MULTIEMPLOYER PENSION RECAPITALIZATION AND REFORM PLAN

Technical Explanation

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TITLE I – RESTRUCTURING PENSION INSURANCE FOR MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS

A. Special Partitions of Eligible Multiemployer Plans

Present Law

On application for a partition of a plan by the plan sponsor of an eligible multiemployer defined-benefit pension plan, the Pension Benefit Guaranty Corporation (PBGC) may order a partition of the plan. No later than 30 days after submitting an application to the PBGC for partition of a plan, the plan sponsor must notify the participants and beneficiaries of the application, in the form and manner prescribed by PBGC regulations.

A plan is eligible to apply for partition if:

- The plan is in critical and declining status;
- The PBGC determines, after consultation with the Participant and Plan Sponsor Advocate,[1] that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including maximum benefit suspensions permitted in the case of a critical and declining plan, if applicable;
- The PBGC reasonably expects that a partition of the plan will reduce the PBGC's expected long-term loss with respect to the plan and is necessary for the plan to remain solvent;
- The PBGC certifies to Congress that the PBGC's ability to meet existing financial assistance obligations to other plans (including any liabilities associated with multiemployer plans that are insolvent or projected to become insolvent within 10 years) will not be impaired by the partition; and
- The cost to the PBGC arising from the proposed partition is paid exclusively from the PBGC fund for basic benefits guaranteed for multiemployer plans.

The PBGC must make a determination regarding a partition application no later than 270 days after the application is filed (or, if later, the date the application is completed) in accordance with PBGC regulations. No later than 14 days after a PBGC order of partition, PBGC must provide notice to any affected participants or beneficiaries, the House Committees on Education and the Workforce and on Ways and Means, and the Senate Committees on Finance and on Health, Education, Labor, and Pensions.

The plan sponsor and the plan administrator of the eligible multiemployer plan (the "Original" plan) before the partition are the plan sponsor and plan administrator of the plan created by the partition order (the "New" plan). For purposes of determining benefits eligible for guarantee by the PBGC, the New plan is a Successor plan with respect to the Original plan.

The PBGC's partition order will provide for a transfer to the New plan of the minimum amount of the Original plan's liabilities necessary for the original plan to remain solvent.

[1] The Participant and Plan Sponsor Advocate is established under the Employee Retirement Income Security Act of 1974 ("ERISA"). Pub. L. No. 93-406, § 1304, 88 Stat. 829 (1974).

The liabilities transferred to the New plan are liabilities attributable to benefits of specific participants and beneficiaries (or a specific group or groups of participants and beneficiaries) as requested by the plan sponsor of the Original plan and approved by the PBGC. The transferred liabilities are limited to the PBGC guarantee level applicable to each participant or beneficiary. Thus, benefits for such participants and beneficiaries will be paid by the New plan, up to the guarantee level. For each month after the effective date of the partition that such a participant or beneficiary is in payment status (*i.e.*, participants who have commenced receiving benefits), the Original plan will pay a monthly benefit to the participant or beneficiary in the amount by which (1) the monthly benefit that would be paid to the participant or beneficiary under the terms of the Original plan if the partition had not occurred (taking into account any benefit suspensions and any plan amendments after the effective date of the partition) exceeds (2) the amount of the participant's or beneficiary's benefit up to the PBGC guarantee level.

During the 10-year period following the effective date of the partition, the Original plan must pay the PBGC premiums due each year with respect to participants whose benefits were transferred to the New plan. The Original plan must pay an additional amount to the PBGC if it provides a benefit improvement (as defined under the rules for plans in declining status) that takes effect after the effective date of the partition. Specifically, for each year during the 10-year period following the effective date of the partition, the Original plan must pay the PBGC an annual amount equal to the lesser of (1) the total value of the increase in benefit payments for the year that is attributable to the benefit improvement, or (2) the total benefit payments from the New plan for the year. This payment is required to be made to the PBGC at the time of, and in addition to, any other PBGC premium due from the Original plan.

If an employer withdraws from the Original plan within 10 years after the date of the partition order, the employer's withdrawal liability will be determined by reference to both the Original plan and the New plan.[2] If the withdrawal occurs more than 10 years after the date of the partition order, withdrawal liability will be determined only by reference to the Original plan and not with respect to the new plan.

Reasons for Change

A number of structural, demographic, and economic challenges within the private-sector multiemployer pension system have placed a significant number of multiemployer pension plans in dangerously poor financial condition. Although many plans have been able to improve their funded status since 2010, plans that were in the worst condition after the 2008-2009 economic downturn have been unable to address their underfunding challenges and remain deeply underfunded and headed to insolvency. The Government Accountability Office (GAO) has estimated that 25 percent of critical-status plans face certain insolvency, with no combination of contribution increases and benefit reductions enabling them to emerge from critical status.[3]

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[2] When an employer stops actively participating in a multiemployer plan, the employer is said to "withdraw" from the plan. If the plan has an unfunded liability, the withdrawing employer is charged for and must make payments on the unfunded liability that it leaves behind, which is the "withdrawal liability." *See* ERISA, at § 4201.
[3] U.S. GOV'T ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: TIMELY ACTION NEEDED TO ADDRESS IMPENDING MULTIEMPLOYER PLAN INSOLVENCIES 19, GAO-13-240 (Apr. 8, 2013). Estimates of the liabilities of the critical-

One of the most important characteristics of these troubled plans is their unfunded legacy liabilities. These liabilities are attributable to employers that have exited the plans, either because of bankruptcy or business failure, and in most cases paid withdrawal liabilities insufficient to finance future benefits of remaining participants. The Congressional Budget Office (CBO) has cited these large legacy-liability costs as a product of withdrawal-liability rules established under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).[4] Under current law, an employer withdrawing from a multiemployer plan is obligated to make withdrawal-liability payments equal to that employer's share of unfunded vested benefits.[5] However, various limitations in law and practice result in underpayments of this liability. Those underpayments burden the remaining employers in the plan with significant costs to cover the benefit obligations of the workers who were employed by the exiting firms. The legal obligation to cover these liabilities is a significant reason why the majority of critical and declining plans are unable to fund their pension liabilities in full.

Current law provides PBGC with authority to partition financially stressed multiemployer plans. After review of a partition application, PBGC may order a partition providing for a transfer to a new plan the minimum amount of the original plan's liabilities necessary for the original plan to remain solvent. The liabilities transferred to the new plan are liabilities attributable to benefits of specific participants and beneficiaries (or a specific group or groups of participants and beneficiaries) as requested by the plan sponsor of the original plan and approved by the PBGC, up to the PBGC guarantee level applicable to each participant or beneficiary. Thus, benefits for such participants and beneficiaries up to the guarantee level will be paid by the new plan.

This transfer puts the plan in a better position to fund ongoing costs with contributions. While financially troubled plans may qualify for partition assistance, the current eligibility criteria have reduced the attractiveness of this option. Under current law, only critical and declining plans may seek partition assistance; plans must demonstrate that they have taken all reasonable measure to avoid insolvency; PBGC also must determine that the requested partition will reduce the PBGC's expected long-term loss with respect to the plan and is necessary for the plan to remain solvent; PBGC must show that the proposed partition amounts will not impair its ability to meet existing financial assistance obligations to other plans; and the cost to the PBGC arising from the proposed partition will be paid exclusively from the PBGC fund for basic benefits guaranteed for multiemployer plans. [6]

Enhancing PBGC authority to provide financial assistance through a partition will improve the ability of the most troubled multiemployer plans to fund their legacy costs prior to becoming insolvent, allowing them to regain their financial footing. Partitioning will permit such plans to fund benefit obligations more adequately with ongoing contributions.

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status plans vary, but are very large. For example, Congressional Budget Office (CBO) estimates the liabilities of these plans at about $80 billion. *See* CONG. BUDGET OFFICE, OPTIONS TO IMPROVE THE FINANCIAL CONDITION OF THE PENSION BENEFIT GUARANTEE CORPORATION'S MULTIEMPLOYER PROGRAM 5 (August 2016) [hereinafter *CBO Options Report*].

[4] Pub. L. 96-364 (Sept. 26, 1980); *See CBO Options Report*, *supra* note 3, at 12,

[5] "Unfunded vested benefits" are the value of non-forfeitable benefits under the plan less the value of plan assets. ERISA, at § 4213.

[6] ERISA, at § 4233.

Enhancing PBGC's partition authority reduces its exposure to full plan liabilities that would otherwise be shifted to the PBGC. Providing partition assistance sooner rather than later prevents entire plans from becoming insolvent, and reduces the number of participants relying on guaranteed payments from PBGC.

Description of Proposal

In General

The proposal establishes a special elective partition program to relieve qualifying multiemployer plans from a sufficient amount of liabilities to ensure that the plans remain solvent indefinitely. Eligible plans are defined as of the date of enactment and described below. To facilitate the removal of liability from these plans, PBGC is authorized to require them to separate their liabilities into two plans, an Original Plan and a Successor Plan as defined below.

Authority of PBGC

Upon application of a multiemployer plan, PBGC must review the application and order a partition of the plan if the plan meets certain eligibility requirements. PBGC must complete its review of the partition application no later than 120 days after the application is filed or completed, in accordance with guidance issued by PBGC. The purpose of the review is to confirm that the plan is an eligible plan and to determine the initial amount of the transfer of liabilities under the partition order.

The plan sponsor must notify participants and beneficiaries of the partition application no later than 30 days after submitting the application, in the form and manner prescribed by PBGC. PBGC must implement the transfer of liabilities under the partition order within 60 days following the completion of its review of the partition application.

Eligible Multiemployer Plans

A multiemployer plan must meet one of the following criteria to be eligible under the new partition program:

1. The plan is the Central States Plan, the Road Carriers Local 707 Pension Plan, or the United Mine Workers of America (UMWA) plan. Under the proposal, these plans are automatically treated as eligible plans, regardless of whether they satisfy the other eligibility requirements;
2. The plan is described in (a), (b) or (c) below:
   (a) The plan was certified to be in critical and declining status[7] under current law prior to November 20, 2019.[8]
   (b) The plan was previously in declining status and implemented a suspension of benefits under the Multiemployer Pension Reform Act of 2014 (MPRA);[9] or

[7] The proposal designates such plans simply as "declining status." *See* discussion *infra*, at Title II.B.
[8] The date that this proposal was released.
[9] Multiemployer Pension Reform Act of 2014 ("MPRA"), Pub. L. No. 113-235, 128 Stat. 2130.

(c) The plan (1) is in critical (but not declining) status, (2) is below 40-percent funded on a current-liability basis, and (3) has an active to inactive participant ratio below 40 percent.

Notwithstanding the forgoing, a plan described in (a), (b) or (c) above is not eligible for the special partition if a transfer of liabilities equal to 100 percent of the benefits guaranteed by PBGC (as increased by this legislation) does not enable the plan to remain solvent indefinitely.[10] In such a case, the plan would remain in declining status and would be subject to the new funding rules described in Title II, Parts A and B. Further, the plan would be required to engage in restructuring discussions with PBGC. The restructuring discussions will identify options for the plan to remain solvent. Any financial assistance provided by PBGC as part of a restructuring must reduce PBGC's expected long-term loss with respect to the plan.[11]

In order to be eligible for a special partition, the multiemployer plan sponsor must file a partition application with the PBGC within one year of enactment of the legislation. This one-year requirement applies to the initial date of the application by the plan sponsor, not the date on which PBGC determines the application to be complete.

