TESTIMONY OF
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SUBMITTED TO THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
EDUCATION & THE WORKFORCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

ON

STRENGTHENING THE MULTIEMPLOYER PENSION SYSTEM: HOW WILL PROPOSED REFORMS AFFECT EMPLOYERS, WORKERS, AND RETIREES?

OCTOBER 29, 2013

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Introduction

On behalf of our more than 37 million members and all Americans age 50 and older, AARP appreciates the opportunity to testify today on steps to strengthen multiemployer pension plans.

AARP is a nonprofit, nonpartisan organization that strengthens communities and fights for the issues that matter most to families, including healthcare, equal employment opportunity, and retirement security. For decades, AARP has also worked to preserve and strengthen defined benefit pensions as well as ERISA's protections for pension participants and beneficiaries. Defined benefit pension plans have proven themselves to be reliable, efficient, and vital mechanisms for ensuring retirement income security. Unfortunately, such plans increasingly have been supplanted by defined contribution arrangements such as 401(k) plans, which shift all of the investment and longevity risk to employees. AARP believes we should take needed steps to help preserve those defined benefit plans still in operation, explore ways of incorporating some of their participant protections and efficiencies into the defined contribution system, and further improve the current system to better ensure retirement security for all.

The “Proposed Reforms” referenced in today’s hearing title presumably reflect those offered by the National Coordinating Committee for Multiemployer Plans (NCCMP) Retirement Security Review Commission in their "Solutions, Not Bailouts" report.[1] However, no bill has yet been introduced, nor has any draft bill been widely shared for review and comment. If such a bill emerges, AARP looks forward to commenting more specifically.

AARP appreciates the tremendous effort put forward by the Retirement Security Review Commission of the National Coordinating Committee for Multiemployer Plans (NCCMP plan). It must be recognized that some deeply troubled multiemployer plans face potential insolvency within the next two decades, or sooner. If this happens, only very low levels of insurance from the Pension Benefit Guaranty Corporation (PBGC) for multiemployer plans will be available – a *maximum* of $12,870 for a 30-year participant – and even that amount is not guaranteed due to the structure of the multiemployer insurance formula and because the PBGC's multiemployer insurance fund itself has far less than it needs to pay projected claims. In the event that the PBGC fund runs short, participants would receive less than the insured amount, or possibly even nothing at all. AARP agrees that "doing nothing" in the face of these threats is not a useful option.

The NCCMP proposal lays out in detail the forces, risks, and liabilities weighing on both employers and employees in multiemployer plans. It seeks to keep troubled plans from becoming insolvent so as to ensure that working-age active participants who are contributing to the plan and retirees who are already receiving their hard-earned pensions receive benefits that are above PBGC-insured levels. However, AARP has deep concerns about several aspects of the plan; chief among them is that it would grant plan trustees broad discretion to cut accrued benefits for participants – *including the unprecedented step of reducing the pension benefits of retirees in pay status* – to achieve solvency. Not surprisingly, AARP strongly objects to this element of the proposal. We are also troubled that such a fundamental diversion from pension law could move quickly through the Congress with a minimum of public attention. We urge this Committee to more closely examine this proposal to avoid undermining one of the central protections for participants under ERISA and to instead consider many other available alternatives.

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[1] R. DeFrehn & J. Shapiro, *Solutions not Bailouts: A Comprehensive Plan from Business and Labor to Safeguard Multiemployer Retirement Security, Protect Taxpayers and Spur Economic Growth* (National Coordinating Committee for Multiemployer Plans, Feb. 2013), *available at* http://webiva-downton.s3.amazonaws.com/71/59/b/39/1/Solutions_Not_Bailouts.pdf [hereinafter *NCCMP Proposal*].

An Unprecedented Attack on Promises to Retirees

The centerpiece of the NCCMP plan is a proposal to give multiemployer plans the legal authority to drastically cut the pension benefits of *retirees*, people already receiving and living on their pensions. It is based on the contention that plans have already done everything else they can possibly do and that "[b]enefit suspensions that preserve benefits above the [very low] PBGC guarantees are preferable to plan insolvency."[2] It does this by offering a benefit floor that is no lower than 110% of the PBGC's insurance level.

Here is what this would mean. Because of the very different way the multiemployer formula is structured compared to single employer plans, even participants whose pensions are under the maximum insurance amount of $12,870 would face cuts. Under the NCCMP's 110% plan, an 80-year-old retiree with a modest $12,000/year pension after 30 years of service – $1,000/month – could instead receive as little as $10,984/year, a total cut of $1,016/year. That represents a loss of more than one month's worth of income every year. How does that retiree pay for food, medicine, housing, and utilities for that lost month? How, exactly, is that retiree expected to make up for that lost income? A retiree with a $24,000/year pension, or $2,000/month, could have her or his benefits cut a whopping 41%, down to $1,180/month, or $14,160/year. That is a recipe for drastically reducing the standard of living of a median income retiree to an income barely above the poverty level. Both of these examples are pensioners with 30 years of service – a lifetime of pension earnings that deserves better. Retirees with fewer years would receive even less. Presumably, surviving spouses would have their survivor pensions cut as well.

