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December 7, 2015

The Honorable Jacob J. Lew,
Secretary of the Treasury
Attn: Deva Kyle
Department of the Treasury, MPRA Office
1500 Pennsylvania Avenue NW.,
Room 1224
Washington, DC 2022

Re: Central States, Southeast and Southwest Areas Pension Fund Application to Suspend Benefits Docket No. TREAS-DO-2015-0009

Dear Sir or Madame:

Teamsters Local 89, on behalf of its 14,000 active members and nearly 10,000 former members who are all participants in the Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund") hereby submits this comment urging that the application filed by the Central States, Southeast and Southwest Areas Pension Fund (the "CSPF" or the "Fund") be denied. In support of our request, we note the following:

General Comments

Both the CSPF and the Pension Benefit Guaranty Corporation ("PBGC") are financially distressed, The PBGC has estimated that it will become insolvent in 2025. The Fund claims that it will become insolvent in 2026. The Fund claims that if it becomes insolvent ten years from now, it will have no place to turn for financial assistance because the ERISA-mandated backstop, *i.e.*, the PBGC, will have already become insolvent. And, the argument continues, if PBGC becomes insolvent, it will not be able to cover its liabilities because its obligations are not

covered by the full faith and credit of the United States.

The PBGC and its financial troubles are certainly not unique. Congress has dealt with such issues in the past. For example, when the financial markets collapsed in 2008, two government corporations, "Freddie Mae" and "Freddie Mac," both faced insolvency. Neither of those enterprises' obligations were protected by the United States Constitution's full faith and credit clause. Rather than let them become insolvent, however, Congress enacted legislation creating a new federal agency, the Federal Housing Financing Agency ("FHFA"). The FHFA, itself with the backing of the full faith and credit of the United States, placed both enterprises into conservatorship. Using approximately two hundred billion dollars supplied by the Department of the Treasury and paid for by United States taxpayers - including our members and the Funds' affected active, retired and terminated vested retired participants (collectively, referred to hereafter as "participants") – the FHFA assumed the corporations' obligations and liabilities, thereby rescuing them and preventing them from insolvency. There are numerous other examples where the Government has intervened to alleviate community-wide turmoil and, as it did on several occasions with respect to Railroad Retirement Act pensions, even to avoid cuts in retirees' benefits.

In December 2014, six years after Congress rescued Freddie Mae and Freddie Mac using tax-payer dollars, and still facing the devastating effects that the 2008 market collapse had on struggling families, including retirees living on fixed incomes, Congress could have directly or indirectly provided the PBGC with some general-revenue support so that the PBGC could fulfill its job of protecting the hard-earned retirement benefits of the country's retirees and their surviving spouses. And, in so doing PBGC could then have provided financial assistance to the CSPF. Congress chose not to take any of these actions, however, and instead turned its back on hundreds of thousands of workers and retirees living on fixed incomes. Specifically, in near secret at the end of the legislative session, on December 16, 2014, Congress enacted the Multiemployer Pension Reform Act of 2014 ("MPRA"), Pub. L 113-235. MPRA enables newly-minted "critical and declining" multiemployer pension plans to permanently and retroactively

cut the vested retirement benefits of current, in-pay-status retirees and future retirees by more than 70% in some cases.

MPRA appears to have been tailor-made for the CSPF. That is why the Fund has so quickly rushed to cut its participants' – including its already retired participants' - benefits. As the first and by far the largest pension plan seeking approval to implement such cuts, the CSPF Application and the application approval process will serve as the model for other pension plans that likely will follow CSPF's lead and seek to cut their own participants' and retirees' accrued benefits. The consequences of approving the Central States Pension Fund's application, therefore, will have far reaching, potentially devastating effects not only on the more than 200,000 CSPF participants and beneficiaries whose benefits are currently on the chopping block, but also on more than one million additional participants and beneficiaries of other pension plans. The economic consequences of such cuts will not rest solely on those hapless souls. To the contrary, they will also adversely affect the directly injured participants' and retirees' extended families and even the communities where they live.

