pass a bipartisan, bicameral solution that works for employers, employees, retirees and the economy.

Introduction

Millions of workers rely on multiemployer pension plans for their retirement security. However, because of a confluence of events, over one million retirees in some of these plans are in danger of losing benefits in the near future because they participate in plans that are on the brink of insolvency. In addition, many employers contribute to more than one multiemployer pension plan because of the makeup of their workforce, some of which are financially distressed and others that are financially healthy. However, if one plan becomes insolvent, it may trigger additional payments from an employer that could negatively impact that employer’s ability to contribute to the other plans, which in turn could harm the once healthy plan. This is known as the contagion effect.

The pension funding crisis is bigger than these plans and retirees. The crisis negatively impacts employers, active workers, and the economy. It limits an employer’s ability to grow its business and expand its workforce. Furthermore, according to its own projections, the Pension Benefit Guaranty Corporation (“PBGC”) which is the federal insurer of these plans, will become insolvent by 2025. Without a resolution to this crisis, billions of dollars in retirement benefits will be lost, which will not only severely harm current retirees, but also will inevitably hurt employees, employers, their communities and the overall economy.

Stabilizing the multiemployer pension plan system will involve significant costs. These costs must be spread among all stakeholders in a fair and equitable manner because all stakeholders have acted in a responsible manner. The retirees provided years of service in the workforce in exchange for a promised pension. The contributing employers made the required contributions under their collective bargaining agreements and the governing rehabilitation plans. While no single group bears responsibility for the crisis, all stakeholders (including taxpayers) stand to suffer if the system is not stabilized. The Federal government also bears significant financial risk if the multiemployer system and PBGC are not stabilized because workers and retirees without pensions will rely on the Federal government for financial assistance. As such, all stakeholders must contribute toward a solution.

In his December 2019 appearance before the Senate Finance Committee, PBGC Director Hartogensis prioritized three goals for a long-term solution to the multiemployer crisis: 1) protect retirees and prevent

collapse of distressed plans; 2) save the Federal backstop (the PBGC); and 3) prevent a future crisis.¹ The Chamber and the Food Association share these goals and hope the following comments will assist Congress in constructing bipartisan legislation that will protect all stakeholders in the multiemployer system.

Our comments focus on the following issues in the MPRRP:

- Funding rules (namely, the discount rate assumptions);
- Withdrawal liability;
- Effects of partition on withdrawal liability;
- PBGC Premium increases;
- Preconditions for partition;
- Stakeholder copayments; and
- Excise taxes

Funding Rules

Background

Because pension plans are designed to pay benefits over decades, plan trustees need to determine the amount of money to contribute to these plans in order to pay both current and future retirees. To determine these future costs in today's dollars, the plan's actuaries assume a certain rate of return ("discount rate") to estimate how much money is needed to cover future expected benefit payments. The actuaries use this discount rate to determine the present value of the plan's obligation to make future benefit payments to current and future retirees. Any change in the discount rate will impact plan liabilities, which ultimately impacts how much employers must contribute. The lower the discount rate, the higher the liabilities, which, in turn, means employers must contribute more to the plan.

In its report on pension valuation methods, the General Accountability Office noted that there are two general methods for determining a plan's discount rate: the assumed-return approach and bond-based approach.²

The assumed-return approach bases the discount rate on the long-term average assumed rate of return on plan assets. "The assumed-return approach is based, in part, on the premise that pension plans are long-term enterprises that can weather fluctuations in financial markets, and that the estimated long-term average cost of financing plan benefits, based on the plan's asset allocation, provides the most relevant measure of plan costs."³

The bond-based approach uses a discount rate tied to the market price of financial instruments, such as bonds, annuities, or other instruments that resemble long-term pension characteristics. "The bond-based approach is premised on the theory that pension benefits are 'bond-like,' in that they constitute promises

¹ Statement of the Honorable Gordon Hartogensis, Director of the Pension Benefit Guaranty Corporation, before the Senate Committee on Finance, December 11, 2019, at p. 8-9, available at <https://www.pbgc.gov/sites/default/files/pbgc-director-statement-senate-finance-committee-12-11-2019.pdf>

² "Pension Plan Valuation Views on Using Multiple Measures to Offer a More Complete Financial Picture", GAO, September 2014 available at <https://www.gao.gov/assets/670/666287.pdf>

³ Id. at p. 14.

to make specific payments in the future and should be similarly valued.”⁴ The Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, requires that single employer defined benefit pension plans use this method to determine minimum required contributions, although the tremendous burden this imposed on employers led Congress to somewhat soften this discount rate requirement.⁵

ERISA’s multiemployer funding rules are different from the single employer rules because of the unique nature of multiemployer plans (in that relatively few multiemployer plans are terminated, when compared to single-employer plans). Given their “permanent” nature, most multiemployer plans use the assumed-return approach, because this approach reflects the returns that a plan can expect to receive over time and more accurately reflects the true cost of the plan’s benefit liabilities. In setting the actuarial assumptions used to value multiemployer pension plan liabilities (including the discount rate), current law requires that the actuarial assumptions used to determine “all costs, liabilities, rates of interest and other factors determined under the plan” be “reasonable (taking into account the experience of the plan and reasonable expectations), and which, in combination, offer the actuary’s best estimate of anticipated experience under the plan”.⁶

Although the discount rate will vary from plan to plan depending on the plan’s asset investment allocation, the discount rates are within range of the average rate of return for other similar investments. As noted by the Segal Group, today, most multiemployer plans use interest rate assumptions between 7.0 to 7.5%.⁷ According to the same analysis, “[e]ven taking into account the investment losses from the 2000s, actual historical returns for multiemployer plans have consistently exceeded 7.5% on a rolling 30-year basis.”