Proponents state that, if nothing is done, participants and retirees in an insolvent plan could receive the inadequate PBGC insured level of benefits, *without* the 10% premium. However, this is not a sufficient argument for cutting retiree benefits and upending ERISA protections. If ERISA stands for anything, it stands for the proposition that already accrued benefits cannot be reduced. The law provides that *future* benefits can be pared or frozen, but not benefits that have already been earned and vested. The “anti-cutback rule” is perhaps the most fundamental of ERISA's participant protections. As a result, we urge this committee to explore and institute alternatives, as well as focus on strategies that increase the PBGC's capacity to assist plans and its multiemployer plan insurance levels.

AARP understands that active employees have already shouldered reductions in the form of increased contributions and scaled-back future benefits. According to NCCMP, employers have also increased their contributions to the point of straining their competitive bidding for jobs. NCCMP is also concerned that the plans may reach a tipping point, prompting old employers to withdraw from the system and new employers to refrain from participating. In addition, NCCMP has expressed concerns that active workers may be prompted to abandon their participation for fear that they'll pay into plans but never see a retirement benefit themselves when they retire. All of these are legitimate concerns. And AARP would be the first to agree we should take all reasonable steps to help preserve defined benefit plans for the sake of retirement security of the workers. The reason is simple – everyone recognizes the value of DB plans that offer *defined*, guaranteed, insured benefits – an income stream that can’t be outlived or reduced.

But, the retirement security offered by DB plans would become illusory if, after having worked a lifetime and earned that pension – which is, after all, income in the form of deferred compensation – your benefits can be cut after you’ve already retired. If pension benefits can be taken away after one retires, the fundamental value of a DB plan is lost. NCCMP has expressed concern that active workers may lose confidence and be unwilling to pay into an insolvent plan. However, AARP can

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[2] *NCCMP Proposal, supra* n. 1, at 24.

imagine a similar if not greater loss of confidence for active employees who witness cuts to retirees' earned benefits. Some have also argued that cuts to retirees' benefits are a matter of internal equity between active workers, who have already seen benefit givebacks, and retirees, who have not. Far from creating a sense of equitable sacrifice, the broken promises to retirees may irreparably damage the trust active workers could have that they will collect their own earned pension benefit at retirement. It is also important to acknowledge that the proposal contemplates that the multiemployer community in the very near future will need to revisit these issues, either to create and substitute new plan designs or maintain the authority of these new plans to cut accrued benefits for active participants and retirees.

What is missing from the NCCMP proposal is an explicit recognition of the strong reasons against cutting accrued benefits for retirees or near-retirees. Historically, there has been a broad consensus that any plan modification that leads to benefit reductions should protect (hold harmless) retirees as well as near-retirees (e.g., those within 5-10 years of retirement age). For good reason: those in and near retirement are either already relying on that income, which is usually modest in amount, or have already made near-term plans in reliance on that income. In the case of retirees, most do not have any meaningful opportunity to return to the workforce or somehow generate new sources of income; in the case of near-retirees, they are deemed too close to retirement to be able to effectuate any significant change in career or retirement plans. It is widely viewed as simply unfair to change the rules of the game people have relied upon throughout their working careers.

Accordingly, other alternatives should be fully explored and deployed as an alternative to cutting *anyone's* accrued benefits. AARP believes that rather than considering abrogation of the anti-cutback rule, alternative measures must be considered and pursued.

Alternatives to Cutting Accrued Benefits

1. Require Steps Plans Can Take Now

AARP believes distressed plans should take all possible steps to rehabilitate themselves under current law. This has not always happened. For instance, according to a report earlier this year by an Independent Special Counsel for the Central States Pension Fund,[3] the fund's rehabilitation plan adopted two approaches available for employers and unions to adopt in their collective bargaining agreements to help improve plan funding. One permitted agreements to maintain benefits but required increased employer contributions. The other approach required the parties to agree to a less attractive menu of increased contributions (though not as high as the first option) and cutbacks in "adjustable" benefits such as early retirement provisions. Most employers and unions in the plan chose the first alternative. During Central States' 2012 rehabilitation plan update process, the pension plan staff reportedly advised the trustees that further "reasonable measures," above and beyond the increased contribution rates, were needed to forestall "possible" insolvency. Based on the fact they had already substantially increased employer contribution rates, raised the minimum age of retirement to 57, and reduced future benefit accruals, the trustees decided not to impose any further benefit reductions or contribution increases.