Condition Precedent to Partition

As a condition of any partition under the proposal, the eligible multiemployer plan must adjust the rate of future accruals effective as of the date of the partition order to a monthly accrual rate that does not exceed 1 percent of annual contributions (or the actuarial equivalent thereof) determined as of the first day of the plan year following enactment.[12]

PBGC may only grant an order for a special partition under the proposal if it determines that the plan sponsor has adopted all reasonable measures to avoid insolvency, including benefit suspensions no greater than 10 percent.[13] The benefits of participants and beneficiaries who are 80 years or older will be excluded from the suspensions, with phased-in protection for participants between age 75 and 80. Benefits attributable to disability also are excluded from the suspension. A plan suspension is generally contingent upon approval of the partition by PBGC and will take place only when the partition is approved based on the new eligibility requirements.[14]

[10] The term "solvent indefinitely" is not defined under current law. However, the term is interpreted under regulations to require a plan to show that it is 100-percent funded over a 30-year projection or that the plan's funding level is not declining over the last 5 years of the projection. Treas. Reg. § 1.432(e)(9)-1(d)(5)(ii). The proposal's use of the term "solvent indefinitely" follows this regulatory interpretation.

[11] *See* ERISA, at § 4231.

[12] A "plan year" is "a 12-month period designated by a retirement plan for calculating vesting and eligibility, among other things. The plan year can be the calendar year or an alternative period [fiscal year], for example, July 1 to June 30." *See Retirement Plans Definitions*, Internal Revenue Service, https://www.irs.gov/retirement-plans/plan-participant-employee/definitions.

[13] "All reasonable measures" may include contribution increases or reductions in the rate of benefit accruals, or reductions and eliminations of early retirement subsidies and other ancillary benefits. ERISA, at § 305(e).

[14] The provision is similar to the benefit-suspension exemptions under MPRA. *See* Code § 432(e)(9)(D).

PBGC may require a multiemployer plan eligible for a special partition to merge with another multiemployer plan as a condition of approval of the partition, under the revised merger requirements described in Title II, Part A. Such mergers will be between plans in the same industry and will be designed to reduce ongoing expenses related to plan administration.

<u>Successor Plan Following the Partition Order</u>

The plan created by the partition order is the "Successor Plan" and is covered by PBGC benefit guarantees.[15] The remaining plan after partitioned liabilities have been transferred to the Successor Plan is the "Original Plan." Benefit payments made by the Successor Plan do not constitute a reduction in benefits with respect to the Original Plan.

The plan sponsor and the administrator of the Original Plan will continue to have the same roles with respect to the Successor Plan. That is, the plan sponsor and administrator of the Original Plan will remain responsible for matters such as benefit determinations, payment of benefits, communications, etc., with respect to participants and beneficiaries covered under the Successor Plan.

The Original Plan will pay to each participant and beneficiary in the Successor Plan the excess, if any, of (1) the monthly benefit that would be paid to the participant under the terms of the Original Plan had the transfer of liabilities not occurred (taking into account any applicable benefit reductions or plan amendments following the effective date of the partition), over (2) the monthly benefit for such participant or beneficiary that is being paid by the Successor Plan.

As prescribed by regulation, the plan sponsor will regularly provide PBGC with all necessary data with respect to participants and beneficiaries covered under the Successor Plan, including the amounts of their total benefits, the benefits paid by the Successor Plan, and guaranteed benefits.

<u>PBGC Financial Assistance to Successor Plan</u>

PBGC will provide financial assistance to the Successor Plan equal to the amount needed to pay monthly benefits to participants and beneficiaries in the Successor Plan up to the PBGC guarantee level (as increased by this proposal).

For the Central States Plan only, benefit liabilities will be partitioned to a Successor Plan whether or not such benefits exceed the PBGC guaranteed limit as increased under Title I, Part B of this proposal.

[15] ERISA, at § 4022A. Under current law, when a multiemployer pension plan fails, PBGC guarantees benefits up to the legal limit. PBGC's guarantee for multiemployer plan benefits depends on the type of benefit, the dollar amount of the benefit, the date on which the plan added the benefit provision, and a participant's years of service in the plan. "Basic" benefits include pension benefits payable at normal retirement age, some early retirement benefits, disability benefits for persons who were disabled before the plan terminated, and some survivor benefits. PBGC guarantees only up to the monthly amount that the participant's multiemployer plan would have paid the participant as a single-life annuity starting at normal retirement age. PBGC cannot guarantee the portion of any combined early retirement benefit and temporary supplemental benefit that is above this amount.

With respect to Road Carriers Local 707 Pension Plan only, PBGC will provide financial assistance to the Original Plan sufficient for the plan to pay each participant and beneficiary in the Successor Plan the excess, if any, of (1) the monthly benefit that would be paid to the participant under the terms of the Original Plan had the transfer of liabilities not occurred (at pre-insolvency levels), over (2) the monthly benefit that is guaranteed by PBGC (as increased by this proposal).

Financial assistance provided to the Successor Plans will not be subject to the repayment requirements under current law.[16]

Plan Responsibility for Premium Payments

The Original Plan will continue to pay applicable PBGC premiums. These include flat-rate premiums (as adjusted under the proposal) consistent with the same premium base as under current law (*i.e.,* flat-rate premiums on all plan participants and beneficiaries under either or both the Original Plan and the Successor Plan, without double-counting participants covered under both Plans), and the new variable-rate premium, as described in Part D of this title below.

For eligible plans that receive a special partition, the variable-rate premium level will be determined based on the eligible plan's improved funded status after the removal of partitioned liabilities.

Transfer of Liabilities

The partition order by PBGC will provide for a transfer of liabilities from the Original Plan to the Successor Plan in the amount necessary for the Original Plan to be projected to remain solvent indefinitely.[17] The amount of the transfer of liabilities must take into account all obligations of the Original Plan, including payment of benefits in excess of the PBGC guarantee to participants and beneficiaries covered under the Successor Plan and payment of PBGC premiums.

The amount of transferred liabilities will be based on a projection of plan assets and liabilities as of the projected partition date, as specified in the partition application. The projection of plan assets will be based on the fair market value[18] of plan assets as of the end of the last plan year preceding the date of the application, with appropriate adjustments for actual or anticipated plan experience through the projected partition date.[19] The projection of plan liabilities will be based on the most recent completed actuarial valuation (or the last filed Form 5500).[20]

[16] ERISA requires plans that have received financial assistance from PBGC to repay that assistance on "reasonable terms." *Id.* at § 4261(b)(2).
[17] *See* discussion *supra* accompanying note 10.
[18] For the definition of "fair market value," see ERISA, at § 304(c)(2); Code § 431(c)(2).
[19] Plan experiences are the financial, demographic or other changes to a plan during the plan year. For example, the actual investment return a plan achieves on its assets during the plan year is an investment experience.
[20] Form 5500 is the primary reporting instrument for multiemployer pension plans, providing regulators with information about plan operations, including a plan's funding status, actuarial valuations and compliance with minimum-funding rules. Form 5500 is required under ERISA, Title I.

Except for determining the Original Plan's benefit liabilities for funding purposes, withdrawal-liability calculations, and PBGC variable-rate premiums, the transfer of liabilities from the Original Plan to the Successor Plan will not constitute a reduction of benefits under the Original Plan for any purpose. Benefit payments made by the Successor Plan with respect to the liabilities transferred from the Original Plan to the Successor Plan will be treated as benefit payments made by the Original Plan for all purposes, including income-tax reporting requirements.

PBGC Guidance

PBGC will issue guidance on the requirements for partition applications within 180 days of enactment, in order to expedite implementation of this proposal. Any such guidance issued by PBGC must be interim or final (*i.e.*, not temporary), so plan sponsors can rely on it in preparing their partition applications. However, PBGC must issue an interim or final rule before any applications may be filed. If PBGC does not issue guidance within the timeframe established under the proposal, any applications filed after that date (and prior to the date guidance is issued) will be deemed to be complete.

PBGC guidance will include rules for determining which participants may be included in the transfer of liabilities to enable the Original Plan to remain solvent. For example, PBGC may describe how to prioritize participants by status, such as inactive-vested participants first, then participants and beneficiaries currently in payment status, and, lastly, currently active participants.

PBGC also is required to issue interim or final guidance within 180 days of the date of enactment on the assumptions that plans applying for partition assistance may use to project the amount of liabilities that will be transferred from the Original Plan to the Successor Plan.

Partition Application

The partition application by the plan sponsor must contain the required information set forth in guidance issued by PBGC.[21] The partition application will be automatically approved if the applying plan meets the eligibility requirements for a special partition. Through its review, PBGC will work with the plan sponsor to determine the initial amount of the transfer of liabilities under the partition order that is estimated to be needed for the Original Plan to remain solvent indefinitely.[22] As described below, the partition amount will be subject to a post-partition review to adjust the amount of the liability transfer based on the actual value of the plan assets and liabilities as of the partition date.

If PBGC determines the plan to be ineligible for a special partition, it must notify the plan sponsor in writing no later than 60 days after the application is filed. Such notice must specify the reasons the plan is ineligible for a special partition. The applicant plan will have a period of

[21] The proposal provides PBGC with authority to stagger the submission of the applications to set a number of submissions per quarter in a manner that will not prejudice the applicant plan's partition request.
[22] *See* discussion *supra* accompanying note 10.

at least 90 days to modify its application, which will then be subject to expedited review by the PBGC. For purposes of satisfying the one-year filing requirement for special partition, a modified application will relate back to the date the application initially was filed.

If PBGC determines the application by the plan sponsor to be incomplete (*i.e.*, missing one or more required components), it must notify the plan sponsor in writing no later than 45 days after the application is filed. Such notice must specify the missing components of the application.

Calculating Liability Transfer Amounts

For purposes of the initial partition application, PBGC guidance will require the applicant to provide projections relating to the Original Plan after partition and a projection of the funding status of the Successor Plan. The PBGC guidance will include specific factors to determine the plan's projected funding status and the amount of liabilities to be transferred, including but not limited to specific projections of investment returns, contribution base units, withdrawal liability payments, administrative expenses, mortality assumptions, and data on new entrants into the plan.

If the application uses the actuarial assumptions prescribed in PBGC guidance, such assumptions will be considered to be reasonable. If an application uses any actuarial assumption that differ from the prescribed assumptions, the applicant must document these assumptions and PBGC must expeditiously review these assumptions and determine whether any are unreasonable. If PBGC determines an actuarial assumption to be unreasonable, it must issue a written notice to the plan sponsor within 90 days of the date of the application. The written notice must identify the unreasonable assumption and specify the alternate assumption that PBGC considers to be reasonable. The applicant plan will have at least 90 days, but not more than 120 days, from the date of the notice to modify and resubmit its application. The revised application will be subject to expedited review by the PBGC and, for purposes of satisfying the one-year filing requirement for special partition, will relate back to the date the application initially was filed.

If PBGC does not provide the written notice to the plan sponsor described above within 90 days from the date of the application, the actuarial assumptions in the application will be deemed to be reasonable. The determinations made by the plan sponsor in the partition application, including participant data and benefit calculations, are presumed to be correct, unless clearly erroneous. Given the expedited review process for the partition application, the amount of the initial liability transfer may be based on certain estimates.

<u>Post-Partition PBGC Review</u>

After liabilities have been transferred under the partition order, PBGC will adjust (increase or decrease) the amount of the liability transfer.[23] The adjustment will be based on applicable updated participant data, calculations of PBGC guaranteed benefits for participants and

[23] If the post-partition review shows that the liabilities transferred exceed the amount necessary to ensure the plan's long-term solvency, the excess liabilities will be transferred back to the Original Plan. If the review shows insufficient liabilities were transferred to the Successor Plan, then PBGC is provided the authority to transfer additional liabilities from the Original Plan to the Successor Plan.

beneficiaries covered under the Successor Plan as of the partition date, and the actual value of benefit liabilities and assets of the Original Plan as of the partition date.[24] Notwithstanding the post-partition PBGC review, the adjusted liability transfer still must enable the Original Plan to be projected to remain solvent indefinitely, based on the same actuarial assumptions used in determining the initial amount of the liability transfer. [25]

Under the proposal, PBGC is provided authority to audit partitioned plans, to enable PBGC to adjust the financial assistance to the Successor Plan to an appropriate level, based on the plan's experience. Such audits are required to be conducted at least every three years.