MPRRP Proposal

The proposal limits the multiemployer pension plan discount rate to the lesser of the actuary’s best estimate of future investment experience under the plan or a cap. The cap is equal to the lesser of (1) a 24-month average of the third segment of the yield⁸ curve plus 2% or (2) 6%. The maximum rate will be phased in over five years, beginning in plan year 2020.

Concerns

Current law already requires that the discount rate reflect the actuary’s best estimate of future investment experience. Setting a “cap”, especially a fixed cap, will cause the plan to overstate the value of benefit liabilities as market conditions change. Although a fixed 6 percent rate may be reflective of the current economic environment, it does not allow a plan to account for future market conditions. For example, a

⁴ Id.

⁵ The interest rate for single employer plans is the modified yield curve of investment-grade corporate bonds of varying maturities in the top 3 quality levels (AAA, AA, and A ratings), and the Department of the Treasury publishes it monthly. 29 U.S.C. § 1083 (h)(2) (ERISA § 303(h)(2)); 26 U.S.C. § 430(h)(2). In an era of unprecedented low interest rates, the Moving Ahead for Progress in the 21st Century Act of 2012 allowed plan sponsor to measure pension liability using the 25-year segment rate average plus or minus a 10% corridor. The Bipartisan Budget Act of 2015 extended these provisions through 2020, with a 5% increase in the corridor through 2023 to 30% where it will remain.

⁶ 29 U.S.C. § 1084(c)(3) (ERISA § 304(c)(3)); 26 U.S.C. § 431(c)(3).

⁷ “The Multiemployer Pension Plan Crisis: Segal’s Observations” available at <https://www.segalco.com/multiemployer-pension-plan-crisis/#Multiemployer>

⁸ From 2014 through 2019, this rate has fluctuated from a low of 4.33% to a high of 5.20%. See IRS Funding Yield Curve Segment Rates at <https://www.irs.gov/retirement-plans/funding-yield-curve-segment-rates>.

period of sustained inflation may warrant the use of a higher rate (which would not be allowed under the proposal).

The MPRRP correctly notes that an inappropriately high discount rate can significantly reduce the probability of pension benefit promises being kept. However, a fixed discount rate is not necessarily the best response to address this concern. Instead, more stringent and forward-looking “zone status” rules, with flexible options, will force plans to take measures that improve the plan’s funded condition without artificially overstating the plan’s liabilities. Adopting such rules would do away with the need for a fixed discount rate.

If there is indeed a change in the rules for determining the discount rate despite these concerns, a longer transition period is needed because any change in the interest rate assumptions can have a dramatic impact on employer contributions. For example, based on the estimates in the GAO report, a 0.25% reduction in the discount rate could increase the value of plan liabilities by almost 4%. This increase in plan liabilities can only be addressed through increased contributions or benefit reductions, which will take time to implement. A five-year period is not long enough to transition to a new formula because these plans are subject to the collective bargaining cycle, which can vary from 3 to 5 years. As a result, plans would not immediately be able to adjust contribution rates, and the only way plans would be able to account for the increase in liabilities before the next collective bargaining agreement (CBA) would be to reduce benefits.

Recommendation

Any final legislation should not change the current rules regarding the determination of the discount rate. As reflected above, most plans currently use a discount rate that reflects long-term asset returns. Furthermore, imposing an unduly restrictive interest rate would cause plans that are otherwise healthy to become artificially “unhealthy” overnight resulting in increased contributions and/or reduced benefits.⁹ Instead of mandating a discount rate, the proposal should focus on the adoption of MPRRP’s proposed reforms that strengthen the zone status rules. These measures will require plans to look farther into the future to estimate their financial status, take earlier action when a plan begins to show signs of financial hardship, and establish new incentives for plans to improve their funding status.

⁹ Horizon Actuarial Service found that when using the corporate bond rates instead of current discount rates, the funding percentage would drop from 73% to 51% and 43% with the 30-year Treasury rates. For zone status, currently 60% of plans are green (meaning a funding ratio of more than 80%), but based on current corporate bond yields, 7 % would be green and 2% if discount rates were based on the current 30-year Treasury yields, both resulting in decreased benefits levels. Additionally, contributions would be increased from 1.7 to 2.4 times current contributions using the corporate bond discount rates and from 2.0 to 3.0 times the current contributions using the 30-year Treasury discount rates. Finally, strictly tying the rate to fluctuating market rates would add volatility even though contributions are locked in for the terms of the CBA. See “The Impact of Alternative Discount Rates on Multiemployer Pension Plan Funding”, Ben Ablin, ASA, EA, MAAA, and David Pazamickas, ASA, EA, MAAA, June 2018, at http://www.horizonactuarial.com/uploads/3/0/4/9/30499196/horizon_actuarial_discount_rate_report.pdf.

Withdrawal liability

Background

Multiemployer pension plans date back to the mid-20th century and were developed to serve as retirement vehicles where employment patterns prevented employees from earning retirement benefits under traditional single-employer defined benefit plans. Multiemployer plans typically cover 1) small employers; 2) employers with mobile workforces; and 3) industries where workers are employed on a job-by-job basis (e.g., construction and entertainment). Before 1974, federal law did not impose funding rules on these plans. ERISA was enacted in 1974, and it added minimum funding requirements and anti-cut back rules (which prohibited amending a plan to reduce accrued benefits). Although these changes were needed to ensure the plans were adequately funded and participants' benefits were protected, the changes increased employer contributions which forced an exodus from these plans.