The Pension Protection Act's (PPA) grant of authority to cut back accrued "adjustable benefits" was a troubling development for AARP. However, as long as the PPA already authorizes these additional steps, which if taken might materially improve the condition of troubled plans, all reasonable measures should be *required* to be taken before any other cuts to accrued benefits are ever

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[3] Quarterly Report of Independent Special Counsel (from David H. Coar to US Dist. Judge Milton Shadur) 4-5 (April 29, 2013), *available at* https://www.tdu.org/sites/default/files/CSPFSpecialCounselReportYearEnd2012.pdf.

considered. In this case, it would first be important for stakeholders and lawmakers to know exactly how much in savings and increased solvency could be gained by making these cuts.

Moreover, it is also important to note that the PBGC's projections of its own financial status do not assume that distressed plans have taken or will take all available steps to address their underfunding. In its five-year report to Congress earlier this year, the PBGC stated that it had to modify its modeling system to "reflect that many plan trustees have decided not to follow all of the plan steps under the law, a decision that is permitted under the 'reasonable measures' provision of PPA."[4] Thus, if all reasonable measures under current law were taken or required to be taken, it is possible that the PBGC's condition would also be better than projected.

2. Enhance the Ability of the PBGC to Assist Troubled Plans

When single employer plans undergo distress terminations, the PBGC receives any remaining plan assets, takes over the plan, and pays benefits directly to participants and beneficiaries. With multiemployer plans, generally, the PBGC can only step in once a plan becomes insolvent, in which case it has no assets. It makes "loans" to the plan, and the plan continues to pay benefits. If the PBGC could step in sooner, with more tools at its disposal, it might be able to stave off insolvency, minimize losses to participants, and mitigate its own liabilities. To better assist troubled plans, the PBGC needs the legal authority to act where it is lacking, and the financial resources to enable it to negotiate changes and restructure plans.

- **Mergers and Alliances** - AARP agrees with NCCMP that mergers and alliances with healthy plans should be encouraged, and not only for small plans. Yet, the NCCMP report states that although many smaller troubled plans could benefit from mergers with healthier plans, funding rules under the PPA and the PBGC's recently restrictive interpretation of its authority are barriers to allowing this to happen. To the extent that overly narrow interpretations of its authority are getting in the way of this potentially helpful strategy, AARP agrees that the PBGC's authority to facilitate mergers and alliances prior to insolvency should be affirmed. Lack of funds to intervene, however, would appear to be the larger obstacle. In any case, merging weaker plans into healthier plans is one promising approach.

  In addition, it would be worth exploring whether multiemployer or single employer plans with overlapping sponsors might be able to combine participants or assets in a way to materially assist troubled plans and still protect participants. Normally, the exclusive benefit and fiduciary rules would and should prevent transfers of assets from one plan to another; however, under very narrow circumstances, limited transfers of assets between one employer's plans are permitted with the goal of helping preserve benefits for retirees.[5] If it could be effective and make a difference, the possibility of transferring one employer's participants from one plan to another should be considered in order to increase the base of contributing active participants or otherwise protect retirees. Similarly, some employers and unions participate in more than one plan, some of which may be healthy and one of which may be distressed. Where the same employers and unions jointly trustee both healthy plans and troubled plans, Congress should consider allowing the PBGC to be able to compel a related healthy plan to contribute funds to a weaker plan, without violating ERISA. Certainly, healthy plans should not undertake steps that would put the better-funded plan at risk of underfunding. However, to the extent pooling assets and liabilities in this

[4] *PBGC Insurance of Multiemployer Pension Plans: Report to Congress required by the Employee Retirement Income Security Act of 1974, as amended* 2 (Jan. 22, 2013), *available at* http://www.pbgc.gov/documents/pbgc-five-year-report-on-multiemployer-pension-plans.pdf [hereinafter *Five-Year Report*].

[5] *See e.g.*, I.R.C. § 420 (transfers of excess pension plan assets to retiree health accounts).

way might work to save a portion of at-risk participants from cuts in accrued benefits, this step should be considered.

- **Partition** - The PBGC has rarely used its authority to partition the benefit obligations of employers who failed to make contributions or went bankrupt.[6] Assuming that the PBGC had the funds needed to partition off and cover participants whose employers no longer contribute, this step could improve the solvency of the plan for remaining participants. In the case of deeply troubled plans, though, it is unclear whether this remedy would be sufficient to restore solvency, because other factors have also contributed to the distress of these plans. However, partition might help staunch concerns about *further* withdrawals from the plan. Unfortunately, this strategy doesn't avoid benefit cuts, at least for those partitioned into the PBGC-assisted plan. Thus, it is critical that increases in the insurance levels covering all multiemployer plans accompany any partitions, whether done within a plan or as part of a merger.

- **Additional Authority** - The PBGC has little leverage to compel plans to improve funding levels. Congress should consider giving the PBGC greater authority, consistent with legal constraints, to compel troubled plans to take steps that would shore up their funding status and to take steps to better protect plan participants.