Special Rules for Plans that have Implemented a Suspension of Benefits under MPRA

The sponsor of a plan that has already successfully implemented a suspension of benefits under MPRA (including a plan that has received partition assistance) has the option to undo the suspension (and, if applicable, the partition) and seek a special partition under the proposal. If the plan sponsor elects to seek a special partition, the suspension of benefits would be undone retroactively, with benefits restored to at least 90 percent of the pre-suspension levels as of the effective date of the partition and participants receiving a special payment equal to at least 90 percent of the amount of benefits previously cut under the MPRA suspension.[26]

The plan sponsor must make such an election and submit an application for a special partition within one year of the enactment of this legislation. Otherwise, the MPRA suspension of benefits will remain in effect. Participants receiving benefits under the plan will be subject to the same level of participant premiums and co-payments (as established under Part D of Title I) as any other plan receiving special partition assistance.

Fiduciary Protection

Plan fiduciaries will be presumed to be acting in the sole interests of plan participants and beneficiaries in applying for partition assistance and in transferring liabilities to the PBGC. Plan participants and beneficiaries whose benefits are transferred to the Successor Plan (or retained by the Original Plan) will not have a claim against plan fiduciaries with respect to the allocation of benefit liabilities between the Successor Plan and the Original Plan.

Effect of Partition on Withdrawal Liability

The liability transfer will be taken into account in determining withdrawal liability of an employer that contributes to the Original Plan so long as the employer remains a contributing employer to the Original Plan (and in compliance with the rehabilitation plan) for a period of 15 years following the effective date of the liability transfer. If an employer completely withdraws

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[24] PBGC is authorized under the post-partition review to adjust, if needed, any material assumptions from the projections and to include plan-specific contribution projections.
[25] *See* discussion *supra* accompanying note 10.
[26] According to PBGC, there have been only six partitions under MPRA through the date of this proposal: three prior to its enactment, and three post-enactment.

or partially withdraws due to a transfer of work,[27] bargaining out of a plan, or a substantial contribution decline at any time within the 15-year period, the transfer of liabilities will be disregarded in computing the employer's complete or partial withdrawal liability, and the amount of the withdrawal-liability payment amount otherwise determined under ERISA[28] will be increased by 25 percent.

This restriction will not apply if the complete or partial withdrawal is due to a decertification, a change in bargaining representatives, disclaimer of interest, or as a result of certain other events.[29] Further, the above restriction will not apply in the case of a partial withdrawal due to a bargaining unit or facility take-out[30] if the contribution base units (CBUs) for the plan year immediately following the year of the partial withdrawal are at least 97 percent of the CBUs for the plan year immediately preceding the year of the partial withdrawal.[31]

Restrictions on Benefit Improvements

If the plan sponsor adopts a plan amendment that increases plan liabilities (because of any increase in benefits, any change in the accrual of benefits, or any change in the rate at which benefits become non-forfeitable[32]) and the amendment takes effect after the effective date of the partition, the Original Plan must make compensating payments to PBGC for each year during the 20-year period following the effective date of the benefit increase.[33] For this purpose, an increase in benefits because of an increase in the contribution rate or compensation is considered a prohibited increase in the amount of benefit accruals.[34]

The amount to be paid by the Original Plan to PBGC each year is equal to the lesser of (1) the total value of the increase in benefit payments for the year that is attributable to the benefit improvement, or (2) the total benefit payments from the Successor Plan for such year. Such payment shall be made by the Original Plan at the time of, and in addition to, any other premium imposed by PBGC on the plan.

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[27] "Transfer of work" refers to a situation in which an employer ceases to contribute for one or more of its facilities, but continues to perform work at the facility for which the obligation ceased. *See* ERISA, at § 4205(b) (defining "transfer of work").
[28] *See id.* at § 4219(c) (establishing the rules for the payment of withdrawal liability).
[29] *Id.* at § 4218. Under this provision, employers are not deemed to have withdrawn from a plan solely because they cease operation due to a change in corporate structure, change to an unincorporated form of business, or if an employer suspends contributions during a labor dispute.
[30] The term "facility take-out" refers to a type of partial withdrawal from a plan, when an employer ceases to be obligated to contribute for employees at a facility, even though work that had been covered at the facility continues. *See id.* at § 4219.
[31] The "contribution base unit" is a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, as defined in regulations prescribed by the Secretary of the Treasury. In practice, contribution base units are the basis on which an employer contributes to the plan. In most cases, the units will be based on hours, days, or weeks worked, although in some industries it may be tons mined or tons of a given commodity consumed in the manufacturing process. *Id.* at § 4001(a)(11).
[32] A non-forfeitable benefit is a benefit for which a participant has satisfied the conditions for entitlement under the terms of the plan, (*i.e.*, "vested benefit"). *Id.* at § 4001(a)(8).
[33] These restrictions apply even if the plan's funding status improves after a partition.
[34] Under the proposal, PBGC is provided authority to establish rules to prevent circumvention of these requirements.

Post-Partition Disclosures

No later than the 120th day of each plan year beginning after the effective date of a special partition, the plan sponsor of both the Original and Successor plan must electronically file with PBGC a report including the following information:

- The Original Plan's market value of assets as of the last day of the preceding plan year;
- The estimated amount of all investment gains or losses of the Original Plan during the preceding plan year;
- Any material changes to benefit provisions, accrual rates, or contribution rates under the Original Plan during the preceding plan year;
- Any increase or decrease in benefits scheduled for the current plan year that would have a material effect on liabilities for the Original Plan;
- The number of participants and beneficiaries under the Original Plan who are active participants, currently in payment status,[35] or terminated-vested participants,[36] as of the first day of the preceding plan year;
- The most recent annual funding notice;
- Copies of (a) any plan amendments, (b) the most recent actuarial valuation report as of the plan year, and (c) any collective-bargaining agreements or participation agreements entered into or modified during the preceding plan year; and
- Such other information as PBGC may require.

Effective Date

The provisions are effective on the date of enactment.

[35] A participant in "payment status" or "pay status" refers to a retiree receiving benefit payments under a plan.
[36] A "terminated vested" participant generally is a former employee who worked long enough to earn vested benefits in a pension plan, but who left the company sponsoring the plan and is not yet receiving a retirement benefit. .

B. PBGC Guarantees for Participants in Multiemployer Plans

Present Law

ERISA, as amended in 1980, provides for PBGC to maintain separate insurance guarantee programs for single-employer defined benefit pension plans and for multiemployer defined benefit pension plans. When an ERISA-insured pension plan fails, PBGC guarantees each participant's benefits under the plan up to a statutory limit.

The PBGC's guaranteed benefit for multiemployer plan participants is based on the participant's benefit level accrued under the plan, the date on which the plan added the benefit provision, and total years of service of the participant in the plan. PBGC does not guarantee a participant's pension benefit or benefit increase until it has been part of the plan for 60 full months. If the multiemployer plan was insolvent or terminated by mass withdrawal in any month, that month does not count toward the 60-month requirement.

For multiemployer plans, each participant's benefit accrual rate is equal to the monthly benefit (in general) of the participant or beneficiary divided by the participant's years of credited service. The PBGC guarantee is 100 percent of the first $11 of the monthly benefit rate, plus 75 percent of the next $33 of the monthly benefit rate, times the participant's years of credited service. For example, a participant with a $1,500 monthly benefit and 30 years of service has a $50 ($1,500 ÷ 30) monthly benefit rate. The participant's guarantee accrual rate is equal to 100 percent of the first $11 plus 75 percent of next $33 ($24.75) or $35.75. And, that accrual rate times 30 years of service results in a guaranteed monthly benefit of $1,072.50 ($35.75 x 30).

The guaranteed benefit is not adjusted automatically for inflation or cost-of-living increases and was most recently increased beginning for plans years after 2000.[37]

The following chart illustrates the annual amount of the guarantee and the percentage of accrued benefit that is guaranteed, for participants with different years of service in plans that provide different levels of benefit accrual.

[37] Consolidated Appropriations Act of 2001, Pub. L. No. 106-554 (2000). This has been the only change to the guarantee limit since its enactment in 1980.

Table 1 – PBGC Annual Guarantees (% of Benefit Guaranteed)

Participant Years of Credited Service	Plan Benefit Annual Accrual Rate				
	$10	$30	$50	$70	$90
10 Years					
Maximum Guaranteed Monthly Benefit	$1,200	$3,030	$4,290	$4,290	$4,290
Percentage of benefit covered	(100%)	(84%)	(72%)	(51%)	(40%)
20 Years					
Maximum Guaranteed Monthly Benefit	$2,400	$6,060	$8,580	$8,580	$8,580
Percentage of benefit covered	(100%)	(84%)	(72%)	(51%)	(40%)
30 Years					
Maximum Guaranteed Monthly Benefit	$3,600	$9,090	$12,870	$12,870	$12,870
Percentage of benefit covered	(100%)	(84%)	(72%)	(51%)	(40%)
40 Years					
Maximum Guaranteed Monthly Benefit	$4,800	$12,120	$17,160	$17,160	$17,160
Percentage of benefit covered	(100%)	(84%)	(72%)	(51%)	(40%)

Guarantee varies based on each participant's years of service and the participant's monthly benefit accrual rate. The amounts shown above assume that plan benefits are determined by multiplying the benefit accrual rate by years of service and already reflects any adjustments for early retirement or survivorship costs.

This table applies only to plans that became insolvent on or after December 31, 2000.

Reasons for Change

The PBGC's benefit guarantee for participants in multiemployer plans is significantly lower than for those in single-employer plans. For an individual with 30 years of service in a multiemployer plan, the PBGC guarantees 100 percent of the pension benefit up to $3,960 and guarantees 75 percent of benefits in excess of that level, but only up to $12,870 per year. Additionally, the PBGC's multiemployer guarantee is prorated based on years of service, so that participants with only 10 years of service are guaranteed 100 percent of the pension benefit up to only $1,320 and 75 percent of benefits in excess of that level, but only up to $4,290. By comparison, for single-employer plans, the maximum guaranteed annual benefit is much higher. For 2017, the single-employer guarantee for a participant at age 65 is $67,295 and is actuarially increased for retirement after age 65. Finally, the PBGC guarantee levels are indexed for inflation in the single-employer program but not in the multiemployer program. Through 2015, about 80 percent of participants in terminated single-employer plans and insolvent multiemployer plans received their full vested benefits. However, the PBGC estimates that only half of participants in multiemployer plans projected to become insolvent in the future will receive full benefits.[38]

[38] PENSION BENEFIT GUARANTY CORP., PBGC'S MULTIEMPLOYER GUARANTEE (2015), http://www.pbgc.gov/documents/2015-ME-Guarantee-Study-Final.pdf [hereinafter *Multiemployer Guarantee*].

Theoretically, participants in multiemployer plans are protected by the obligation of every company in the plan to ensure that all promised pension benefits are paid, whereas a single-employer plan is dependent on the fate of one company alone. The net result is that fewer multiemployer plans fail to pay their full benefits, but those that do cut benefits reduce them much more sharply than a single-employer plan in a similar condition. Raising the guarantee benefit for participants in insolvent multiemployer plans will increase plan stability by encouraging more participants and employers to remain in, as well as join, such plans.

Explanation of Provision

The guarantee benefit amount for participants in a multiemployer pension plan is increased to 100 percent of the first $56 per month per year times the number of years of a participant's credited service, but not less than $250 per month. As under present law, PBGC will not guarantee a participant's pension benefit or benefit increase until it has been part of the plan for 60 full months.

Under the proposal, the maximum guaranteed monthly benefit for a worker with 30 years of credited service will rise from about $13,000 annually to about $20,000 per year.