The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") amended ERISA to address employers leaving these plans by creating withdrawal liability, which requires an employer to pay its share of any unfunded vested benefits when the employer leaves the plan. If an employer cannot pay its withdrawal liability, for example because it is bankrupt, those liabilities are shifted to the remaining employers, which created the "last man-standing rule."

When MPPAA was enacted in 1980, there were large numbers of contributing employers which, at the time, ensured a sustainable contribution base that could absorb the loss of a contributing employer, even one that could not pay its full withdrawal liability. In addition, there was less volatility in the capital markets making contributions more predictable.

The economy, the investment market, and plan demographics have changed dramatically since 1980. Because of the "last-man standing" rule and the withdrawal liability rules, new multiemployer plans are not being created, and employers are strongly discouraged from adding new employees to existing plans.¹⁰ For example, under the MPPAA rules for allocating a multiemployer plan's underfunding among the contributing employers, a new employer could be exposed to a "full share" of the plan's unfunded vested benefits as soon as 5 years after joining a plan, even if the new employer is making contributions significantly in excess of the amount required to fund its employees' benefits (and has few employees eligible for benefits because of its short period of participation). As a result, MPPAA essentially became a bar to new employer entrants into multiemployer plans. This bar, coupled with the exodus of so many employers (especially through bankruptcy), is a key aspect of the system's demographic problems.¹¹

¹⁰ See "MULTIEMPLOYER PENSION PLANS: CURRENT STATUS AND FUTURE TRENDS", Alicia H. Munnell, Jean-Pierre Aubry, and Caroline V. Crawford, December 2017, Center for Retirement Research at Boston College available at https://crr.bc.edu/wp-content/uploads/2017/12/multiemployer_specialreport_1_4_2018.pdf. ("[E]mployers negotiating collective bargaining agreements are now reluctant to enter defined benefit plans, because they effectively are assuming some portion of the plan's unfunded liability.")

¹¹ The number of participating employers is reported on the Form 5500, however, this reporting only goes back to 2009. Using the number of active participants as a proxy for contributing employers, it is clear that the number of employers has shrunk dramatically. For example, there was a 52.2% decrease in manufacturing and 30.7% in transportation in active participants from 2001 to 2015. See "Multiemployer Plans: Their Current Circumstances in Historical Context Final Report", September 29, 2017, Impact International available at <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/multiemployer-plans-their-current-circumstances-in-historical-context.pdf>.

MPRRP Proposal

Under the proposal, the annual withdrawal-liability payment amount generally is equal to 100% of the employer's highest contribution base units in any year during the last 20 years (versus the current high 3 year average out of the last 10), multiplied by its highest contribution rate in the last 10 years, but in no event less than the highest amount that the employer has contributed in the past 20 years. Withdrawal liability would be required to be measured on the same basis as the plan liabilities reported on the annual funding notice and as modified under the minimum-funding standards.

The payment schedule is based on the plan's funded percentage as of the beginning of the plan year in which the employer withdraws, as follows:

- If the plan is 140% or more funded, a withdrawing employer owes no withdrawal liability.
- If the plan is 100% to 139% funded, a withdrawing employer owes no withdrawal liability if the plan has a policy of immunizing or annuitizing a share of the plan's benefit liabilities equal to the employer's share of the plan's five-year contribution history.
- If the plan is 90% to 139% funded, a withdrawing employer owes five years of payments based on the employer's share of the plan's five-year contribution history.
- For every two percentage points below 90% funded, a withdrawing employer owes one additional year of payments (up to a maximum 20 years of payments, unless the plan is in declining status or terminated, as discussed above); for example:
 - If the plan is 80% funded, a withdrawing employer owes 10 years of payments.
 - If the plan is 70% funded, a withdrawing employer owes 15 years of payments.
 - If the plan is 60% funded, a withdrawing employer owes 20 years of payments.

If the plan is in declining status (*e.g.*, projected insolvency within 20 years) or if a plan is terminated, a withdrawing employer owes a maximum of 25 years of payments (or, if less, a duration relating to the plan's funded percentage for the year of withdrawal or plan termination). The proposal also eliminates mass-withdrawal liability.

The provision is effective for withdrawals occurring after November 20, 2019. Under a transition rule, employers that withdraw during the period when the new funding rules are phasing in are subject to an annual payment of 150% (rather than 100%) of the withdrawal-liability payment. The transition rule is effective on the date of enactment until the third year in which the new contribution rates are fully phased in and the new funding rules are reflected in the 10-year highest contribution rate for purposes of determining withdrawal liability.

Concerns

The proposal adopts a new withdrawal liability regime that will significantly affect the withdrawal liability rules but does not address the systemic problems with the rules nor the detrimental effects of the partial withdrawal rules.

The MPRRP states that deficiencies in the current withdrawal liability rules have provided disincentives for employers to join the multiemployer system. We agree. However, the proposal does not address the

principal deficiencies that discourage new entrants, and it exacerbates the problem by significantly increasing the withdrawal liability exposure for most employers.

Instead of addressing these concerns, the proposal makes the withdrawal liability rules more onerous by increasing an employer's exposure for withdrawal payments. No new employer will voluntarily join a multiemployer plan, and current contributing employers will be strongly discouraged from adding employees to a plan.