The CSPF's proposal is, moreover, the product of a structurally flawed process whereby the Fund and the PBGC are operating under an inherent conflict of interest. MPRA lobbyists and supporters misleadingly informed Congress that the economic distress afflicting certain multiemployer pension plans did not require "bailouts," but instead the very "solutions" that are now contained in MPRA's toolbox. Their sophistry proves that words can bankrupt and devastate innocent lives. MPRA is, in truth, bailout legislation of the most socially and morally abhorrent kind, namely one where the cost of bailing out the CSPF and propping up the PBGC is borne disproportionately by individuals who can least afford to do so. That flawed process may well fuel years of litigation and result in lost time and opportunity to better, more fairly and more equitably address the CSPF's funding problems - one in which retirees on fixed incomes will not be forced to bear the greatest burden of fixing problems that they did not cause.

The CSPF's Proposal
Unfairly and Inequitably Allocates Benefit Cuts Among Stakeholders

Congress enacted ERISA to ensure that employees would receive promised pension benefits upon retirement. See Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980). In so doing, Congress adopted a strong, national protective policy designed to make sure that if a worker has been promised a defined pension benefit upon retirement and has fulfilled whatever conditions were required to obtain a vested benefit, he actually will receive it. See Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996). Although corporate America and its political allies have attacked and, at times and in particular industries, weakened, the pension protections and promises made to working families, ERISA's national policy protecting retirees' accrued benefits has remained intact for forty years. It has helped workers most injured by and vulnerable to the economic upheavals of the last several decades to support themselves and their families throughout their careers and during their retirement years. In late 2014, however, Congress turned its back on these retirees when it enacted MPRA and allowed the trustees of "critical and declining" multiemployer pension plans to permanently and retroactively cut the accrued, *i.e.* vested, retirement benefits of plan participants, including retirees who are already in pay status.

As reflected in the CSPF Application, not all participants are treated the same way and injured to the same extent. To be sure, all will be greatly and unfairly harmed, but some will be harmed more greatly and more unfairly than others, particularly deferred vested participants and current, in-pay-status retirees younger than 75. Included within this group is one large subset that was specifically targeted for cuts greater and more devastating than those that will affect everyone else. They are the so-called Tier 1 or "orphan" retirees. Many of the orphans are ill-fated victims of national economic policies that drove their employers out of business. Prior to their demise and exit from the CSPF, many, if not most, of the orphans' employers paid all of the contributions determined by the Fund and its actuaries to be sufficient to pay for their retirement benefits. The employers that withdrew from the CSPF without paying the "full" amount of additional payments, *i.e.*, withdrawal liability, were likely bankrupt, and their employees lost

their jobs and had scramble to find new work or retire. Regardless of whether their employers paid most of their withdrawal liability assessment or had their liability discharged in bankruptcy or in a compromise with the plan, all of those employers' former employees are now orphans. In the absence of a zealous advocate representing their interests, orphans are a convenient target upon which to stick the greatest burden for the past sins and misfortunes of all of the CSPF's dead and deadbeat employers. The orphans' bad luck for having worked for such employers should not cause them to bear the greatest and most severe brunt of the harsh and grossly unfair pension cuts that Central States seeks to impose.

We recognize that the Department of the Treasury cannot ignore Congress' command to require plan sponsors to reduce orphan retirees' benefits more than all others, but we submit that the Department can and should reasonably construe the definition of the term "orphan." We do not believe, for example, that Congress intended that the application of its MPRA orphans provisions undermine the bankruptcy laws by shifting a bankrupt employer's already discharged debt to its former employees. The CSPF's proposal is predicated on such a misreading of MPRA, however, and, if implemented, will have indeed resulted in a gross miscarriage of justice.