Effective Date

The provision is effective for plan insolvencies occurring on or after the date of enactment. The provision also is effective only with respect to benefit payments due after the date of enactment.

C. PBGC Insurable Event for Multiemployer Plans

Present Law

Under the rules established by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), the insurable event for a multiemployer plan is plan insolvency (*i.e.*, the point at which the plan's available assets are not sufficient to pay benefits when due, and the plan may apply to PBGC for financial assistance). Unlike a single-employer plan that must reduce benefits to the guarantee level upon plan termination (preserving the plan's remaining assets), a multiemployer plan that is in declining financial status or has terminated continues to pay full plan benefits until it runs out of money to pay benefits.[39]

Plan Insolvency

A multiemployer plan that is in declining status and depleting its assets over many years is not subject to benefit payment limitations under present law. It must continue paying full plan benefits until it becomes insolvent. At that time, benefits are reduced to the "resource benefit level" (*i.e.*, the level that can be supported by the plan's available resources). When the plan's available resources can no longer cover guarantee-level benefits, the plan must reduce benefits to the guarantee and apply to PBGC for financial assistance to provide the difference between the plan's available resources and guarantee-level benefits

An insolvent multiemployer plan is not required to terminate. It may remain ongoing and continue to provide future accruals after it becomes reliant on PBGC to provide financial assistance. Employers may continue to contribute to an insolvent plan, rather than withdraw from the plan.

Plan Termination

Unlike a single-employer plan that must reduce benefits to the guarantee level at termination, a multiemployer plan that terminates by mass withdrawal or amendment pays full plan benefits until the plan becomes insolvent.[40] In this case, employers owe mass-withdrawal liability. In the rare case in which a plan terminates by plan amendment, MPPAA provides that employers may continue to contribute at a rate at least equal to the highest rate of the employer's contributions in the five preceding plan years.

Reasons for Change

In recent years, multiemployer plans have typically remained ongoing throughout their financial decline and even after they become insolvent. This trend is expected to continue in the future.

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[39] For multiemployer plans, plan termination is defined by ERISA as the date when plan participants cease receiving service credits, the plan is subject to a mass withdrawal of all participating employers, or the plan converts to an individual account plan. ERISA, at § 4041A.

[40] The plan sponsor must limit the payment of benefits to those that are non-forfeitable as of the date of termination (*e.g.*, payment of vested benefits only), and benefits are generally payable only in the form of an annuity. Also, when the value of all non-forfeitable benefits exceeds the value of the plan's assets, the plan must be amended to eliminate benefits in effect under the plan for fewer than 60 months.

The reasons are twofold: First, under current law, no multiemployer plan with at least one contributing employer is required to terminate, no matter how underfunded the plan becomes. Second, the excise tax on accumulated funding deficiencies – which historically drove employers to withdraw and plans to terminate in advance of an accumulated funding deficiency – was eliminated by PPA in 2006. Since then, the bargaining parties often opt to continue contributions to a deeply troubled plan, enabling the employer to avoid a withdrawal and an assessment of withdrawal liability from the plan.

Some of these plans with ongoing contributions after insolvency continue to provide future accruals for the active workers of contributing employers. Participants earn new benefits under these plans even as the plans have no assets and rely on PBGC financial assistance to cover guaranteed benefits. Other plans freeze future accruals and offer active workers future accruals in a new future-service plan. These frozen legacy plans are "ongoing plans" in name only – in substance, the bargaining parties generally negotiate contribution amounts sufficient to keep the employer from initiating a withdrawal. An earlier insurable event would curb this trend, which otherwise is expected to continue among troubled plans as long as the exemption from the excise tax under current law is retained.

Implementing an insurable event more proactively would extend plan solvency; reduce required financial assistance for the plan; reduce premiums needed to keep PBGC solvent; incentivize plans to act early to avoid the insurable event; and more closely reflect the timing of benefit reductions in the single-employer program.

Explanation of Provision

The definition of an insurable event for a multiemployer plan is amended under the MPPAA to occur as of the first plan year for which a plan is projected to become insolvent in any of the next five plan years. The plan actuary must certify this status as part of the plan's annual funded-status certification to the plan sponsor and ERISA agencies (*i.e.*, the Departments of Labor and the Treasury and the PBGC).

Plans that do not apply for the special partition program are subject to the revised insurable event rules under the proposal.

A plan projected to become insolvent within the next five years must be amended (1) to terminate (*i.e.*, to cease crediting service for any purpose under the plan) and (2) to reduce benefit payments to guaranteed-benefit levels (as modified by the proposal). Employers may not be compelled to withdraw and may continue making contributions pursuant to a collective-bargaining agreement.

An ongoing insolvent plan as of the date of enactment is required to terminate effective as of the first day of the seventh full month following the date of enactment, preceded by a notice of termination to participants.

The notice requirements for a plan in declining status also are amended to include the plan's projected year of insolvency, and must include an explanation of the requirement for the plan to terminate and reduce benefits to the guarantee if projected to be insolvent within five years.[41] The date of termination and effective date of the amendment is the first day of the seventh month of a plan year in which the plan furnishes notice to participants (*i.e.*, funded-status notice under current law).[42] This notice must be accompanied by a notice of termination and the reduced benefit level participants will receive.[43]

Any plan that terminates under existing provisions of law – through a mass withdrawal or plan amendment – is required to reduce benefits immediately to the guarantee level unless fully funded.

Effective Date

The provision is effective upon the date of enactment. A transition rule is provided for plans that satisfy the definition of insolvency as of the date of enactment. The transition rule requires the plan to limit benefit payments to the guarantee level (as modified by the proposal) and freeze future accruals, but allows the plan to continue to provide service credit for vesting/eligibility service through the date of insolvency.

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[41] A multiemployer plan that is in critical status must determine at least every three years whether the plan's assets are less than three times the total amount of benefit payments. In such a case, if the plan sponsor determines that the plan will be insolvent in any of the next five plan years, the plan must notify the Department of the Treasury of the nearing insolvency, and notify participants that certain benefit payments may be suspended but not below the guarantee level.
[42] ERISA, at § 305(b)(3)(D).
[43] *Id.* at § 4281.

D. PBGC Premiums in Multiemployer Plans

Present Law

While the PBGC is a federal agency, it is not funded with tax revenue. Instead, its single-employer and multiemployer insurance programs are funded primarily by premiums collected from defined-benefit plan sponsors, and earnings from invested assets. In the single-employer program, additional funding is received from the assets of terminated defined-benefit plans for which PBGC serves as trustee, as well as recoveries in bankruptcy from former plan sponsors. PBGC premiums for both programs are set by Congress.[44]

There are several kinds of premiums: the flat-rate (per-participant) premium, which applies to all plans, and the variable-rate premium and termination premium, which apply only to single-employer plans. The variable-rate premium varies with the level of plan underfunding and today comprises the majority of PBGC premium revenues. The termination premium applies only to terminating plans whose sponsors are in distress or in Chapter 11 reorganization and provides less than 0.1 percent of PBGC premium revenues (nearly all of which are uncollectible).[45]

Private-sector defined benefit pension plans pay different levels of premiums to PBGC. Multiemployer plans and single-employer plans pay a flat-rate premium, payable with respect to every participant with a benefit under the plan. In the case of a multiemployer plan, the flat-rate premium applies at a rate of $29 per participant for plan years beginning in 2019. In contrast, the single-employer flat-rate premium for 2019 is $80 per participant. Both rates are indexed for inflation.

Under current law, PBGC also levies a variable-rate premium on single-employer defined benefit pension plans, subject to a cap, based on the level of plan underfunding. The variable-rate premium cap is a maximum amount that a plan sponsor of a significantly underfunded plan has to pay. It is calculated based on the number of participants in the plan. There are other caps that apply for small plans. The variable-rate premium establishes a link to the risk of plan insolvency by requiring the sponsors with more underfunded plans to pay more toward the cost of covering risk than sponsors with better funded plans.[46] The current cap on the variable-rate premium for single-employer plans is $541, rising to $561 in 2020.

PBGC is required to review its multiemployer insurance program periodically to determine the premiums needed to maintain the current guarantee levels and whether the guarantee levels may be increased without increasing the premiums. If its most recent report indicates that a premium increase is necessary to support existing guarantee levels, PBGC may request congressional action under an accelerated timetable by transmitting to its committees of jurisdiction[47] (i) a revised schedule of guarantees that would be necessary in the absence of an increase in

[44] Payment of premiums to the PBGC is required by sections 4006 and 4007 of ERISA, and PBGC's Premium Regulations. *See* Code of Fed. Reg., tit. 29, subtit. B, ch. XL, subch. B.

[45] PENSION BENEFIT GUARANTY CORP., FISCAL YEAR 2018 ANNUAL REPORT 97, at note 11, https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2018.pdf [hereinafter *2018 Annual Report*].

[46] ERISA, at § 4006(a)(3)(E)(i)(II).

[47] *I.e.,* the Senate Committees on Finance and on Health, Education, Labor, and Pensions and the House Committees on Education and the Workforce and on Ways and Means.

premiums, (ii) a revised schedule of premiums that would be necessary to support existing guarantees, and (iii) an intermediate schedule of guarantees and premiums. If an increase in premiums is requested but not enacted by a joint resolution of Congress, the revised guarantee schedule in (i) must go into effect as of the beginning of the following year.[48]

Reasons for Change

PBGC's current premium structure for multiemployer defined benefit pension plans does not fully reflect the risks against which the PBGC insures. The current structure relies largely on a flat-rate premium that is based on the number of plan participants and that assesses rates equally per plan participant across all sponsors. A flat-rate premium is a poor proxy for the risk of future claims by multiemployer pensions.

Additionally, for several years, PBGC has reported that premiums are insufficient to cover the multiemployer program guarantees. In a 2016 study, PBGC estimated the amount of premium revenue needed to fund the insurance program through 2025.[49] Among its findings were that the structure of the premium directly affected the amount of premium needed. Because premiums are paid from plan assets, a large increase in premiums on the most troubled pension plans may lead to earlier insolvency and a larger need for premiums to provide financial assistance.

Both the Obama and Trump Administrations have included proposals in their annual budget submissions to Congress to provide more than a five-fold increase in premium revenues and to incorporate a variable-rate premium for multiemployer plans.[50] These proposals also would authorize PBGC to provide limited waivers from variable-rate premiums for multiemployer plans that have been terminated or are in critical funded status.

In order to align multiemployer premiums better with the risk PBGC insures and to prevent insolvency, the proposal includes a variable-rate premium, stakeholder and retiree co-payments, and an increase in the current multiemployer flat-rate premium. These new provisions will provide incentives for plans to become better funded and more conservatively invested, while also strengthening PBGC's ability to insure multiemployer-pension risk.

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[48] PBGC has never initiated the automatic-increase provision.

[49] PENSION BENEFIT GUARANTY CORPORATION, MPRA REPORT (June 17, 2016), https://www.pbgc.gov/documents/MPRA-Report.pdf.

[50] The Administration's Fiscal Year 2020 budget calls for a new variable-rate premium estimated to raise an additional $18 billion in premium revenue over the period 2020-2029. The proposed variable-rate premium would require plans to pay additional premiums based on their level of underfunding, up to a cap. WHITE HOUSE, A BUDGET FOR A BETTER AMERICA, FISCAL YEAR 2020 BUDGET FOR THE U.S. GOVERNMENT 68 (June 11, 2019). Similar proposals were offered by the previous administration. *See, e.g.*, WHITE HOUSE, MEETING OUR GREATEST CHALLENGES: OPPORTUNITIES FOR ALL, FISCAL YEAR 2017 BUDGET 46 (2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/budget/fy2017/assets/opportunity.pdf.

Explanation of Provisions

Flat-Rate Premium Increase

The multiemployer flat-rate premium paid to PBGC is raised to $80 (the same as the 2019 single-employer flat-rate premium), from $29, for each participant in a plan.