Our specific concerns are as follows:

- The change in the lookback period for determining highest contribution base units (to the highest CBU in the last 20 years versus the highest 3-year average during the past 10 years) could significantly increase the liability for many employers that are in declining industries or that experienced a spike in CBUs in a particular year. It would also discourage employers from adding contribution hours in any given year, even to address a temporary business need for increased union personnel.
- The proposed changes do not address the principal deficiencies that have discouraged new entrants. For example, the proposal does not address the fact that under the current withdrawal liability rules, a new employer could be exposed to a "full share" of the plan's unfunded vested benefits as soon as 5 years after joining a plan, even if the new employer is making contributions significantly in excess of the amount required to fund its employees' benefits (and has few employees eligible for benefits because of its short period of participation).
- The proposal does little to address any concerns associated with partial withdrawals, which under current law, could be triggered through no fault or control of the employer (such as a partial withdrawal triggered by a decertification, disclaimer of interest or change in bargaining representative).
- The proposal appears to require a schedule of payments tied to the plan's funded status, but it is determined without regard to the employer's share of the plan's unfunded vested benefits. As a result, a newer employer could pay far more in withdrawal liability than it would under the current rules. This makes the current disincentive for joining a plan (or adding new participants to a plan) worse.
- The proposal would require five years of withdrawal liability even where a plan is between 100% and 139% funded (and has no unfunded vested benefits). As a result, employers could pay far more in withdrawal liability than under the current rules. This would serve as a further disincentive to joining a plan (or adding new participants to a plan).
- The proposal could harm plans that appear well-funded but are at risk. For example, a plan with a dominant employer that is 90% funded using a 6% return could be doomed to insolvency if it loses that employer. In this case, the proposal's requirement of five years of payments may be insufficient to fund the employer's share of the plan's unfunded benefits, especially if the plan experiences a year of significant adverse investment experience.
- The current withdrawal liability rules (especially those regarding partial withdrawals) lead employers to make contorted and inefficient business decisions to avoid triggering withdrawal liability. The proposal does nothing to address this deficiency.

- The proposal appears to repeal the limitation on the highest contribution rate that was included as part of MPRA. Specifically, under MPRA, post-2014 plan year contribution increases made to improve the funding of endangered and critical plans are not taken into account in determining an employer's highest contribution rate. This would have the effect of discouraging employers from agreeing to additional contributions to improve plan funding.

Recommendation

The withdrawal liability proposal should not be included in any multiemployer pension funding reform legislation. Instead, the legislation should establish a working group involving the PBGC, pension plans and employer groups to study the withdrawal liability rules and develop recommendations for submission to the House of Representatives and Senate committees of jurisdiction. The recommendations must be received within two years following the implementation of the pension funding reform legislation. This will allow the group adequate time to develop a proposal, and it also will allow for implementation of any funding reforms.

Alternative approach

As an interim approach and to provide more certainty in the withdrawal liability calculations, in addition to the working group described above, legislation should: 1) increase plan disclosures to employers; 2) standardize the discount rates for funding and withdrawal liability; 3) eliminate the mass withdrawal rules. All other rules, including the 10-year lookback, should remain in place. The recommended disclosure rules regarding withdrawal liability are attached as Exhibit B.

Discount Rates for Withdrawal Liability Determination

Under current law, in determining a plan's minimum funding, the plan is required to use a discount rate that is reasonable, taking into account the plan's experience and reasonable expectations, and, that offers the actuary's best estimate of the plan's anticipated experience.¹² For purposes of withdrawal liability, all actuarial assumptions must be reasonable in the aggregate, taking into account the plan's experience and reasonable expectations, and which, in combination, offers the actuary's best estimate of anticipated experience under the plan.¹³

Congress should require that the interest rate used for withdrawal liability be the same rate as the rate used for funding purposes. This change will provide transparency and consistency to employers in knowing what interest rate will be used in determining withdrawal liability. In addition, it will prohibit plans from using withdrawal liability to unfairly penalize employers that withdraw by using a lower interest rate (and thus increase withdrawal liability) than the funding interest rate.¹⁴

¹² 29 U.S.C. § 1085(c)(3); ERISA § 305(c)(3)

¹³ 29 U.S.C. § 1393; ERISA § 4213.

¹⁴ Even a small change in the interest rate can significantly impact the amount of withdrawal liability. Although in the context of funding, one actuarial study found that by changing the current interest rates to the corporate bond discount rate, contributions would increase from 1.7 to 2.4 times current contributions. If the rates were the 30-year Treasury rates, contributions would increase from 2.0 to 3.0 times current contribution requirements. See "The Impact of Alternative Discount Rates on Multiemployer Pension Plan Funding", Ben Ablin, ASA, EA, MAAA, and David Pazamickas, ASA, EA, MAAA, June 2018, at http://www.horizonactuarial.com/uploads/3/0/4/9/30499196/horizon_actuarial_discount_rate_report.pdf.

Mass Withdrawal Rules

Special rules apply when a plan terminates because of a mass withdrawal. A mass withdrawal occurs when either:¹⁵

- Every employer withdrawals from the plan;
- All employers' obligations to contribute to the plan cease; or
- All, or substantially all, employers withdraw from the plan pursuant to an agreement or arrangement to withdraw.

Upon a mass withdrawal, the 20-year withdrawal liability payment and *de minimis* limit is removed.¹⁶ Any employer who withdrew within three years of the mass withdrawal will be considered to be part of the mass withdrawal.¹⁷

Repealing the mass withdrawal rules will eliminate the uncertainties facing employers from a mass withdrawal (including a re-allocation of liabilities and the use of a lower PBGC termination interest rate). It also may encourage employers to remain in plans (especially larger contributors who fear a mass withdrawal and being the “last man standing” and subject to all liability).

Effects of Partition on Withdrawal Liability

Background

Under the current partition rules, the time period for which transferred liabilities are taken into account in determining withdrawal liability is 10 years.¹⁸ The purpose of the rule is to discourage employers from withdrawing from a partitioned plan after liabilities are transferred to the PBGC.

