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**TO PREVENT SIGNIFICANT HARM TO EMPLOYEES' BENEFITS AND PBGC,  
SENATE HYBRID PROVISIONS SHOULD CLARIFY DESIGN VALIDITY UNDER  
CURRENT LAW AND AVOID CONVERSION LINKAGES AND MANDATES**

*The Senate Finance and HELP Committees have both approved pension reform bills that contain provisions addressing hybrid pension plans (cash balance and pension equity) and conversions. Yet there are fundamental flaws with the hybrid provisions of both bills. Neither bill provides the urgently needed unconditional clarification that the hybrid designs satisfy current age discrimination rules. Both contain a series of mandates that will deter employers from continuing to offer hybrid plans and that risk the atrophy of voluntary, employer-provided benefits. As pension reform legislation proceeds in the Senate, it is critical that (1) the hybrid design clarification apply to current law and not linked to specific conversion requirements, and (2) that new conversion and design mandates be eliminated.*

- **After-the-Fact Benefit Requirements and Litigation Carve-Outs are Unfair.** The clarification that current hybrid plans are not age discriminatory contained in the HELP bill is offered only to employers that met -- or now agree to meet -- certain extremely demanding conversion safe harbors. Very few employers will fit within these safe harbors as they fail to account for a number of successful conversion techniques and ban practices that have been perfectly legal. As a result, employers will be forced to go back in time and provide significant additional benefits if they want the limited legal protection for their basic plan design. Employers that have been sued do not even have this option under the bill's litigation carve-out. The result is that employers with the exact same plans will be treated differently based solely on whether they have been a target of the plaintiffs' bar. Moreover, the presence of the litigation carve-out will encourage more class action lawsuits as the plaintiffs' bar lobbies for the carve-out date to be extended. In sum, both the after-the-fact conversion requirements and the litigation carve-out are fundamentally unfair. They set a terrible precedent that Congress will second guess employers' legal benefit decisions and impose costly benefit mandates after the fact. This will undoubtedly discourage employers from maintaining their commitment to voluntary employee benefit plans.
- **Mandates Will Drive Employers From the System.** Both Senate bills impose new and costly design requirements on hybrid plans (such as reduced vesting) and new and costly mandates on employers wishing to transition to hybrid plans. The

conversion mandates would -- for the first time -- prevent companies from changing their future pension formula in many instances and will make it extremely unattractive for employers to remain in the defined benefit system through conversion to a hybrid plan. Ironically, employers that instead choose to freeze their plan face none of the bills' mandates and costs. These are surely not the incentives Congress wants to provide at a time when it is focused on helping employees achieve retirement security. And if Congress acts in this context to prevent plan changes and protect mere employee expectations, employers will rightly worry about future application of such rules to other benefit programs and be extremely reluctant to commit to new benefit plan offerings.

- **Design Clarification Prevents Harm to Employees and PBGC.** More employers are facing copy-cat class action suits that assert the hybrid pension designs are age discriminatory. Under this *Cooper v. IBM* theory, the liabilities of the hybrid plan generally at least triple as employers are forced to "correct" for the operation of compound interest with huge unexpected benefit payments. In the face of this astronomical increase in costs, companies will increasingly be forced to eliminate these plans, denying additional retirement benefits to the more than 8.5 million Americans with hybrid plans today. Such inflated liabilities will also greatly aggravate the financial challenge faced by the Pension Benefit Guaranty Corporation. Concerns have focused on PBGC's current \$23 billion projected deficit, but conservative estimates of the national liability attributable to the *Cooper* theory of age discrimination are in excess of \$100 billion. Many employers will undoubtedly be forced to shift their liabilities to PBGC as a result, greatly aggravating the agency's shortfall. Other employers will simply freeze or terminate their plans, denying PBGC much of the 25% of per participant premium revenue that today comes from hybrid plans. To avoid these harms, the Senate pension bill should include a clean provision available to all employers clarifying the validity of the hybrid designs under current age discrimination rules.