Variable-Rate Premium

The proposal establishes a variable-rate premium (VRP) payable to PBGC equal to 1 percent of a plan's unfunded current liability with respect to participant benefit levels. Specifically, the per-participant amount of the variable-rate premium equals 1 percent of the current unfunded liability divided by the number of participants, and is determined on a per participant basis for purposes of applying a cap.

The variable rate premium is capped, based on the plan's average benefits reported in the most recent Form 5500, calculated as the total benefits distributed in the plan year divided by participants and beneficiaries in payment status. In no case will the cap be higher than $250 per participant.

For the first five year after implementation of the variable-rate premium, adjustments to the average benefit levels will be based on 2017 data reported by the plans. Thereafter, PBGC will make such adjustments by regulations not less than every fifth year. The cap will be indexed for inflation in the same manner as PBGC's flat-rate premiums.[51]

Plans that receive a partition are required to include any participants whose benefits are payable by PBGC in the count of participants subject to PBGC flat-rate and variable-rate premiums, applicable to both the Original and Successor plans. However, for partitioned plans, the calculation of total unfunded current liability against which the VRP is applied will be made *after* taking into account the removal of liabilities under the partition order.

Plans that are insolvent prior to the date of enactment are not required to pay a variable-rate premium, and plans that are terminated but not yet insolvent on the date of enactment are required to pay a variable-rate premium.

Variable-rate premiums will be payable to PBGC annually, at the same time as current flat-rate premiums. The proposal includes enforcement rules based on the provisions of the variable-rate premium applied to single-employer plans, including late-payment penalties and interest, reasonable cause waivers of penalties, and PBGC audit authority.[52]

Under the proposal, PBGC is required to review only the multiemployer variable-rate premium structure every five years to determine the amounts variable-rate premiums necessary to maintain PBGC's long-term solvency. In reviewing the variable-rate premium, PBGC will be required to

[51] Under current law multiemployer flat-rate premiums are indexed to the national average wage index. 29 U.S.C. § 1306(a)(3)(M)). *See also* 42 U.S.C. § 409(k)(1) (defining the national average wage index).
[52] *See generally* ERISA, at § 4007.

consult with its advisory committee. The PBGC will issue a report on whether the current premium is sufficient to maintain long-term solvency of PBGC. If its report indicates that a variable-rate premium increase is necessary to maintain PBGC's solvency, PBGC will request congressional action under an accelerated timetable by transmitting to its committees of jurisdiction a revised variable-rate premium amount. In the case that the current variable-rate premium is determined to be adequate to maintain PBGC solvency, then the report may recommend a reduction in the variable-rate premium amount. If a modification in premiums is requested but not enacted by a joint resolution of Congress, the revised variable-rate premium will go into effect as of the beginning of the following year.

Stakeholder Co-Payments

Under the proposal, a monthly $2.50 fixed rate co-payment is imposed on each union and participating employer in relation to all active employees covered under the plan pursuant to a collective-bargaining agreement. Plans are responsible for collecting the co-payments and transmitting them to PBGC on a monthly basis. Plans must use collection methods similar to those used to collect delinquent contributions.[53]

Plans must provide annual notice to employers and unions of the co-payment owed for active participants, and annual notice to active participants of the employer and union co-payment. PBGC may impose a $100 per day penalty for failure to provide such notice.

Retiree Co-Payments

Under the proposal, plans are required to withhold co-payments from retirees equal to a fixed percentage of benefit payments and transmit the premiums to PBGC on a monthly basis, with the co-payments waived for certain beneficiaries. The retiree co-payment rates are based on the plan's zone status, and on whether the plan received a partition. The rate are summarized below.

Plan Type	Percentage Co-Payment
Endangered Status	3%
Critical Status	5%
Declining Status	7%
Frozen after Enactment	7%
Partition Plan (overrides other categories)	10%
Other (insolvent or frozen as of date of enactment)	7%

Changes in a plan's zone status (as modified under the proposal) that result in changes to retiree co-payment amounts due will be withheld as of the seventh month of the plan year (three months after the plan has determined the zone status and two months after the participants receive notice of the new zone status). Plans are required to provide notice annually to payment-status participants of the percentage deduction from monthly benefits for retiree co-payments.

[53] *Id.* at § 515.

Under the proposal, disabled retirees (as defined under the plan) are not subject to the monthly co-payment. Similarly, co-payments for participants or beneficiaries phase out beginning at age 75 and those over the age of 80 are not subject to the monthly co-payment. PBGC is authorized to establish by regulation a phase-out schedule similar to the MPRA benefit reduction phase out for older retirees.[54]

Collection of Premiums from Insolvent Plans

Plans would no longer owe premiums if the plan becomes insolvent (although stakeholder co-payments would continue). Additionally, PBGC would not be permitted to grant financial assistance to plans only for the purpose of enabling the plan to pay PBGC premiums.

PBGC Solvency Trigger to Assure Long-Term Solvency for the Multiemployer Program

The PBGC will be required to certify in its Annual Report whether its multiemployer program will remain solvent for at least 10 years. If PBGC projects insolvency of the multiemployer program within 10 plan years, it must submit to Congress a recommendation that provides a balanced combination of premium increases and guarantee reductions needed to ensure solvency for the next 20 years. If Congress does not act to accept or waive the recommended reforms, the new guarantee and premium schedules will go into effect on the subsequent October 1st.

Effective Date

The increase in the flat-rate premium is effective as of October 15, 2020, with transition provisions. The variable-rate premiums are effective for plan years beginning on or after the date of enactment. Stakeholder and retiree co-payments and collection of premiums from insolvent plans are effective as of October 15, 2020.

[54] Code § 432(e)(9)(D).

E. Pension Insurance Modelling

Present Law

The Moving Ahead for Progress in the 21st Century Act (MAP-21)[55] requires the PBGC to contract annually with a capable agency or organization that is independent of PBGC to conduct annual peer reviews of the Multiemployer Pension Insurance Modeling System.

Reasons for Change

To carry out its work, PBGC has developed two simulation models over the past two decades, the Single Employer Pension Insurance Modeling System (SE-PIMS), and the Multiemployer Pension Insurance Modeling System (ME-PIMS). These complex models use several input parameters regarding actuarial assumptions, capital-market developments, the evolution of assets and liabilities, and plan terminations, to model how PBGC's financial status might unfold over the next decade or two.

While it is critical to PBGC's mission and operations to ensure that its modelling systems are up to date and employ state-of-the-art tools and data, the MAP-21 annual review process is too costly with respect to PBGC resources and can be more efficiently accomplished within a five-year time frame.

Explanation of Provision

The proposal moves the PIMS review from an annual basis to a review every five years.

Effective Date

The provision is effective as of the date of enactment.

[55] Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 40233(a) (July 6, 2012).

TITLE II – FUNDING RULES, WITHDRAWAL LIABILITY, OTHER REFORMS FOR MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS

A. Minimum-Funding Standard for Multiemployer Plans

<u>Present Law</u>

Multiemployer defined benefit pension plans are subject to minimum-funding requirements under ERISA and the Internal Revenue Code (the "Code").[56] The amount of contributions required for a plan year under the minimum-funding rules are generally the amount needed to fund benefits earned during that year plus that year's portion of other liabilities that are amortized over a period of years, such as benefits resulting from a grant of past service credit.[57] The amount of required annual contributions is determined under one of a number of acceptable actuarial cost methods.[58]

<u>Funding-Standard Account</u>

To facilitate the application of the funding requirements, a defined benefit pension plan, including a multiemployer plan, is required to maintain a special account called a "funding standard account" to which specified charges and credits are made for each plan year, including a charge for normal cost and credits for contributions to the plan.[59] Other credits or charges may apply as a result of decreases or increases in past service liability, plan amendments, experience gains or losses, gains or losses resulting from a change in actuarial assumptions, or a waiver of minimum required contributions. If, as of the close of the plan year, charges to the funding-standard account exceed credits to the account, the excess is referred to as an "accumulated funding deficiency." For example, if the balance of charges to the funding-standard account of a plan for a year would be $500,000 without any contributions, then a minimum contribution equal to that amount would be required to meet the minimum-funding standard for the year to prevent an accumulated funding deficiency. If credits to the funding-standard account exceed charges, a "credit balance" results. The amount of the credit balance, which the plan may increase to reflect interest, can be used to reduce future required contributions.

Plans that meet certain criteria may be required to establish funding-improvement plans and rehabilitation plans, which require the plan to make additional contributions.[60] These additional

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[56] Code § 431; ERISA, at § 304. Minimum-funding rules also apply to single-employer plans, but diverge significantly from the multiemployer rules.

[57] Many multiemployer plans grant past service credit to employees for service with the employer in order to encourage an employer who is not yet contributing to the plan to join. A multiemployer plan may grant past service for work in similar jobs before the plan began, or participants may claim prior service for an employer who has since gone out of business. *See* Code § 411(d).

[58] A multiemployer plan is required to use an acceptable actuarial cost method (referred to as a funding method) to determine the elements included in its funding-standard account for a year. Generally, an actuarial cost method separates the cost of benefits under the plan into annual charges to the funding-standard account. *See* ERISA, at § 304.

[59] *See* definition of "plan year," *supra* note 12.

[60] Code § 432; ERISA, at § 305.

requirements are not incorporated into the charges to the funding-standard account. As a result, additional contributions made to satisfy a funding-improvement or rehabilitation plan may result in additional credit balances to the funding-standard account.

Funding Methods and General Concepts

A multiemployer plan is required to use an acceptable actuarial cost method to determine the elements included in its funding-standard account for a given year. Generally, an actuarial cost method breaks up the cost of benefits under the plan into annual charges consisting of two elements for each plan year: (1) normal cost, and (2) supplemental cost.

The plan's normal cost for a plan year generally represents the cost of future benefits allocated to the year by the funding method used by the plan for current employees and, under some funding methods, for separated employees. Specifically, it is the actuarially determined amount that would be required as a contribution by the employer for the plan year in order to maintain the plan if the plan had been in effect from the beginning of service of the included participating employees and if the costs for prior years had been paid, and all assumptions as to interest, mortality, time of payment, etc., had been fulfilled.

The supplemental cost for a plan year is the cost of future benefits that would not be met by future normal costs, future employee contributions, or plan assets. A common supplemental cost is one attributable to past service liability, which represents the cost of future benefits under the plan: (1) on the date the plan is first effective, or (2) on the date a plan amendment increasing plan benefits is first effective. Other supplemental costs may be attributable to net experience losses (*e.g.*, investment losses), changes in actuarial assumptions, and amounts necessary to make up funding deficiencies for which a waiver was obtained. Supplemental costs must be amortized (*i.e.*, recognized for funding purposes) over a specified number of years, depending on the source.

Plans may extend any amortization period by up to five years automatically (*e.g.*, from 15 years to 20 years), without IRS approval and by 10 years with IRS approval.[61] To qualify for automatic approval, a plan's actuary must certify that: (1) absent the extension, the plan would have an accumulated funding deficiency in the current plan year and any of the nine succeeding plan years; (2) the plan sponsor has adopted a plan to improve the plan's funding status; (3) taking into account the extension, the plan is projected to have sufficient assets to pay its expected benefit liabilities and other anticipated expenditures on a timely basis; and (4) required notice to participants and other affected parties has been provided.

Congress extended the period for amortizing plans' net investment losses occurring during the financial crisis, within the two plan years following August 31, 2008, from 15 years to 30 years.[62]

[61] Code § 412.
[62] Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Pub. L. No. 111-92.

For funding purposes, the "actuarial value" of plan assets may be used, rather than fair market value.[63] The actuarial value of plan assets is the value determined under a reasonable actuarial valuation method that takes into account fair market value and is permitted under Treasury Department regulations. Any actuarial valuation method used must result in a value of plan assets that is not less than 80 percent and not more than 120 percent of the fair market value of the assets. In addition, if the valuation method uses the average value of the plan assets, values may be used for a stated period not to exceed the five most recent plan years, including the current year.