MPRRP Proposal

Under the proposal, certain named plans and plans that meet other criteria are allowed to partition off enough liability so that the plan will be solvent indefinitely (as defined under current Treasury regulations). Any reduction in unfunded benefits resulting from the partition of liabilities to a successor plan are taken into account immediately in determining withdrawal liability. However, if an employer withdraws within 15 years of the partition, the transferred liabilities are clawed back, and an additional 25% penalty is added to the payments.

Concerns

The proposed 15-year period is inconsistent with the current law with respect to partitioned plans and withdrawal liability computations. In addition, current law does not contain an additional penalty on top of including the transferred liabilities in the computation of withdrawal liability within the 10 year period.

¹⁵ 29 U.S.C. § 1341a(a)(2); ERISA § 4041A(a)(2); 29 C.F.R. 4001.2.

¹⁶ 29 U.S.C. §§ 1389(c), 1399(c)(1)(D); ERISA §§ 4209(c), 4219(c)(1)(D).

¹⁷ 29 U.S.C. §§ 1389(d), 1399(c)(1)(D); ERISA §§ 4209(d), 4219(c)(1)(D).

¹⁸ 29 U.S.C. §§ 1413(d)(3), 1085(g)(1); ERISA §§ 4233 (d)(3), 305 (g)(1).

A 25% penalty is onerous. Including the removed liability in the withdrawal liability calculation is a sufficient deterrent to employers from leaving plans after the partition.

Recommendation

The 15-year period should be reduced to 10 years to reflect the current state of the law and the penalty rate should be eliminated.

PBGC Premium Increases

Background

Defined benefit plans pay premiums to the PBGC to protect participants in the case of plan termination for single employer plans and plan insolvency in the case of multiemployer plans. The premiums are to ensure participants are provided a minimum guaranteed benefit. Historically, single employer premiums have been higher than multiemployer premiums because (1) the benefit guarantee for single employer plans is significantly higher than that for multiemployer plans; and (2) the theory that the chances of insolvency are less for multiemployer plans because contributions are made by numerous employers rather than only one employer, and the contributing employers are jointly responsible for funding plan benefits under the “last-man standing” rule.

It is undisputed that the current multiemployer premium contribution rates are not adequate to provide the current guarantees, let alone any increased guarantees, if nothing is done to remove liabilities from some of the most underfunded plans. However, this premium deficit has not always existed, and it cannot be considered in a vacuum.

Until 2003, the PBGC reported a surplus in the multiemployer program for the first 20 years of its existence, and up until 2010, the deficit was less than \$1 billion.¹⁹ According to the PBGC, the multiemployer deficit for the end of the 2019 fiscal year is \$65.2 billion, which is over a 60-fold increase in 9 years.²⁰ Although many plans were declining due to the effect of the great recession in 2008, Congress did not significantly raise the PBGC multiemployer premiums until 2014, when the Multiemployer Pension Reform Act of 2014 (“MPRA”) increased the premiums from \$12 to \$26 (indexed) per participant.²¹ However, due to the growing instability of many critical and declining plans, the MPRA premium increases are insufficient to stabilize the PBGC’s multiemployer program.²²

Under current law, the PBGC may propose any premium increases; however, Congress must approve any change for it to go into effect.²³

¹⁹ “Honoring the PBGC Guarantee for Multiemployer Plans Requires Difficult Choices,” American Academy of Actuaries, October 2016 available at

<https://www.actuary.org/sites/default/files/files/publications/PBGCissuebrief10.20.16.pdf>

²⁰ See “Fiscal Year 2019 Annual Report”, PBGC, November 18, 2019 available at

<https://www.pbgc.gov/sites/default/files/pbgc-fy-2019-annual-report.pdf>

²¹ From 2007 to 2014, the premiums only increased from \$8 to \$12.

²² The GAO notes that the MPRA changes may only forestall the PBGC insolvency by three years. See “High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas”, GAO-19-157SP, March 6, 2019 available at <https://www.gao.gov/assets/700/697245.pdf>.

²³ 29 U.S.C. § 1306; ERISA § 4006;

MPPRRP Proposal

The proposal would increase the flat-rate premium from \$29 to \$80 (the same as the 2019 single-employer flat-rate premium) for each participant in a plan. For plans that take advantage of the one-time partition under the proposal, the flat-rate premium would apply to participants in the original plan and participants whose liabilities are moved to a successor plan where the benefits (up to the PBGC guarantee) essentially are paid by the PBGC.

The proposal also establishes a variable-rate premium (VRP) equal to 1% of a plan's unfunded current liability. The VRP is capped based on the total benefits distributed in the plan year divided by participants and beneficiaries in payment status (not to exceed \$250). The cap will be indexed for inflation the same as PBGC's flat-rate premiums. For plans that take advantage of partition, the VRP only applies to the original plan but not the successor plan.

Concerns

Given the state of the PBGC's multiemployer program, increased premiums should be part of any proposal. However, it appears that most of the cost associated with the liability removal program ("partition") is funded from increased premiums and fees on employers and plan participants. There needs to be a recognition that government policies (no matter how well-intended) contributed to the current crisis, and the government must contribute to the cost of shoring up the PBGC. One example of the government policies is the "last man standing" rule, which shifts the obligation of a withdrawing employer's unfunded vested benefits to the remaining contributing employers (thereby increasing the contribution rates and withdrawal liability for the remaining employers). Additionally, the withdrawal liability rules (previously discussed) present another barrier to new entrants, as well as an immediate and significant threat to contributing employers.