Nor do we believe that when the CSPF over the years agreed to take less than full withdrawal liability from employers, or received most of, but not the full amount of, the withdrawal liability assessments from an employer, Congress intended to treat those employers' employees as orphans. MPRA does not compel that these individuals and their surviving spouses be treated as orphans, however, and the CSPF's treatment of them as orphans is unfair and inequitable.

In this regard, MPRA amends ERISA Section 305(e) by authorizing accrued benefit cuts. That authorization, however, is subject to several critical limitations, including the all-encompassing requirement that benefit cuts "shall be equitably distributed across the participant and beneficiary population, taking into account [enumerated] factors," including "the extent to which benefits are attributed to service with an employer that failed to pay its full withdrawal liability." 29 U.S.C. §305(e)(9)(D)(vi)(XI). As set forth in its proposal the CSPF proposal treats

employees of employers that, by agreement with the CSPF, paid less than full withdrawal liability and employees of employers that paid most but not all of their withdrawal liability as "orphans." In so doing, the CSPF ignored the above-described equitable distribution limitation's "withdrawal liability" MPRA factor. The Fund instead focused only on a separate MPRA limiting provision, namely, 29 U.S.C. §305(e)(9)(D)(vii). This latter limitation lumps benefit cuts into three categories and provides that, with respect to one of those categories, benefit cuts "shall be applied, to the maximum extent permissible" to benefits attributable to a participant's service with an employer that withdrew from the plan without paying, by statute or agreement, the "full" amount of withdrawal liability. 29 U.S.C. §305(e)(9)(D)(vii)(I).

CSPF's proposal assumes that Section 305(e)(9)(D)(vii)(I) mandates that it must, without the exercise of discretion, cut all accrued benefits attributable to "less than full withdrawal liability payers" to MPRA's maximum allowed amount, *i.e.*, 110% of the PBGC's statutory amount for multiemployers plans. That is an incorrect assumption, for it were correct, Congress would not have included the "less than full withdrawal liability payers" provision in MPRA's separate, "equitable distribution," limitation contained in Section 305(e)(9)(D)(vi). Harmonizing these two limitations and giving effect to both of them requires that in order to equitably distribute benefit cuts, a plan sponsor must develop a plan that starts with a simulation/test run in which the "Tier 1" category (accrued benefits attributable to "less than full withdrawal liability payers") are cut to MPRA's 110% PBGC limit, and then determine whether the result creates an equitable distribution when measured against the plan's overall, comprehensive cuts attributed to "Tier 2" and "Tier 3" benefits. If that simulation of benefit cuts fails to produce an equitable distribution, then the plan can and must redistribute the cuts among the 3 tiers in a matter that is equitable. That did not happen here, with respect to the CSPF proposal, because the Fund misconstrued MPRA's orphan provisions. The proposal should, therefore, be denied,

The CSPF also proposes allocating greater pension cuts to "Tier 2" participants than the "Tier 3" participants. This is inequitable and it unfairly enriches UPS at the expense of tens of

thousands of CSPA participants. Prior to the enactment of MPRA, multiemployer pension plan participants accrued benefits and retired with the same expectation that those benefits would not be cut except in the most dire of circumstance, namely, upon plan insolvency, in which event they would all shoulder the economic burden of benefit cuts equally. Particularly as applied to Tier 2 and Tier 3 participants, that equality of sacrifice is not present, and its absence renders the proposal fatally flawed.

Tier 2 participants are those who are not Tier 1 "orphans" and are not former UPS employees who became participants of the new, jointly-trusteed single employer defined benefit plan established in 2008 (the UPS Plan). They face pension cuts of up to 50% **even before** early retirement and joint-and-survivor reductions are applied. Tier 3 participants are the UPS employees who became participants in the UPS Plan. They face benefit cuts of up to 40% (again, before early retirement and joint-and-survivor reductions are applied.) Tier 3 participants, however, in the long run, will not suffer **any** reduction in their overall retirement benefits because they are protected by a contractual indemnity agreement between UPS and the International Brotherhood Teamsters that requires UPS to fully cover any and all benefit reductions from the Central States Pension Fund.