3. Increase Funds for the PBGC - A *Shared* Responsibility

In addition to enhancing the PBGC's authority to act, AARP also recommends measures to improve the health of the PBGC's multiemployer plan insurance fund, to ensure it is capable of handling its projected liabilities and addressing problems before they become crises. There is no getting around the fact that the PBGC needs additional funds. Premiums were recently increased in the MAP-21 legislation by $3 per participant, but are set at the still-too-low level of $12/year per participant beginning in 2013 – about what it costs to go to a movie. These premiums are wholly inadequate to cover the PBGC's liabilities. They also yield insurance levels that are far too low to provide retirement security to participants.

According to the PBGC, raising premiums to $120/year per participant would reduce the probability of the PBGC's insolvency by 2022 down to zero,[7] at least for plans now on the PBGC's books. Another roughly $120/year per participant would help finance multiemployer statutory insurance guarantees to at least double their current levels – to around $24,000/year. Given current low premium levels, there is room to improve PBGC financing.

Ultimately, the PBGC may need higher premiums, especially if Congress takes the position that the PBGC should be self-financing no matter what the circumstances. Restoring the PBGC's ability to handle its liabilities, intervene to assist plans, and provide greater insurance protection should be a shared responsibility.

- **Healthy Plans** - If healthy plans cannot absorb troubled ones, at a minimum increased PBGC premiums should be an option to help cover the PBGC's projected funding shortfall due to multiemployer plan insolvencies. Ideally, they should contribute an additional amount to help enable the PBGC to cover the costs of intermediate assistance measures and hopefully improved levels of PBGC insurance for multiemployer plan participants.

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[6] *See, Challenges Facing Multiemployer Pension Plans: Evaluating PBGC's Insurance Program and Financial Outlook* 8, (Testimony of Joshua Gotbaum, PBGC Director, before the Health, Employment, Labor and Pensions Subcommittee of the House Committee on Education and the Workforce (Dec. 19, 2012)), *available at* http://www.pbgc.gov/Documents/PBGC-Testimony-Multiemployer-Plans.pdf.

[7] *Five-Year Report, supra* n. 4, at 6.

- **Employers** - The NCCMP plan implies that employers cannot bear additional costs such as large premium without triggering withdrawals and other severe consequences. Employers may not be able to afford substantial increases in their contributions to the plan, but employers' ability to contribute a more reasonable amount in premiums should be an option.

- **Participants** - Premiums at current levels also yield insurance levels that are too low to provide retirement security to participants. AARP objects to cuts in participants' accrued benefits, but some type of small assessment to participants could be considered as an option. In the past, some retiree health plans have started to charge premiums or other forms of cost-sharing of retirees, even though the plans were earlier offered as requiring no contributions from retirees.[8] This was possible because retiree health plans are not protected by an anti-cutback rule. Faced with the threat of being forced to accept benefit cuts of one-third or worse under the NCCMP proposal, it is possible that retirees and other participants might welcome the chance to better insure their pensions, especially if they would receive much higher levels of insurance protections. For example, if all of the more than 10 million participants in multiemployer plans were required to contribute $120 per year or $10/month, it would raise more than $12 billion dollars over the next 10 years, thereby helping to finance more adequate levels of insurance. However, any assessment on retirees would need to recognize that most retirees receive pensions that are, at best, modest.

- **Congress** - From the standpoint of national retirement policy, Congress should help support the preservation of defined benefit plans and ensure that no one's hard-earned pensions can be undercut. Since Congress currently sets the PBGC's premiums and limits its ability to manage its liabilities, Congress should share some role in shoring up the finances of the PBGC, especially if all other stakeholders are pitching in. The history of ERISA is based on the importance of protecting those who have worked and earned a pension, particularly for those who had the bad fortune of retiring from a struggling company or industry. Congress should consider additional financing to help close the PBGC's projected deficit and improve multi-employer insurance protection for retirees, which is currently much less than for retirees of single employer plans.

4. Increase Revenue for the Plans

The NCCMP report is called *Solutions, not Bailouts*. Pension plans, and the PBGC, are set up to be self-financing, without the need for federal funds. And for the most part, they have been. Some of the same plans that are so troubled now were adequately funded at the beginning of 2008, when the financial meltdown decimated business and jobs for many of the industries such as construction that sponsor multiemployer plans. The meltdown also led to steep losses in plan asset values and returns, and it produced the need for an extended, stimulative, low-interest rate environment, which is placing inflated funding obligations on employers.

Given that federal policy has played a role in many of the developments that have placed multiemployer plans at risk of insolvency (e.g., oversight and industry deregulation, pension policy changes, interest rate assumptions), combined with the fact that Congress has provided long-term loan assistance to some companies and industries decimated by the financial crisis, some similar federal assistance should be an option.

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[8] *See generally*, Employee Benefits Security Administration, U.S. Dept. of Labor, *Can the Retiree Health Benefits Provided By Your Employer Be Cut?*, *available at* http://www.dol.gov/ebsa/publications/retiree_health_benefits.html.