Sound public policy dictates that premiums should be set at a level that reflects the risk to the PBGC for insuring these plans, not paying for other programs, such as the partition relief provided in the proposal. Any premium increase should accurately reflect the premiums needed to fund the guarantee in the future.²⁴

While the plans are legally required to pay the premiums to the PBGC, plans only receive funds from employer contributions or investments. To the extent premiums are increased, plans either will have to increase employer contributions (which cannot be done outside of the collective bargaining process) or decrease benefits to pay the increased premiums.

The proposal bases the VRP on the plan's current liability, which is different from its actuarial liability. Current liability is based on statutory discount rates and mortality tables (the current discount rate is around 3 percent), which produces a much higher liability than the actuarial liability, which is based on

²⁴ Although increased premiums on the single employer side have eliminated the PGBC's single employer deficit, and it is now running a significant surplus, the increased premiums are forcing employers to de-risk their plans by cashing out participants or terminating plans. See "Pension de-risking study - plan sponsor focus group analyzing the drivers of pension de-risking activity", Mercer, July 25, 2018 available at https://www.pbgc.gov/sites/default/files/appendix_i_de-risking_study-2018.pdf.

expected return of assets.²⁵ Use of current liability to calculate the VRP will result in many, if not most, plans paying variable rate premium at the \$250 cap level, resulting in a total premium of \$330 per participant when the flat rate is included. This 1100% increase in premium payments is not sustainable for plans to maintain reasonable benefit and contribution levels.

The proposed premium structure also does not take into account the economic realities of the various plans (especially low-benefit plans) and their contributing employers. In the case of a plan that provides modest benefits (e.g., less than \$8,000 annually for a participant with 30 years of service), the increased flat rate premium alone could account for a large share, up to 30% or more, of the plan's contribution dollars. This would force inordinately large contribution increases and/or benefit cuts and make these plans economically unsustainable. Furthermore, such an increase forces these plans to pay for insurance that is higher than plan benefits.

Under the proposal, if the Congressional committees with jurisdiction over the PBGC ("Committees") do not act on a PBGC premium increase recommendation (to address a projected PBGC insolvency within 10 years), the recommendations go into effect on the subsequent October 1st. Although the proposal allows the Committees the ability to act on a recommendation before it becomes effective, the Committees may not have the resources to act before such increase automatically would become effective. The Committees provide much needed oversight to the PBGC premium rate setting. Allowing an increase to become effective without appropriate Congressional review is not sound policy.

Recommendation

Any increase in the flat rate premium must take into account the current state of the PBGC multiemployer program and any possible increased guarantee, but it also must recognize the reduced risk of insolvency because of partition. In addition, it must recognize that many plans' full benefits are not even close to the proposed increased guarantee level.²⁶ To accommodate this, there should be a modest increase in the flat-rate premium (indexed), coupled with a variable-rate formula that utilizes a percentage (e.g., 1%) of the current liability normal cost for the preceding plan year, plus interest on the unfunded current liability (if any), over the employer contributions made to the plan in the preceding plan year. The combined limit (flat-rate plus variable rate) should not exceed \$85 per participant. Two examples of the recommended variable rate premium structure are attached as Exhibit A.

The current process for establishing PBGC rates under 29 U.S.C. § 1306 (ERISA § 4006) should remain in effect.

²⁵ See Data on Multiemployer Defined Benefit Pension Plans, John J. Topoleski, August 10, 2018, GAO, p. 3 available at <https://fas.org/sgp/crs/misc/R45187.pdf>.

²⁶ The average benefit paid to retirees covered by these plans was \$11,935 per year. See Pensionomics 2018: Measuring the Economic Impact of Multiemployer DB Pension Expenditures, Diane Oakley and Ilana Boivie, Issue Briefs, January 2019 available at <https://www.nirsonline.org/reports/pensionomics-2018-measuring-the-economic-impact-of-multiemployer-db-pension-expenditures/>.

Preconditions for Partition

Background

Under current law, plans that are in critical and endangered status are required to adopt policies to increase the plan's funded status. Plan trustees are provided a variety of tools to do this, such as increasing employer contributions, reducing or eliminating future accruals, reducing or eliminating certain benefits that are not protected under ERISA's anti-cutback rules, and, for critical status plans, eliminating certain adjustable benefits. In addition, critical status plans are prohibited from paying lump sum benefits. MPRA amended ERISA to allow certain plans that are in critical and declining status to suspend benefits if such actions are necessary for the plan to remain solvent. MPRA does not specify the process for suspending benefits, although MPRA does protect older and disabled retirees from benefit suspensions.

MPRA also added a provision that allows for partition of a plan if:

- The plan is in critical and declining status;
- The trustees have taken (or are taking) all reasonable measures to avoid insolvency;
- PBGC determines that the partition will reduce PBGC's expected long-term loss and is necessary for the plan to remain solvent;
- PBGC certifies to Congress that PBGC's ability to meet existing financial assistance obligations to other plans will not be impaired by the partition; and
- The cost of the partition is paid exclusively from PBGC's multiemployer fund.²⁷

To date, only five plans have applied for partition. Because these standards are so strict, the PBGC has only granted three of the five requests.

MPRRP Proposal

Under the proposal, a plan may only take advantage of partition if the PBGC “determines that the plan sponsor has adopted **all** reasonable measures to avoid insolvency, including benefit suspensions no greater than 10 percent.”

Concerns

Plans make judgments as to which measures can be reasonably implemented to postpone insolvency. Requiring that a plan have taken “all” reasonable measures will inevitably lead to the PBGC second-guessing plan trustees' judgment during the partition application process, and it will likely significantly lengthen the application and approval process. For example, a plan could have elected to eliminate some (but not all) adjustable benefits after determining that the elimination of all adjustable benefits (as opposed to some adjustable benefits) could increase attrition and actually accelerate insolvency. However, if an “all” reasonable measures standard is applied, the PBGC could conclude that eliminating all

²⁷ 29 USC §1412(d); ERISA § 4232(d).

adjustable benefits was nevertheless reasonable and the failure of the plan to do so meant it has not taken “all” reasonable measures and is not eligible for partition.