Given that the CSPF lists UPS's 2007 withdrawal as one of the critical reasons for its financial distress, there simply is no legitimate basis, and it is patently unfair, to differentiate between Tier 2 and Tier 3 participants. The differentiation between the 2 Tiers and the lesser "paper-only cuts" to the Tier 3 participants is instead a brazen and unfair gift to UPS, presumably because it was part of the bargain struck to win UPS's support for MPRA's enactment in the first place. Assuming that is indeed the case, such a cynical, backroom deal enabling UPS to mitigate its indemnity costs at the expense of the Tier 1 and Tier 2 participants is unforgivable and it is unfair.

MPRA requires an "equal distribution" of pension cuts. As applied to the CSPF proposal, fairness and equity require that, at the very least, the Tier 2 and Tier 3 participants be subjected to the same cuts. If the CSPF is as financially distressed as it says it is, then both logic

and equity suggest that it should have subjected the Tier 3 participants to the same 50% cuts as the Tier 2 participants. After all, the CSPF is seeking to cure its own financial distress, not reward and enrich UPS, the real beneficiary of Tier 3. And, as noted above, had the Fund treated the participants in these tiers equally, it is certainly possible that the extent of the affected participants' benefit cuts would have be less than what it will be under the CSPF proposal.

In summary, the CSPF's proposal is fundamentally unfair. It retroactively and very drastically allocates the deepest pension cuts to participants who have already retired or would otherwise retire with legitimate, legally established and settled expectations that their hard-earned retirement benefits would not be cut. In so doing, it places the burden of saving the CSPF almost exclusively on its participants. They, are not financially capable of shouldering that burden. At the same time, the CSPF proposal greatly reduces the financial burden of the other set of critical stakeholders involved in this tragedy, namely the former and current CSPF participating employers. Indeed, the proposal actually enriches one of the largest and one of the most profitable of those employers, namely, UPS, by reducing the amount of its private indemnity obligation under its collective bargaining agreement and withdrawal exit agreement with the Central States Pension Fund. Based on fundamental notions of fairness and equity alone, therefore, the CSPF's application should be denied.

The CSPF's Application Should Be Denied
Because It Was Developed Pursuant To A Fundamentally Flawed and Unfair Process

MPRA requires that large pension plans select a plan participant in pay status to act as a retiree representative. The retiree representative is charged with the duty to advocate for the interests of the retired and deferred vested participants and beneficiaries of the plan throughout the plan's suspension approval process. The conflict of interest inherent in such a statutory provision giving the pension plan seeking to cut retiree benefits the authority to select an advocate charged to represent the opposing interests of the affected retirees is obvious. Equally obvious is the consequence of such an "ineffective counsel" conflict, namely, that an advocate's less-than-zealous advocacy can result in the unfair and disproportionate allocation of

multiemployer bailout burdens on the plan's retirees and participants. It is for this reason, therefore, that we urge the Department to evaluate the CSPF Application with a sharp focus on ensuring that the CSPF's hand-picked "retiree advocate" adequately and fairly represents the interests of the affected retirees and deferred vested participants, the stakeholders who can least afford to shoulder that burden and who were deprived of their representative rights.

In this case, the Fund and its executive director ignored the Fund's obvious inherent conflict of interest in directly selecting an advocate who is required by law to challenge the Fund's proposal, and its underlying data and assumptions, and to suggest alternative approaches to the Fund that meet the Fund's objective of sustaining solvency while better accommodated the interests of the affected retirees. These are the basic, guiding principles of advocacy and they were not exercised with respect to the CSPF's selection of the advocate, nor were they exercised by the advocate in her evaluation of the CSPF's proposal.