- **Low-interest loans** - Until jobs and higher interest rates return to levels that help troubled plans regain their financial footing, Congress should consider making low-interest loans available to the plans, such as by requiring the banks and investment houses that received TARP funds to make long-term, low-interest loans to the plans at the same Federal Reserve discount rate they use to loan each other funds.

- **Private financing with public guarantees** - The challenges facing distressed pension plans call for creative financing models and partnerships. For instance, without endorsing particular proposals, AARP notes that a 2011 Milken Institute report recommended some ways to involve private capital markets.[9] Previous hearings by this Committee have explored, for example, whether there might be a way to encourage investment banks or hedge funds to provide federally guaranteed loans to plans earlier so as to stave off insolvency due to cash flow issues, or even to establish a federal credit facility that would infuse funds to help offset the contributions that employers are having to make for orphans and others in the plan for whom an employer is not contributing.[10] The NCCMP proposal puts forward the idea of federally guaranteed bond offerings that companies could use to pay off their unfunded legacy costs. Options such as these should be fully considered before the hard-working employees and retirees who rely on these plans should be asked to accept cuts in already accrued benefits.

AARP would suggest that the PBGC – which has the institutional expertise, the data, and the actuaries to crunch the numbers – could be charged with fully developing and analyzing these ideas, with some numbers attached. Then, Congress could adopt such measures as part of any legislation to stabilize multiemployer plans and protect plan participants and beneficiaries.

Cutting Accrued Benefits

The proposed standards and process for making cuts to participants' accrued benefits are deeply flawed and unfair. Some have urged AARP and other participant advocates to propose safeguards that would make the NCCMP's benefit-cutting process more fair. However, AARP rejects the premise that cutting retiree benefits is an imperative, and advocates instead the adoption of the many alternative approaches that are available. The following critique of the "benefit suspension" proposal illustrates the significant shortcomings of the proposal that fails to be even minimally protective of participant rights.

1. Unbridled Discretion by Plan Trustees

At the outset, the NCCMP proposal states that certain criteria would need to be met before a plan would be eligible to cut accrued benefits. It would need to be so distressed as to face a projection of insolvency in 20 years or less, the cuts in benefits must fix the problem and restore solvency, and the "plan sponsors and trustees [must] have exercised due diligence in determining that suspensions are necessary, including having taken all reasonable measures to improve the plan's funded position."[11]

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[9] P. Angkinand, B. Belt, *et al.*, *Protecting Private Pensions and the Public Interest: Solutions for the Shortfalls in Employer-Sponsored Defined-Benefit Plans* (Apr. 2011), *available at* http://www.milkeninstitute.org/pdf/FI_ProtectingPensions.pdf.

[10] *See e.g.*, *Assessing The Challenges Facing Multiemployer Pension Plans* 39-40, 51, Hearing before the Health, Employment, Labor and Pensions Subcommittee of the House Committee on Education and the Workforce. (Transcript) (June 20, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg74621/pdf/CHRG-112hhrg74621.pdf.

[11] *NCCMP Proposal*, *supra* n. 1, at 24. AARP reads this last criterion as requiring plans to have already taken "all reasonable measures" *before* determining cuts are necessary; to the extent that it does not, it should be modified to do so. Every plan should consider other measures rather than consider cuts to accrued benefits.

First, for purposes of the drastic measure of “benefit suspension” authority, one would think that such an extreme measure would only be considered on the brink of imminent insolvency, for instance, less than 5-7 years. Supporters of the NCCMP proposal would argue that having to wait that long would mean that the retiree cuts would not be efficacious in staving off insolvency. However, as discussed earlier, it is not at all clear to AARP that any plan that can so drastically cut the accrued benefits of people already retired is still a “defined benefit” plan worth saving. Cutting the benefits of 80-year-old retirees today to a level that is not much higher than PBGC levels is not an appropriate step for addressing shortfalls that are two decades away. Plans that are operating at a deficit but have 15-20 years until they face insolvency may be able to obtain low-cost financing or take other steps that would significantly "bend the curve" away from insolvency, thereby lessening the need for more draconian measures.

Second, the plan as proposed grants too much discretion to plan trustees. Nothing is required. What constitutes "reasonable measures" is not specified, but would seem to be encompassed within the list of "illustrative" indicators of "due diligence," i.e., considering factors such as contribution levels, future accrual levels, the impact on ancillary benefits, etc. Yet, as noted earlier, nowhere is there a requirement *first* to have taken all rehabilitative measures permitted by law. Instead, having granted that plans should be required to exercise due diligence to be eligible to take drastic actions, the proposal then provides that “it is impractical to develop a precise and complete list of quantitative tests to measure the due diligence of the sponsors and trustees....”[12] AARP understands that plan designs and terms can vary widely and that plan trustees may need to have some flexibility to fashion the measures that will work best for their stakeholders and participants. However, pension plans are not so different from one another that "all reasonable measures" cannot be anticipated and required, or that steps that constitute and are relevant to a finding of "due diligence" cannot be specified.