Imposing a precondition that a plan have implemented MPRA benefit suspensions no greater than 10% would make several classes of plans that the proposal is designed to protect ineligible for partition. This would include 1) plans that could not implement MPRA benefit suspensions because the maximum permitted suspensions would not allow the plan to avoid insolvency; 2) plans that sought to implement benefit suspensions, but whose suspension application was rejected for technical reasons (and were not in a position to “reapply” because maximum suspensions would no longer allow the plan to avoid insolvency due to the passage of time); and 3) plans that implemented MPRA benefit suspensions greater than 10% to avoid insolvency.

Recommendation

Based on experience with the current partition requirements, any proposal should not be so strict that it prevents plans from using this tool to prevent plan insolvency. As such, any legislation should simply require that a plan have taken reasonable measures to avoid insolvency - and should not mandate the 10% benefit reduction under the proposal.

Stakeholder copayments

Background

Present law does not impose a PBGC fee on contributing employers or unions.

MPPRRP Proposal

The proposal imposes a monthly \$2.50 fee for each active employee under the collective bargaining agreement for each union and each participating employer. Plans would be required to collect and transmit this amount monthly to the PBGC.

Concerns

We understand that all stakeholders will be involved with any pension funding solution. However, the proposed employer copayments creates an additional burden on employers that are already paying into the system through normal contributions, increased rehabilitation contributions, and surcharges (which under the proposal would also include significantly increased premium payments). Moreover, the co-payment will be unduly burdensome relative to the amount that it will raise. From a practical matter, it is extremely unclear how such a fee would work. For example, would an employer be required to pay for employees in both a national and local plan if its employees participate in both? How would an employer pay for employees who work part of the month, are on leave, or are subject to reciprocity agreements?

Recommendation

Any final legislation should eliminate the union and employer copayment.

Excise Taxes

Background

Under present law, if there is a deficiency in the funding standard account at the end of any plan year, an excise tax of 5% is imposed on the contributing employers. If the funding deficiency is not eliminated, the contributing employers could be exposed to an additional excise tax equal to 100% of the funding deficiency. If the insolvency of a multiemployer plan triggers a funding deficiency, then the funding deficiency would have to be eliminated by an immediate contribution by the contributing employers. Employers need clarity regarding the imposition of excise taxes in situations that were not contemplated when the current multiemployer framework was developed (or which were contemplated but are ambiguous as written in the current statute).

MPPRRP Proposal

No proposals regarding the imposition of excise taxes.

Concerns

In cases where a critical zone plan cannot be expected to emerge from critical status during a ten-year rehabilitation period (after exhausting reasonable measures), the multiemployer plan is required to take reasonable measures to emerge at a later time or “to forestall possible insolvency....”²⁸ Most (if not all) severely troubled multiemployer plans follow this approach. While the critical status rules require the plan to take reasonable measures to “forestall possible insolvency,” they do not address the steps the plan must take once it actually becomes insolvent. The recommendation would clarify that the excise taxes related to funding deficiencies would not apply to a plan insolvency or required termination.

Some plans have been using the threat of an accumulated funding deficiency to increase the amount a withdrawing employer must pay by assessing the employer’s share of any potential accumulated funding deficiency when the employer withdraws, even though a funding deficiency has not occurred (and may never occur). These recommendations clarify that 1) the funding deficiency does not occur until the plan fails to comply with the zone rules; 2) no portion of any potential funding deficiency is due (or collectible) unless such event occurs; and 3) the accumulated funding deficiency cannot be treated as additional withdrawal liability.

Recommendations

Any proposed legislation should:

- Clarify that excise taxes related to accumulated funding deficiencies do not apply after plan insolvency or required termination.
- Clarify that the employer (not the plan) is responsible for paying its share of any accumulated funding deficiency, and the employer is not liable for the accumulated funding deficiency as long as 26 U.S. C. § 4971(g) applies.

²⁸ 26 U.S.C. § 432(e)(3); 29 U.S.C. 1085(e)(3); ERISA § 305(e)(3).

- Provide that each employer is responsible for its proportionate share of any accumulated funding deficiencies, but it is not responsible for any uncollectible or unpaid accumulated funding deficiencies allocated to another unrelated employer.
- Clarify that a plan may not include any accumulated funding deficiency payment or projected payments as part of the withdrawal liability.

Conclusion

We appreciate the extraordinary work that you have put into this proposal. We look forward to working with Congress to ensure that legislation moves forward to result in a bipartisan, bicameral solution.

Sincerely,

Chantel Sheaks
Executive Director, Retirement Policy
U.S. Chamber of Commerce

Jon McPherson
President
Association of Food and Dairy Retailers,
Wholesalers and Manufacturers

cc: Ranking Members Ron Wyden
Ranking Member Patty Murray

About the U.S. Chamber of Commerce

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.

About the Association of Food and Dairy Retailers, Wholesalers and Manufacturers

The Association of Food and Dairy Retailers, Wholesalers and Manufacturers is a coalition of 14 employers representing various sectors in the food industry. Collectively, these companies employ over one million associates and contribute to over 90 multiemployer pension plans.