In applying the funding rules, all costs, liabilities, interest rates, and other factors are required to be determined on the basis of actuarial assumptions and methods, each of which is 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.

When plan sponsors contribute more than the minimum-funding requirement, a credit balance is created in the funding-standard account. The credit balance grows with the funding interest rate and decreases if the plan uses the credit balance to satisfy the minimum-funding standards (*i.e.*, the contributions are not enough to meet the charges and credits).

For funded-status purposes, multiemployer plans determine their funded percentage as assets divided by liabilities. The assets are not decreased by the credit balance in the minimum-funding account when determining that percentage, but the credit balance is still available to use to offset minimum-funding requirements. To the extent an endangered or critical status plan is required by the terms of its funding-improvement or rehabilitation plan to make contributions in excess of the minimum-funding requirement, those excess contributions increase the credit balance.

Reasons for Change

The assumptions concerning the investment of plan assets are critical to determining the level of future benefits in a defined benefit pension plan.[64] Underfunding of a multiemployer plan is one of the most significant financial risks faced by retirees, plan beneficiaries, and the PBGC. While participants in multiemployer plans may access PBGC guarantees should their plan become insolvent, the guarantee level is so small compared to the guarantee level for single-employer plans that it leaves retirees and beneficiaries in multiemployer plans at a much greater risk of losing their benefits as promised under their retirement plan.

The assumption of a plan's future investment performance (also called the "discount rate") generally is used to value a pension plan's future liabilities. The discount rate, therefore, affects both normal and supplemental plan costs, which in turn determine how much plans must collect in required employer contributions under the current law minimum-funding rules.[65]

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[63] *See* JT. COMM. ON TAXATION, PRESENT LAW, DATA, AND SELECTED PROPOSALS RELATING TO MULTIEMPLOYER DEFINED BENEFIT PLANS 41, JCX-9-16 (Feb. 26, 2016).

[64] U.S. GOV'T ACCOUNTABILITY OFFICE, PENSION PLAN VALUATION: VIEWS ON USING MULTIPLE MEASURES TO OFFER A MORE COMPLETE FINANCIAL PICTURE 2, 11, GAO-14-264 (Sept. 2014) [hereinafter *Pension Plan Valuation*].

[65] *Id.* at 11–12. *See also,* Gregorio Impavido, *Conducting Stress Tests of Defined Benefit Plans* (Int'l Mon. Fund Working Paper, 2011).

Multiemployer plan trustees and actuaries generally employ a discount-rate assumption based on a long-term assumed rate of return on plan assets.[66] This approach results in reported obligations that frequently appear lower than those reported by single-employer plans, which are required to use a more conservative discount-rate assumption.[67] The higher the discount rate, the lower the plan's estimate of its liability and normal cost.[68] Conversely, the lower the discount rate, the higher the plan's estimate of its liability and normal cost. The farther into the future that the projected benefit payment is made, the more significant is the effect of the discount rate, because of the effects of compounding over a greater number of years.

Multiemployer pension benefits represent promises from plan administrators and fiduciaries to plan participants, and inappropriately high discount rates significantly reduce the probability of such promises being kept. With high discount rates, plans must hold riskier investment portfolios in order to achieve a sufficient rate of return to meet promised benefits.[69] Furthermore, when employer contributions are insufficient to cover even new benefits due to inappropriate valuations of normal cost, the risk of retiree benefits failing to materialize increases further. Therefore, the discount rates assumed by multiemployer plans serve as a key indicator of future plan solvency risks endemic to the multiemployer system as a whole.

Currently, the average discount rate assumed by multiemployer plans is 7.13 percent, and 10 percent of plans with the riskiest portfolios discount their liabilities at 7.74 percent, according to the PBGC.[70] One percent of plans even assume a rate of return averaging 8.17 percent – more than 5 percent greater than the second-segment rate of the yield curve, which is currently 3.07 percent.[71]

A discount-rate standard reflecting virtually no risk to participants is the "current liability" standard used by the PBGC to measure insured pension benefits in its annual data tables.[72] This standard is based on a formula that uses a weighted average of 30-year Treasury securities rates

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[66] *Pension Plan Valuation*, *supra* note 26, at 29.

[67] "Actuarial conservatism" refers to the use of actuarial techniques and assumptions that lead to a higher price for a set of pension benefits, or a higher value of a liability. Actuarial conservatism generally is understood to mean a weighting of one or more assumptions intended to provide a safety margin (*i.e.*, to deliberately overstate recommended contributions to a pension plan to some extent). *See* Brian A. Jones, *Actuarial Conservatism: Not in Public Sector Defined Benefit Pension Plans*, 3 J. ACTUARIAL PRACTICE 135 (1995).

[68] Normal cost is the pension cost attributable to an employee's work in a single year, which can also be considered the pension cost incurred after an employee's work in a single year. *See Pension Plan Valuation*, *supra* note 62, at 12.

[69] *See* CONG. BUDGET OFFICE, MODELING THE COSTS OF THE PENSION BENEFIT GUARANTY CORPORATION'S MULTIEMPLOYER PROGRAM 4 (June, 2017) [hereinafter *Modeling the Costs*].

[70] PBGC data provided Oct. 30, 2019 (on file with the Senate Finance Committee).

[71] *See Minimum Present Value Segment Rates*, Internal Revenue Service, https://www.irs.gov/retirement-plans/minimum-present-value-segment-rates.

[72] "Current Liability" is measured based on benefits accrued to date using interest rates that are related to 30-year Treasury bonds. It is important to note that even current liabilities do not absolutely guarantee pension payments the way that, for example, a portfolio of 10-year Treasury STRIP default-free bonds would cover such promises. *How the Multiemployer Pension System Affects Stakeholders: Hearing Before the Jt. Select Comm. on Solvency of Multiemployer Pension Plans*, 115th Cong. (July 25, 2018) (statement of Joshua D. Rauh, Senior Fellow & Dir. Research, Hoover Inst.). Current liability moves directionally with a truly risk-free rate, but has a generally longer direction than the cash flows of underfunded pension plans, since it is based on 30-year Treasury rates.

codified in the Retirement Security Act of 1994. Measured on a current-liability basis, net unfunded liabilities to the PBGC have grown to over $638 billion as of the last official PBGC estimate.[73] This severe underfunding threatens the solvency of the PBGC multiemployer program, but also the pension benefits promised to current workers and retirees. However, since the discount rates associated with current liability are so much lower than the rates used by plans for funding purposes, requiring plans to use a current liability standard would entail increases in employer contributions so large that the multiemployer system may become untenable for employers. Therefore, the proposal does not recommend a current-liability standard.

Nevertheless, leading pension economists throughout the academic community and regulators such as the PBGC, have long recognized that the lack of restrictions with respect to the accounting rules in pricing plan benefit obligations is one of the most, if not *the* most, significant factors in the severe underfunding of multiemployer pensions. In fact, PBGC stressed this point in the years immediately after enactment of ERISA.[74] More recently, the Congressional Budget Office reported that the current funding rules create incentives for multiemployer plan trustees to invest in riskier assets, which have created persistent underfunding of the plans.[75] CBO developed a rigorous simulation model with input from the Massachusetts Institute of Technology, the Joint Committee on Taxation, and PBGC. The paper reported that important factors contributing to the poor outlook for the multiemployer system include "large losses on plans' risky investments following collapses in the stock market," and "pension accounting rules that create a strong incentive for plans to fund relatively fixed pension benefits with risky assets."[76]

Since the overall purpose of the rules surrounding the multiemployer plan system is to ensure that retirees and beneficiaries have access to adequate income in retirement, it is appropriate for Congress to consider limits on the actuarial assumptions used to price benefit obligations in multiemployer plans and the associated risks.

<u>Explanation of Provision</u>

<u>Valuation of Liabilities</u>

The proposal regulates the assumed discount rate used by actuaries to project the liabilities of a multiemployer plan. The assumed rate is limited 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 yield curve plus 2 percent, or (2) 6 percent.[77] The

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See 2016 Pension Insurance Data Tables, Pension Benefit Guaranty Corp., Table M-9, https://www.pbgc.gov/sites/default/files/2016_pension_data_tables.pdf.

[74] Among industrialized nations with multiemployer defined benefit pension systems, the United States is alone in the level of discretion it provides plan trustees in setting discount rates to price the current value of future benefit obligations. *See Pension Plan Valuation*, *supra* note 62, at 50, 60.

[75] *CBO Options Report*, *supra* note 3 at 7, 23; *Modeling the Costs*, *supra* note 67, at 36–37.

[76] *Modeling the Costs*, *supra* note 67, at 4.

[77] The applicable rate is based on the interest rates determined with respect to the corporate bond yield curve under Code § 430(h)(2)(C)(ii).

maximum rate will be phased in over five years, beginning in plan year 2020. The cap applies to the assumptions with respect to the determination of all plan liabilities.

30-year Amortization of Increased Liability from Changes

Changes in a plan's unfunded obligations solely attributable to the required decrease in the interest rate and change in the valuation of assets will be amortized over a 30-year period.

Effective Date

The provisions generally are effective for plan years beginning after the date of enactment.

B. Additional Funding Rules for Multiemployer Plans

Present Law

The Pension Protection Act (PPA) of 2006 introduced new funding rules for multiemployer plans based on tiered funded ("zone") statuses, which operate in addition to the minimum-funding standards. Under this regime, effective for the 2008 plan year, every plan is required to certify annually its funded status to the plan's trustees and the Secretary of the Treasury. Certifications of tiers are based on whether the plan's funded status (*i.e.,* ratio of assets to liabilities using actuarial funding measurements) at the beginning of the plan year is at least 80 percent and on projections of the plan's ability to meet the minimum-funding requirements and to remain solvent in the future.

The PPA changes were intended to compel trustees to identify and correct existing and potential funding issues proactively, prevent further funding deterioration, and stabilize the plans' finances. PPA requires plans that trigger endangered status or critical status to adopt a package of measures designed to achieve objective benchmarks for improved funding over specified timeframes. In addition, PPA gives plan trustees flexibility to alleviate severe funding stresses experienced by plans, through negotiations with a plan's bargaining parties to reduce certain types of benefits offered under the plan.

Projection of Zone Statuses

Within 90 days after the first day of a plan year, a plan's actuary must certify to the Secretary of the Treasury whether or not the plan is in endangered or critical status for the plan year. If the certification is not made within this period, the plan is presumed to be in critical status until the plan actuary makes a contrary certification.

In making this determination, the plan actuary must make projections for the current and succeeding plan years, using reasonable actuarial assumptions and methods, of the current value of plan assets and the present value of liabilities under the plan for the current year as of the beginning of the year, based on the actuarial statement for the preceding plan year. Any actuarial projection of plan assets must assume (1) reasonably anticipated employer and employee contributions for the current and succeeding plan years, assuming that the terms of one or more collective-bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for the succeeding plan years, or (2) that employer and employee contributions for the most recent plan year will continue indefinitely, but only if the plan actuary determines that there have been no significant demographic changes that would make continued application of such terms unreasonable.

If a plan is certified to be in endangered or critical status, notice must be provided within 30 days after the date of certification to the participants and beneficiaries, the bargaining parties, the PBGC, and the Secretaries of the Treasury and Labor.

Endangered and Seriously Endangered Statuses

A plan is in endangered status (commonly referred to as "Yellow Zone") if it is funded percentage is less than 80 percent, or the plan has or is projected to have in any of the six succeeding plan years an accumulated funding deficiency (*i.e.*, fails to satisfy minimum-funding standards).[78] If a plan is determined to be in endangered status, the trustees must adopt a funding-improvement plan designed to increase the plan's funded percentage by one-third within a 10-year period, and to avoid a funding deficiency at the end of the 10-year period. (A plan that triggers both the funded percentage and funding deficiency provisions is in a subcategory called "seriously endangered status" and must increase its funded percentage by one-quarter within a 15-year period.)