Third, the proposal does not clarify the trustees' fiduciary duties, or to whom they are owed. This is not the usual plan design or plan modification that generally fits within the “settlor” function. Any legislation should expressly make clear that the trustees are acting in their fiduciary capacity when they make any decisions related to remedying underfunding – and that they especially have a fiduciary duty to the participants and beneficiaries to safeguard their accrued benefits. Moreover, the proposal does not appear to recognize that the trustees may have possible conflicts of interest between protecting the active employees, who are contributing to the plan, paying union dues, and voting for union leadership; the deferred vested employees, who no longer contribute, pay dues, or vote; and the retirees, who no longer contribute or pay dues, and may not have a vote or representation among the plan trustees. In failing to differentiate among various groups of participants with competing interests, it also fails to provide any appropriate procedural and substantive protections against conflicts of interest.

Related to the conflict of interest problem is that retirees have no guarantees of effective representation in this process. There is no requirement for retirees to be represented among the plan trustees who make the decisions, no requirement that retirees receive sufficient advance notice of proposed changes, no process for retirees to be heard by the trustees (or later by the PBGC), nor any duty by the plan to finance adequate legal and actuarial support for retirees to be able to prepare their own counterproposals or challenge the trustees' findings or decisions.

2. PBGC Approval Process

The inclusion of a review and approval process by the PBGC, as outlined, does not compensate for these problems, as that process is itself grossly inadequate.

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[12] *Id.*

First, there is a threshold issue of whether the PBGC is the appropriate entity to review a plan's proposed cuts to benefits. The entire scheme fails to acknowledge that the PBGC is *not* a disinterested watchdog in this context. If plans become insolvent, the agency is on the hook to pay benefits, and at present, it has insufficient funds to do so. As long as the PBGC is underfunded, it is in the interest of the PBGC to do all it can to prevent the plan from becoming insolvent; it has little financial incentive to not approve the trustees' plan. Further, even if the PBGC were not so incentivized, the PBGC Director is a political appointee, and politics vary; participants cannot count on the PBGC to be attuned to their interests. Nevertheless, because the PBGC has the institutional expertise and is best situated to question and oversee such proposed actions by plans, AARP believes that an adequately funded PBGC, constrained by much better procedural rules than proposed by NCCMP, should play a role in reviewing proposed benefit changes. The newly created Participant and Plan Sponsor Advocate at the PBGC, who is charged with advocating for "the full attainment of the rights of participants in plans trusteed by the corporation,"[13] or in this case, plans at risk of being trusteed by the corporation, should be given a meaningful role in the review and approval process.

Second, the PBGC's assigned scope of review is limited to whether the plan trustees exercised due diligence. Yet, as stated above, "due diligence" is simply a list of considerations, not standards of fairness or a defined set of duties that provide a basis for any real measure of accountability. The NCCMP plan does call for PBGC approval of the distribution of suspensions, taking into account "equitable" distribution across populations and "protections" for "vulnerable populations."[14] However, these terms are vague and undefined.

The PBGC's scope of review should be broadened to include all relevant factors weighing in favor and against adoption of the plan, including but not limited to strengthened standards of due diligence. The PBGC should examine the actuarial justification for the proposal, with dissenting views adequately represented, and whether the plan trustees have first taken all available steps and met applicable standards. In that sense, its review should be "de novo" rather than requiring the PBGC to defer to the plan's decisions "absent clear and compelling evidence to contrary." Contrary to what NCCMP proposed, the trustees' plan should not simply be "deemed approved" and in accordance with fiduciary standards if the PBGC fails to approve the plan within six months, possibly preempting challenges, or at least creating a presumption of compliance. The entire process should be more than a rubberstamp of the trustees' decision. AARP agrees with NCCMP that the agency should be given a time limit for acting; the PBGC will need to weigh in on the question of whether six months is reasonable and appropriate. However, deemed approval by default does not rise to the level of appropriate review, especially when people's benefits are at stake. And as noted earlier, fiduciary standards should apply to the trustees' proposal and be subject to challenge for breach.

Finally, any plan approved by the PBGC should have to be updated by the plan and reapproved by the PBGC, frequently, such as every two years. A plan's fortunes can improve as quickly as it deteriorates. A plan should be required to revise its solvency status and rejustify its remedial plan, and the PBGC should have to reevaluate and reapprove whether it is still necessary or could be revised to lessen any hardships or restore any lost benefits.

3. Inadequate Protections for Participants, Especially Retirees

AARP is also extremely concerned that the NCCMP proposal is substantially lacking in participant protections, especially for retirees. Consideration of *retirees* appears *nowhere* in the list of "illustrative"

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[13] Moving Ahead for Progress in the 21st Century (MAP-21), Pub. L. No. 112-141, 126 Stat. 405, 856, Sec. 40232 (2012).