EXHIBIT A: Examples of Recommended Variable Rate Premium Formula

1. Variable-rate premium (VRP)
 - a. 1.0% of the excess, if any, of:
 - i. The current liability normal cost for the preceding plan year, plus interest on the unfunded current liability (if any), less
 - ii. The employer contributions (including withdrawal liability payments) made to the plan in the preceding plan year
2. Application of variable rate premium to specific plans:
 - a. Plan A (28% funded)
 - i. Assumptions:
 1. Number of plan participants: 384,948
 2. Assumption current liability interest rate of 3%
 3. Current liability normal cost: \$528,000,000
 4. Underfunding: \$39,891,000,000
 5. Interest on underfunding @3%: \$1,194,930,000
 6. Employer contributions (including withdrawal liability payments): \$810,000,000
 - ii. Calculation of VRP: $((\$528,000,000 + \$1,194,930,000) - \$810,000,000) \times 1\% = \$9,126,984$.
 - iii. Per participant VRP: $\$23.71 (\$9,126,984 \div 384,948 \text{ participants})$.
 - b. Plan B (99% funded)
 - i. Assumptions:
 1. Number of plan participants: 235,466
 2. Assumption current liability interest rate of 3%
 3. Current liability normal cost: \$120,000,000
 4. Underfunding: \$68,000,000
 5. Interest on underfunding @7.5%: \$5,100,100
 6. Employer contributions: \$100,000,000
 - ii. Calculation of VRP: $((\$120,000,000 + \$5,100,000) - \$100,000,000) \times 1\% = \$251,000$.
 - iii. Per participant VRP: $\$1.07 (\$251,000 \div 235,466 \text{ participants})$.

EXHIBIT B: Recommended Disclosure Rules Regarding Withdrawal Liability

Background

Under current law, upon a contributing employer's request, a multiemployer plan administrator must provide the contributing employer an estimate of the employer's withdrawal liability as of the last day of the year before the date of the request.²⁹ The plan administrator also must provide an explanation of how the estimate was determined, including any actuarial assumptions and methods used to value plan liabilities and assets, the data regarding the employer's contributions, unfunded vested benefits, annual changes in the plan's unfunded vested benefits and any relevant limitation on the estimate.³⁰ An employer is allowed one estimate during any 12 month period, and the plan administrator may charge for "copying, mailing, and other costs of furnishing such notice."³¹

Current law also provides that upon a contributing employer's request, a multiemployer defined benefit plan administrator must provide the following: the current plan document (and amendments), the latest summary plan description, the current trust agreement, any participation agreement within the last five years, any annual report, any funding notice, any periodic actuarial report (including any sensitivity testing), any quarterly, semi-annual, or annual financial report prepared for the plan by any plan investment manager or advisor or other fiduciary, any plan audited financial statements, any MPRA application, and the latest funding improvement or rehabilitation and related the contribution schedules.³² Any contributing employer is entitled to such documents no more than one time during a 12 month period. The plan administrator may charge any reasonable amount to cover "copying, mailing, and other costs of furnishing copies of information."³³

Recommendation

To provide more transparency for contributing employers, any legislation should include the following:

- 29 U.S.C. § 1021(l)(1)(B) (ERISA § 101(l)(1)(B)) should be amended to include the following information:
 - The contribution dollars used to determine the employer's share of unfunded vested benefits;
 - An estimate of the required payment amount, including –
 - A determination of the highest contribution rate and the contribution base units used to determine the employer's payment amount under 29 U.S.C. § 1309(c) (ERISA § 4219(c)), and

²⁹ 29 U.S.C. § 1021(l)(1); ERISA § 101(l)

³⁰ *Id.*

³¹ 29 U.S.C. § 1021(l)(3); ERISA § 101(l).

³² 29 U.S.C. § 1021(k)(1); ERISA § 101(k)(1).

³³ 29 U.S.C. § 1021(k)(3); ERISA § 101(k)(3).

- A list of the historical contribution rates and contribution base units used in making the determination;
 - Whether and the extent to which Multiemployer Pension Reform Act of 2014 (MPRA) limits the highest contribution rate; and
 - The application of any prior credits against withdrawal liability.
- 29 U.S.C. § 1021(l)(1)(B) (ERISA § 101(l) (1)(B)) should be amended to make it mandatory for a plan to provide all contributing employers their withdrawal liability estimates at least once every three years, at no charge.
- 29 U.S.C. § 1021(k)(1) (ERISA § 101(k)(1)) should be amended to include the actuarial and other assumptions used in determining of any/all contributions schedules provided to employers under any funding improvement, rehabilitation or solvency plan.
- To ensure compliance with the disclosure requirements, 29 U.S.C. § 1132(a) (ERISA § 502(g)) should be amended to allow a contributing employer to bring a civil action to enforce the disclosure requirements in 29 U.S.C. §§ 1021(k) and (l) (ERISA § 101(k) and (l)) (including attorney's fees for a contributing employer in any such action per 29 U.S.C. § 1132(g) (ERISA § 502(g))).
- 29 U.S.C. § 1399 (ERISA § 4219) (which provides the procedures under which a multiemployer plan assesses withdrawal liability) should be amended to require that plan provide the following along with any withdrawal liability assessment:
 - If an employer is not subject to a specific collective bargaining agreement requiring contributions to the plan, a copy of the participation agreement or other document governing the employer's contribution obligation;
 - The underlying calculations, data, or actuarial assumptions used to determine the employer's share of unfunded vested benefits, the calculation of payment amounts and application of any prior credits (namely, all of the information required under 29 U.S.C. § 1021(l)(1)(B) (ERISA section 101(l)(1)(B)), as amended);
 - Any separate actuarial valuation or other report used to determine the employer's withdrawal liability;
 - Any benefit reductions due to MPRA suspensions and calculation of restoration of these reductions for purposes of withdrawal liability calculation; and
 - The extent that the highest contribution rate is limited, if at all, by MPRA.