To achieve the necessary benchmarks, the trustees of an endangered-status plan may propose a range of options, including contribution increases and reductions of future accruals. The trustees, however, may not reduce the accrued benefit of any participant, including the right to an early retirement benefit, retirement-type subsidy, or optional form of benefit. These benefits are protected by the anti-cutback rule under ERISA and the Code, prohibiting the reduction of accrued benefits.[79]

Plans that do not need to take additional action in order to meet these benchmarks are exempted from endangered status.

Critical Status

A plan is in critical status (commonly referred to as "Red Zone") if it will become insolvent or fail to meet the minimum-funding standards over the next several years. There are four tests that determine whether a plan is in critical status: (1) the plan projects insolvency within the succeeding four plan years; (2) the plan projects insolvency within the succeeding six plan years and its funded percentage is less than 65 percent; (3) the plan has or projects an accumulated funding deficiency for any of the three succeeding plan years (four years if its funded percentage is less than 65 percent); and (4) the plan has or projects a funding deficiency for any of the four succeeding years, has an inactive participant liability that exceeds the plan's active participant liability, and contributions fail to meet the normal cost and interest on the unfunded liabilities.[80] Additionally, plans that are projected to be in critical status within five years may elect critical status.

Trustees of a plan entering critical status must adopt a rehabilitation plan designed to enable the plan to emerge from critical status within a 10-year period. To avoid undue stress on contributions and benefits, if the trustees determine that the plan has exhausted all reasonable

[78] Plans may include the effect of an extension with respect to the amortization of certain supplemental costs in determining proximity to a funding deficiency.
[79] ERISA, at § 204(g) and Code § 411(d)(6). These provisions protect participants from losing benefits they have already earned, including the right to an early retirement benefit or retirement-type subsidy or optional form of benefits with respect to benefits attributable to service before the amendment was adopted. These rules are commonly known as the "anti-cutback" rules.
[80] Projection of a funding deficiency under these tests may not take into account any extension of amortization periods.

measures and cannot reasonably be expected to emerge from critical status within a 10-year period, PPA allows the plan to emerge at a later date or to forestall insolvency.

To achieve the necessary funding improvement benchmarks, the trustees of a critical status plan may propose a range of options, including contribution increases and reductions of future accruals. The bargaining parties must adopt terms in their collective-bargaining agreements consistent with the schedules presented by the trustees. To encourage adoption of such terms, PPA imposes an automatic employer surcharge of 5 percent of contributions for the first year, and 10 percent for subsequent years, for periods prior to the adoption of a conforming collective-bargaining agreement (and after notice to the employer that the plan is in critical status and the surcharge is in effect).

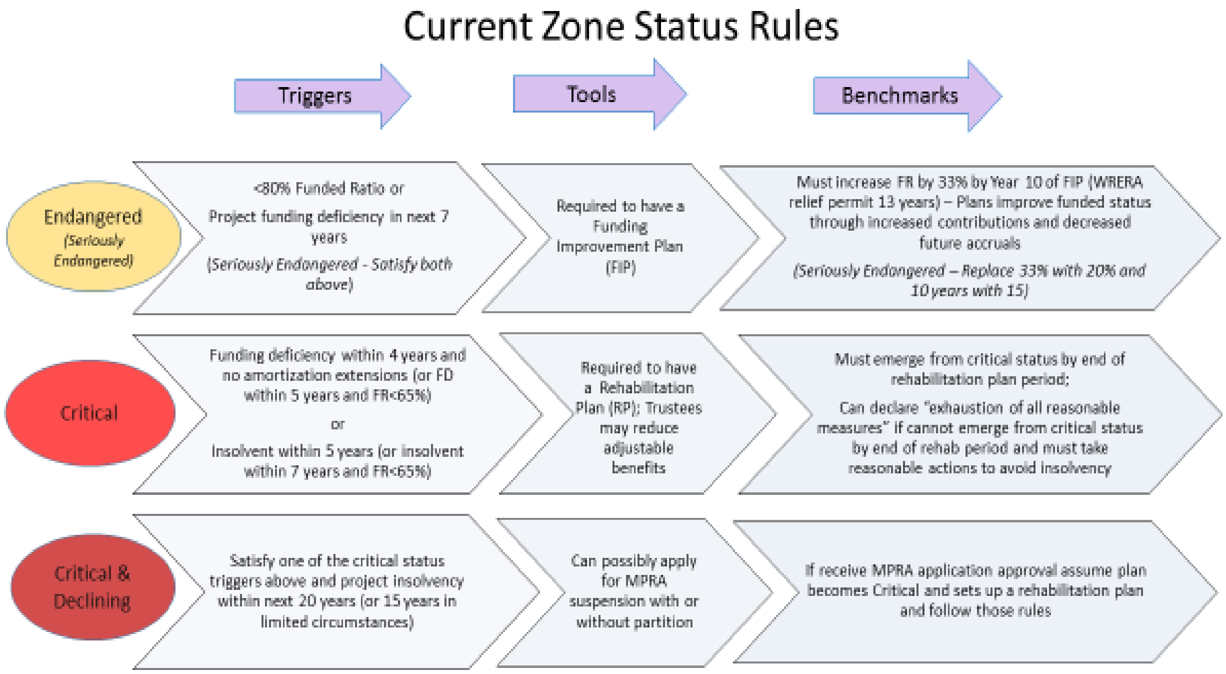
Notwithstanding ERISA's anti-cutback rule, PPA permits the trustees of a critical status plan to reduce "adjustable benefits" of participants not yet in payment status (*i.e.*, participants who have not commenced receiving benefits by the date on which the plan provides notice of the plan's initial critical year). A participant's accrued benefit at normal retirement age, however, remains protected. "Adjustable benefits" include early retirement benefits, retirement-type subsidies, other forms of payment subsidies (other than a qualified joint and survivor annuity), disability and death benefits not yet in payment status, and similar benefits.

Critical and Declining Status

MPRA added a new "critical and declining" status. Critical and declining plans meet one of the triggers to be categorized as in critical status (described above) and, in addition, are projected to become insolvent within the next 20 years.[81] A tax is imposed on the board of trustees of a critical and declining status plan that fails to adopt a rehabilitation plan, equal to the greater of 5 percent of the deficiency or $1,100 per day after the required deadline that the failure continues.

Under ERISA and the Code, a plan that certifies it has "exhausted all reasonable measures" to emerge from critical status may "take reasonable measures to forestall insolvency." This standard may give plans an incentive to maximize income (contributions and withdrawal-liability payments) prior to insolvency at the expense of generating income to the plan after insolvency (income after insolvency is used to offset PBGC financial assistance payments).

[81] If the ratio of inactive to active participants is less than 2 to 1 going forward and the plan has a funded percentage of at least 80 percent, it would only enter critical and declining status if projected insolvency is within 15 years. It is rare for plans in critical status to meet both of these tests.



Source: Joint Select Committee on Multiemployer Plans (2018).

Reasons for Change

Under PPA, plan sponsors are required to look beyond financial snapshots on a certain date for purposes of estimating plan valuations. Based on these PPA assessments, plans are assigned to a "zone status," or rough measure of their financial stability. These requirements are designed to make plans take a more forward-looking approach to managing plan assets and liabilities, to assess where a plan is headed, and to provide flexible options the plan may take to bring the plan to a better funded condition.

These rules, which went into effect in 2008, have allowed many plans to take remedial action to move into a more stable financial position. However, for a significant number of relatively poorly funded multiemployer plans, many of which are systematically important, the zone rules have not brought the plans to a better funded status. It also is clear that a significant number of plans that rest in a higher zone status are not financially stable, and may, if subject to demographic or economic headwinds, quickly deteriorate to a more poorly funded status, threatening participant benefits.[82]

The operation of the current zone rules raises a number of concerns. First, as currently structured, the rules do not adequately show the underlying causes of a plan's financial instability, particularly with respect to future streams of contributions. The current rules do not take into account key indicators of industry health, such as whether an industry is growing or in decline, nor do they examine fully the contributions base of a given plan. This latter problem is

[82] Judith F. Mazo and Eli Greenblum, Multiemployer Pension Plans Respond to the Financial Crisis 21, 32–33 (September 2011) (Pension Research Council).

exacerbated by current "smoothing" rules, which can mask the trajectory of employee contributions to a plan.[83]

The proposal expands the zone rules for plans in declining status so that plan sponsors are given greater incentives to take corrective action to place plans on a sounder financial footing. The proposal improves the measures of plan status to make it easier for plan sponsors to see the signs of decline and provides sponsors with earlier access to corrective tools to address funding issues. By making the measurements more predictive and increasing early access to remediation methods, the proposal is intended to improve the ability of plans to forestall insolvency and to safeguard the retirement benefits promised to plan participants. These changes also include new reporting rules to improve notifications to plan stakeholders so that they have a greater ability to understand the current financial status of their plan and its future financial course.

Explanation of Provisions

Benefit Increases

Under the proposal, the trustees of a multiemployer plan may not adopt a plan amendment that increases plan liabilities arising from any increase in benefits, any change in the accrual of benefits, or any change in the rate at which benefits become non-forfeitable unless:

- The plan is currently in stable or better status (described below), and the plan actuary certifies that the benefit increase would not cause the plan to exit unrestricted status; or
- In the case of a plan that is not in critical or declining status, the plan actuary certifies that the benefit increase is paid out of additional contributions not contemplated in any current funding-improvement plan; or
- The benefit increase is required by law.

In the case of a plan that is in critical status or declining status (as modified below), the restriction on benefit increases applies to existing plan provisions (*i.e.*, for which a plan amendment is not needed) under which an increase in the contribution rate or compensation following the first day of the first plan year following the date of enactment (or the date of partition, in the case of a plan eligible for the special partition provisions) results in an increase in the amount of benefit accruals.

If a plan that is not in critical status or declining status, the restriction on benefit increases does not apply to existing plan provisions (*i.e.*, for which a plan amendment is not needed) under which an increase in the contribution rate or compensation results in an increase in the amount of benefit accruals.

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[83] *Id.* at 21. Pension "smoothing" is an accounting technique that allows companies to base pension liability calculations on average interest rates over a longer historical period during which interest rates were higher than in the recent past. This approach allows the company to assume higher interest, or "discount," rates to lower the present value of future liabilities, which reduces their pension contribution amount. Under current law, plans are permitted to use a special rate to value pension liabilities, as long as that rate falls within a specified range based on an average of the rates normally used to calculate liabilities, and as long as that rate it is no less than 90 percent and no more than 110 percent of a corresponding 25-year average set of rates. *See* Code § 430(h).

Zone-Status Reforms

In general, under the new funding standards defined in Title II, Part A of the proposal, healthy "Green Zone" plans will be re-categorized as "unrestricted" or "stable" plans. Less well-funded plans will continue to be subject to the current-law zone-status rules (as modified by the proposal) but are provided additional tools and required to take stronger proactive steps to improve their funded percentage.

Unrestricted Plans

The proposal establishes a new "unrestricted" status. A plan is in unrestricted status for the plan year if it is not in endangered status, critical status, or declining status and it satisfies at least one of the following tests: (1) the plan's projected actuarial liability funded percentage as of the first day of the 15th succeeding plan year is at least 115 percent;[84] and (2) the plan's current liability funded percentage as of the first day of the plan year is not less than 80 percent.[85]

Stable Plans

The proposal establishes a new "stable" status, which will replace the current so-called "Green Zone" status.[86] A plan is in stable status for the plan year if the plan is not in endangered status, critical status, or declining status.