[14] *NCCMP Proposal*, *supra* n. 1, at 24.

factors that would be used to determine due diligence. The plan's trustees, and then by design the PBGC, are not called upon by a single factor to weigh the impact of the solvency plan on retirees. Moreover, it seems to us that the due diligence factors that *are* listed tilt heavily *toward* cutting benefits for retirees. Clearly, the high substantive standards of loyalty and fairness embedded in ERISA should be required as part of any measure of due diligence and should include the fundamental protections afforded to participants who are already retired and in pay status.

In addition to omitting any consideration of retirees, the plan makes no differentiation in treatment between different groups of participants and beneficiaries. This is also a fatal flaw. There is nothing to prevent the trustees' plan from treating retirees or near-retirees more adversely than it treats newly vested participants, for example. The only allusion to differentiation in the proposal appears in the provision regarding the distribution of benefit suspensions. There, the proposal specifies that benefit cuts should be distributed "equitably" across the participant population, and that "vulnerable" populations, which are never defined, should receive protections which again are never specified.

These objections regarding lack of regard for retirees and near-retirees are not ones of the tail wagging the dog, or allowing concerns about the vulnerable to overwhelm the bigger proposal, as some have suggested. This is a huge problem *with* the bigger proposal. It is not very meaningful to cordon off a “vulnerable” group as if they are a small part of the population when the median multiemployer pension benefit received by retirees is so modest: only about $8,300/year in 2009.[15] If, in fact, most of the participant and beneficiary population in multiemployer plans are receiving relatively small pensions of well under $10,000/year, AARP would contend that most retirees would qualify as "vulnerable" and unable to bear any benefit cuts whatsoever.

Numerous alternatives were available to protect benefits and lessen the harshest effects of the NCCMP plan on retirees. For example, first and foremost, the plan should have required consideration of the status of retirees to be an explicit factor that is part of any evaluation of due diligence and fairness. Second, the plan should have differentiated among groups of participants. The plan fails to consider or establish any order of priority in how any proposed benefit suspensions would be handled in order to protect retirees in pay status, as well as near-retirees. This ranking should have been mandatory/statutory, and retirees and near-retirees should have been placed at the end of the line as an absolute last resort. Third, any benefit cuts should also have been expressly limited, perhaps according to a formula based on age or income, or limited on a sliding scale based on the size of the pension, e.g. no cuts should have been permitted for those with benefits of $12,000 or less, with higher limits on cuts for those at higher ages. Certainly, benefit protections that are only 10% higher than the amount provided by the PBGC in the event of insolvency is not much protection. That floor could have been set at a much higher level, for instance at 150-175% of PBGC insurance levels.

If any cuts at all are considered, AARP agrees that cuts in optional, adjustable, or "ancillary" benefits such as 13th checks should be considered instead of cuts in core pension benefits earned and determined at retirement. However, AARP disagrees that benefits for surviving spouses (the 50% qualified joint and survivor annuity), or former spouses/surviving spouses who have received a court-ordered share of a participant's pension, are "ancillary" benefits. These benefits were part of deferred compensation, jointly earned and jointly owned by both partners in the couple. They are considered part of the core benefit, and respect for these beneficiaries' rights are a condition of the plan's tax-qualified status. The NCCMP proposal does not state exactly how it would affect the rights of beneficiaries, or how, for example, a qualified domestic relations order that orders payment of a particular dollar amount would be fulfilled. AARP would maintain that the benefits of beneficiaries

[15] *See,* GAO, *Private Pensions: Timely Action Needed to Address Impending Multiemployer Plan Insolvencies* 32 (March 5, 2013), *available at* http://gao.gov/assets/660/653383.pdf.

should not be subject to worse treatment than the benefits of the participant. For instance, if the participant's benefits are reduced by 15%, the cuts to the beneficiary should not be larger. In addition, cost-of-living adjustments are part of the core benefit, and these adjustments, if available, should not be considered adjustable or ancillary just because they are issued after retirement.

If legislation moves forward, AARP agrees with the proposal's limitation that any suspension of benefits "must achieve, but not exceed," the amount needed to achieve solvency. However, should such a proposal be adopted, we would take issue with the framing of another stated limitation. The proposal specifies, presumably after the plan achieves solvency, that any future benefit improvements "must be accompanied by equitable restoration of suspensions, where the liability value of the improvement for actives cannot exceed the value of the restoration for retirees."[16] Of course, it would inappropriate and unacceptable for *any* participant's benefits to be improved unless and until all suspended benefits are restored. However, should retirees' benefits be reduced, it is insufficient to specify that improvements or restorations of benefits for active participants cannot exceed the value of restoring benefits to retirees. Under such a plan, it should be an absolute requirement that once solvency is achieved, the benefits of retirees are restored first, *before* there is *any* improvement or restoration of benefits to active participants. Once all suspended accrued benefits have been restored in full to retirees, improvements to the benefits of active participants would be permitted.