With respect to the CSPF's selection of the retiree advocate, a November 10, 2015 BNA article authored by David B. Brandolph provides telling insight regarding the Fund's advocate selection process. In the article, the CSPF's executive director explained that the Fund trustees believed that in enacting MPRA and allowing large multiemployer plans to cut accrued benefits, Congress "wasn't looking to have the representative conduct an extremely in-depth review." He also expressed skepticism in giving participants a say in the selection process since there were many different interest groups within the participant population and no one representative would could represent them equally. It is clear, based on his skepticism, that the Fund's executive director and trustees did not consider that the Fund could have provided for the selection of more than one lone individual to advocate and represent the retirees' diverse interests. Instead, the Fund's executive director said that the trustees found what they were looking for in selecting retirees' advocate based upon her in service as a principal in a local union appointment as the head of the International Teamster Women's Caucus. Conspicuously absent in his description of the advocate's resume is the fact that she was the principal office of a local union that represents public sector employees who do not participate in the CSPF, that has little, if any, substantive

experience with private-sector pension plans, and has not ever even negotiated a collective bargaining agreement requiring participation in such plans, let alone ever served as a trustee on one of them.

The CSPF's hand-picked advocate also failed the retirees and terminated vested participants whom she was supposed to represent. Perhaps her most significant accomplishment was retaining an actuary whose fees were reviewed and paid for by the CSPF. By his own admission, that actuary did not have the time and did not consider it his responsibility, to do anything other than to perform a cursory review of the data provided to him by the Central States Pension Fund. Under these circumstances, it is not surprising that the actuary's report and the advocate's reports confirm the CSPF's application in its entirety. It is also not surprising that the advocate has assumed a passive role, effectively watching from the sidelines, as the Central States Pension Plan application process continues. Notwithstanding the few limited "accomplishments" for which the advocate has claimed credit, and without casting aspersions upon her personal integrity, the CSPF participants and retirees were legally entitled to and deserved better from the advocate. In the absence of a zealous, conflict-free, representative to advocate on their behalf, the CSPF participants are now facing massive benefit cuts that are disproportionately and utterly unfair. Under the present circumstances, in light of the advocate's very limited experience dealing with private sector pension plans and her tepid participation in the process, the CSPF proposal, if approved, will forever be considered by affected participants as having been rigged from the start.

MPRA also mandates that the PBGC play a significant but undefined consulting role in the application approval process, including the "vote-override" process. The PBGC claims that it is nearing insolvency and that it will collapse even before CSPF claims that it will. As a governmental corporate entity, the PBGC has a clear objective of preserving assets and avoiding additional liabilities. Like the CSPF and the MPRA advocate, the PBGC has an inherent conflict of interest. In order to avoid the assumption of greater liabilities, the PBGC has a strong incentive to encourage the approval of the CSPF's application, thereby ensuring that others,

namely the Fund participants - including retirees on fixed incomes - backstop the Fund's liabilities. It also has a strong incentive to ensure that the CSPF is deemed a "systematically important plan" so that the proposed benefit cuts can be imposed even if the affected participants' vote to reject them.

The structural conflicts discussed above have tainted the CSPF's application because the participants who will suffer the proposed benefit cuts have been deprived of their statutory representation rights. The application should, therefore, be denied while those conflicts are resolved. In light of the massive, life-altering cuts that will affect tens of thousands of participants if the application is approved, any delay in ensuring the application process is at least procedurally fair far outweighs any potential harm to the CSPF. This is especially true because the Fund is required only to select an advocate, and is therefore not limited in determining the method by which that selection is made. It has the discretion under the statute, for example, to request that a neutral third party recommend the advocate or even assume the delegable role of selecting the neutral itself. Likewise, the Department of Treasury can and should publish clear guidelines specifying the PBGC's consulting responsibilities under the statute and ensuring that those responsibilities do not include the performance of functions that trigger its inherent conflict of interest. Indeed, approval of the application as it currently stands, without fixing these flaws, invites only greater delay through litigation.