In summary, AARP believes it is contrary to the most fundamental pension protection to permit the reduction of anyone's accrued benefits, especially those of retirees and near-retirees; other alternatives should first be explored and implemented. If Congress is committed to consideration of proposals to permit reductions to accrued benefits, cuts to retirees and near-retirees should be the last resort, and severely limited in scope and amount. We do not countenance vague assertions of protections in lieu of the current firm statutory protections for retirees and other vulnerable populations. Nor do we consider statutorily required benefits for surviving spouses and former spouses to be ancillary. Protections for these groups must be strong and explicit. Finally, *before* any future improvements in retirement benefits should be permitted, any cuts to accrued benefits, especially for retirees, should be required to be restored in full. In fact, periodic reviews of the implementation of any plan that includes accrued benefit reductions should be mandatory to determine whether prior cuts could be partially or fully restored.

There can be no doubt that the current proposal is contrary to one of the most central and fundamental tenets of ERISA, and would be a bad precedent for pension law generally. AARP also has no doubts that such a precedent could encourage other efforts to cut back accrued benefits. To prevent any further erosion of pension law, any proposal that advances should make clear that the measures permitted are emergency measures confined only to the unique and difficult circumstances currently faced by a minority of very distressed multiemployer plans.

Other Issues in the Proposal

The NCCMP proposal also proposes allowing plans to "harmonize" their normal retirement age with those of Social Security, as a way of "strengthening" the system.[17] Currently, private sector pensions may not raise their retirement age for full benefits past 65.[18]

AARP would caution against this proposal for several reasons. First, the types of jobs held by participants in many multiemployer plans are typically physically demanding and/or are performed

[16] *NCCMP Proposal*, *supra* n. 1, at 25.
[17] *NCCMP Proposal*, *supra* n. 1, at 23.
[18] 29 U.S.C § 1056.

under difficult working conditions. Many participants in these plans will not be able to work until age 65, let alone later. It is for this very reason that many unions have been among the most ardent opponents of raising the early retirement age in Social Security above 62 and of raising the full retirement age beyond the higher age 67 previously enacted in the 1983 changes.[19] Second, most pension plans already provide for actuarially reduced benefits in the event of early retirement. Raising the full retirement age in pension plans would have the same effect as it has in Social Security: to further reduce the benefits the participant receives, for life. Third, this change likely would not be limited to multiemployer plans on the brink of insolvency. Finally, especially for those with physical disabilities or illness that prevents them from working longer, being able to collect a full pension at 65 enables the pensioner to make it until 66 or 67 when they can collect their full Social Security, in order to maximize what may be a small retirement income. AARP believes that retroactively increasing the retirement age for pensions, as is proposed, is again an unfair benefit cutback and would impose an undue hardship.

AARP does believe that there need to be better ways of handling bankruptcies by employers who sponsor or participate in pension plans. Currently, employers can use bankruptcy to discharge their pension liabilities and to foist payment responsibilities onto others. Employees and pension participants should have higher standing among creditors in a bankruptcy court. While AARP is not currently recommending changes to address the problem of withdrawal liability facing multiemployer plans, we agree that action is needed to protect against excessive liability for orphans and other disincentives on remaining employers.

Finally, the NCCMP report puts forward some proposals for the redesign of pension plans in the future. AARP has not analyzed nor do we take a position on those plans here. However, AARP welcomes the efforts of NCCMP and many others who recognize the unique value of defined benefit plans for both employers and employees, and recognize the importance to retirement security of maintaining them.

Conclusion

The NCCMP proposal comes at a time when promises to retirees are under unprecedented stress, at all levels, public and private. Recent proposed changes have become more aggressive, with many proposals now designed even to reduce the benefits of people who are retired, in pay status, and living on fixed incomes – an option that previously was considered out of bounds. These cutbacks in promised and earned benefits are simply unfair and highly damaging to a retiree population whose typical annual income is only about $20,000.

AARP agrees the NCCMP proposal attempts to address real problems faced by multiemployer plans, and appreciates its attempt to ensure everyone comes out better than they would under insolvency. However, we are not convinced that alternatives to cutting accrued benefits – a fundamental protection under ERISA – have been adequately considered. Nor are we convinced that an ill-conceived design will serve to make plan benefits any more secure. We are convinced, however, that should a package emerge, far greater protections for participants and beneficiaries must be required.

[19] *See e.g.*, International Brotherhood of Teamsters Resolution on Social Security/Medicare (July 1, 2011), *available at* http://www.teamster.org/content/social-securitymedicare; AFL-CIO, *What Is Social Security? available at* http://www.aflcio.org/Issues/Retirement-Security/What-Is-Social-Security.