Furthermore, the CSPF Application is deficient because the notice to affected participants does not clearly explain what, if any appeal rights the affected participants will have if their benefits are cut. In this regard, MPRA amends ERISA Title I, Section 305 by requiring plans seeking to cut participants' vested benefits to provide the affected participants with sufficient information to enable them to understand the effect of any suspensions of benefits, as well as information relating to their rights and remedies. MPRA further amends ERISA Section 305 by providing that "a participant or beneficiary affected by a benefit suspension under this paragraph shall not have a cause of action under this title." 29 US.C.3-5(e)(9)(I)(iii). This provision can be interpreted to strip affected participant of their ERISA Title I right (as provided for in 29 U.S.C.

Section 502) to challenge in an appropriate court the imposition of benefit cuts, including even miscalculations of those cuts by the CSPF if the Department approves the Fund's Application.

We believe that the intended aim of ERISA title I's amended Section 302(e) and its litigation limitation was only to preclude participant suits directly under MPPA to challenge a benefit-suspension plan. Nevertheless, the litigation limitation as set forth in Section 305(e)(9)I(iii), expressly references "this title," and that clause can be construed to mean ERISA title I, were the statute's claims and appeals procedures are delineated at ERISA title I's Section 502. The CSPF notice does not reference the litigation limitation and does not explain what rights and remedies affected participants have. Instead, the notice merely directs participants to the claims procedures contained in its summary plan description. Such an off-handed reference to the Fund's claims procedures, without any specific guidance detailing what participants can and cannot challenge, and assuring them that their rights to seek redress in court are protected simply is not sufficient.. At best, CSPF notice and MPRA's litigation limitation contain inconsistent and confusing provisions relating to participants' appeal rights. In light of this fact, the CSPF's Application is deficient for failure to provide sufficient notice to the affected participants regarding their rights and remedies if their benefits are cut.

**The CSPF's Application Should Be Denied
Because It has Not Demonstrated a Reasonable Likelihood That It Will Remain Solvent
Even If the Drastic Benefit Cuts Are Implemented**

The CSPF claims that it has an ever-so-slightly greater chance of remaining solvent, rather than becoming insolvent, over the next thirty years if its proposed benefit cuts are approved. Its projections, intended to satisfy what the advocate's actuary has termed the "Goldilocks rule" requiring that the cuts be "just right," *i.e.*, not greater than what is necessary to ensure continued solvency. MPRA's "Goldilocks rule" and the CSPF projections offered to satisfy it are a fairytale full of actuarial alchemy and devoid of any realistic, measurable standard by which any distressed pension plan's long-term solvency can be evaluated. They are designed to provide political cover – and near absolute legal immunity - to enable plan sponsors and the

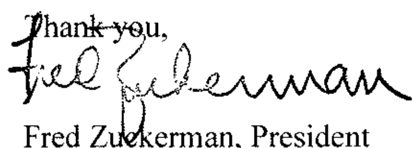
PBGC to implement pre-ordained results calling for drastic benefit cuts. To be sure, they are a clever and cruel hoax, as any criticism of the long-term solvency projections invites an obvious response from the plan sponsor that the cure to that criticism is even more drastic cuts.

Despite the otherwise worthless and utterly self-serving long-term solvency projection data contained in the CSPF's application, a general consensus appears to have developed that the Fund has sufficient assets to pay its current benefit obligations for at least ten years. This means that there is still sufficient time for all affected stakeholders to develop a long-term funding solution where the costs and burdens relating to that solution are fairly and equitably distributed across all stakeholder groups. We are by no means suggesting that all the involved and affected stakeholders delay that process, as we fully appreciate and recognize that the CSPF simply may not be salvageable. But given the choice between devastating the lives of hundreds of thousands of retirees, spouses, widows and their families or taking the time to work with involved stakeholders for an equitable and workable solutions, the latter option is the better and more honest and moral one to take.

Conclusion

For all the foregoing reasons, we respectfully request that you deny the CSPF's application.

Thank you,



Fred Zuckerman, President