Endangered Plans

The proposal updates the "endangered" status rules. A plan is in endangered status if it is not in critical status or declining status, and the plan is described by at least one of the following tests: (1) the plan's actuarial liability funded percentage as of the beginning of the plan year is less than 80 percent; and (2) the plan has a projected accumulated funding deficiency in the current or next nine succeeding plan years (taking into account amortization extensions). With the updated endangered status, the proposal eliminates the "seriously endangered" status under current law.

The trustees of a plan in endangered status must adopt a funding-improvement plan that is designed to enable the plan to emerge from endangered status by the end of the funding-improvement period, and to avoid any accumulated funding deficiencies during the funding-improvement period (taking into account amortization extensions).

Under the proposal, the funding-improvement period for an endangered status plan is initially the 10-year period beginning after the expiration of collective-bargaining agreements covering at least 75 percent of covered active participants but may be reset to a new 10-year period following adverse plan experience, provided that the plan is still projected to meet the

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84 The term "actuarial liability funded percentage" is not defined under current law. The new term is based on current-law measurement rules in Code § 432(c)(3), which are fixed-date estimates of the plan's funded percentage and the Code § 432 tests, which are used to establish a plan's zone status.

85 The "liability funded percentage" measures a plan's funding level based on the value of assets as a percentage of actuarial present value of accrued benefits on the measurement date. These values are reported on the Form 5500.

86 Under present law, "Green Zone" status is not defined in the statute. Rather, Green Zone is the absence of being in endangered or critical status.

requirements of the funding-improvement plan and emerge from endangered status by the end of the new 10-year period.[87]

The funding-improvement plan for endangered status plans consists of one or more schedules of benefits and contributions to be proposed to the bargaining parties. The funding-improvement plan must include a default schedule, under which all early retirement subsidies must be eliminated as adjustable benefits, any other adjustable benefits may be reduced or eliminated, and the future monthly benefit accrual rate must be reduced to the equivalent of 1 percent of annual contributions (or the current accrual rate, if lower) based on the rate in effect as of the later of the first day of the first plan year following the date of enactment or first day of the initial endangered year. Alternate schedules are optional and may reduce or eliminate adjustable benefits.

Endangered Plan Restrictions

In addition to the contribution restrictions that apply to all multiemployer plans, certain restrictions apply to plans in endangered status (similar to current law). In general, an endangered plan may not be amended after the date of the adoption of a funding-improvement plan in a manner that would be inconsistent with the adopted funding-improvement plan. In addition, the plan trustees of a plan in endangered status may not adopt a plan amendment that increases plan liabilities unless the plan actuary certifies that such an increase is paid out of additional contributions not contemplated by the funding-improvement plan, and, after taking into account the benefit increase, the plan is still reasonably expected to emerge from endangered status by the end of the funding-improvement period on the schedule contemplated in the adopted funding-improvement plan.

The proposal retains the special rule that a plan is not in endangered status if it was not in endangered, critical, or declining status in the prior plan year and no corrective actions are needed to emerge from endangered status within the next 10 plan years. The proposal adds a special rule allowing an endangered plan that cannot reasonably emerge from endangered status to elect to be in critical status. Similarly, the proposal adds a special rule permitting a plan sponsor for a plan that is not currently in endangered, critical, or declining status to elect to be in endangered status, if the plan is projected to be in endangered status in the next five plan years.

Critical Plans

The proposal also updates the "critical" status rules. A plan is in critical status if it is not in declining status and is described by any of the following tests: (1) the plan's actuarial liability funded percentage as of the beginning of the plan year is less than 65 percent; or (2) the plan has a projected accumulated funding deficiency in the current or next six succeeding plan years (taking into account amortization extensions); or (3) the plan's projected actuarial liability funded percentage as of the first day of the 15th succeeding plan year is less than 80 percent.

[87] "Adverse plan experience" means plan results that affect the provision of benefits. Investment returns that are below the assumed rate is one type of adverse plan experience.

A plan will not emerge from critical status until it meets each of the following tests: (1) the plan does not fail any of the initial critical-status tests described above; and (2) the plan has no projected accumulated funding deficiencies in the current or next nine succeeding plan years (taking into account amortization extensions).

The plan sponsor of a plan in critical status must adopt a rehabilitation plan that is designed to either: (1) enable the plan to emerge from critical status by the end of the 10-year rehabilitation period; or (2) if following the exhaustion of all reasonable measures the plan sponsor determines that the plan cannot reasonably be expected to emerge from critical status at the end of the 10-year rehabilitation period, the rehabilitation plan must consist of reasonable measures to either emerge from critical status at a later date, or forestall possible insolvency.

The rehabilitation period is initially the 10-year period beginning after the expiration of collective-bargaining agreements covering at least 75 percent of covered active participants (as under current law). Following the exhaustion of reasonable measures, the rehabilitation period will be extended to conform to the delayed date of emergence from critical status, or the projected date of insolvency, if applicable.

The rehabilitation plan will consist of one or more default schedules of benefits and contributions for approval by the bargaining parties. The rehabilitation plan must include a default schedule, under which: (1) all early retirement subsidies must be eliminated as adjustable benefits; (2) any other adjustable benefits may be reduced or eliminated; and (3) the future monthly benefit accrual rate must be reduced to the equivalent of 1 percent of annual contributions (or the current accrual rate, if lower). Alternate schedules are optional and may reduce or eliminate adjustable benefits.

Critical Plan Restrictions

In addition to the restrictions that apply to all multiemployer plans, certain restrictions apply to plans in critical status. In general, a critical-status plan may not be amended after the date of the adoption of the rehabilitation plan to be inconsistent with the adopted rehabilitation plan. Also, the plan sponsor of a plan in critical status may not adopt a plan amendment that increases plan liabilities unless required by law or the amendment results in a *de minimis* increase under current law. As under current law, lump-sum distributions and similar benefits are prohibited while a plan is in critical status. Similarly, contribution surcharges, as required under current law for critical-status plans, will continue to apply.[88]

For any plan that is operating under a rehabilitation plan that is not on track to emerge from critical status by the end of a 10-year rehabilitation period, no schedule under the rehabilitation plan may provide for a future monthly benefit accrual rate that exceeds the equivalent of 1

[88] Current law requires that all contributing employers pay to the critical-status plan a surcharge to help correct the plan's financial situation. The amount of the surcharge is equal to a percentage of the amount an employer is otherwise required to contribute to the plan under the applicable collective-bargaining agreement. With some exceptions, a 5-percent surcharge is applicable in the initial critical year and a 10-percent surcharge is applicable for each succeeding plan year thereafter in which the plan is in critical status. ERISA, at § 305(e)(7).

percent of annual contributions, based on the current contribution rate in effect as of the later of the first day of the first plan year following the date of enactment (or the date of partition, in the case of a plan eligible for the special partition provisions) or first day of the initial critical year.

Critical plans may no longer certify a rehabilitation plan that relies on "exhaustion of all reasonable measures" and "reasonable measures to forestall insolvency."

The proposal retains the special rule that permits an election by a plan sponsor for the plan to be in critical status, if the plan is projected to be in critical status in the next five plan years.

Transition Rule for Plans Currently in Endangered Status or Critical Status

The sponsor of a multiemployer plan that is in endangered status on the date of enactment of the proposal and is making scheduled progress toward its adopted funding-improvement plan is eligible for a special transition rule. Under this rule, the plan sponsor may elect to remain in endangered status, disregarding the changes to the status rules under the proposal and continue to make progress toward the adopted funding-improvement plan.

A plan also is eligible for the special transition rule if it is in critical status on the date of enactment and is making scheduled progress toward its adopted rehabilitation plan, provided that the rehabilitation plan targets emergence from critical status by the end of the 10-year rehabilitation period (or 13-year rehabilitation period, if extended under ERISA or within 3 years of delayed emergence).[89]

If the sponsor of an eligible plan elects to use the special transition rule, the plan sponsor must provide notice of the election to the Secretary of the Treasury and the PBGC no later than the due date for the notice of endangered status or critical status for the plan year after December 31, 2020. If the plan sponsor does not provide such notice, the plan will no longer be eligible for the special transition rule.

After such an election, the plan sponsor must continue to review annually and update (if necessary) its funding-improvement plan or rehabilitation plan. The plan actuary must continue to certify annually whether the plan is making scheduled progress toward the adopted funding-improvement plan or rehabilitation plan.

Declining Plans

The proposal re-names the "critical and declining" status as "declining." A plan is in declining status if the plan is projected to become insolvent within the current or any of the 29 succeeding plan years; or if the plan was certified to be in critical status for the immediately preceding plan year, and (1) the plan is operating under a rehabilitation plan that targets forestalling possible insolvency (rather than emergence from critical status), and (2) the plan has a projected actuarial

[89] Worker, Retiree, and Employer Recovery Act of 2008, Pub. L. 110-458, § 204 (amending ERISA § 305(b)).

liability funded percentage as of the first day of the 15th succeeding plan year that is less than the actuarial liability funded percentage as of the first day of the current plan year.[90]

The plan sponsor of a declining plan must adopt a solvency plan that uses reasonable measures to avoid the projected insolvency. The solvency plan consists of one or more schedules of benefits and contributions that must be proposed to the bargaining parties, including a default schedule under which (1) all early retirement subsidies must be eliminated as adjustable benefits, and (2) any other adjustable benefits may be reduced or eliminated.

The future monthly benefit accrual rate must be reduced to the equivalent of 1 percent of annual contributions (or the current accrual rate, if lower) based on the rate in effect as of the later of the first day of the first plan year following the date of enactment (or the date of partition, in the case of a plan eligible for the special partition provisions) or the first day of the plan year that the plan is first certified to be in declining status. Alternate schedules are optional and may reduce or eliminate adjustable benefits.

In addition to these schedules, the solvency plan may include the use of one or more of the tools under MPRA (as modified and described below) to enable the plan to avoid projected insolvency.

Declining Plan Restrictions

In addition to the restrictions that apply to all multiemployer plans, certain restrictions apply to plans in declining status. In general, a plan may not be amended after the date of the adoption of the solvency plan to be inconsistent with the adopted solvency plan. The plan sponsor of a plan in declining status may not adopt a plan amendment that increases plan liabilities unless required by law or the amendment results in a *de minimis* increase under current law.

For any plan that is operating under a solvency plan, any increases in contribution rates or compensation cannot generate an increase in the amount of the benefit accrual. This restriction applies to any increases to contribution rates or increases in compensation that take effect after the later of the first day of the first plan year following the date of enactment (or the date of partition, in the case of a plan eligible for the special partition provisions) or the first day of the plan year that the plan is first certified to be in declining status. As under current law, lump-sum distributions and similar benefits are prohibited while a plan is in declining status. Additionally, as under current law for critical-status plans, contribution surcharges will continue to apply.

[90] The tests for declining status are separate from the initial tests for determining whether a plan is in critical status.

Summary of Zone Status Reforms

Status	Criteria	Requirements

Unrestricted	• Not Endangered, Critical, or Declining, and
	• Meets either of the following tests:
	  o Projected actuarial liability funded percentage in 15 years ≥ 115%
	  o Current liability funded percentage for current plan year ≥ 70%
		• Not required to adopt corrective action plan
		• Not restricted from adopting increases in benefits or accepting reduced contribution rates, if plan actuary certifies such action would not cause plan to exit unrestricted status

Stable	• Not in Unrestricted, Endangered, Critical, or Declining status	• Not required to adopt corrective action plan • Subject to restrictions on adopting increases in benefits or accepting reduced contribution rates (see section on restrictions for more detail)

Endangered	• Not Critical, not Declining, and
	• Is described by any of the following tests:
	  o Actuarial liability funded percentage for current plan year < 80%
	  o Projected funding deficiency in current or next 9 plan years
	
	Special rule: Plan remains in "stable" status if it would otherwise be in endangered status for the current plan year but no action is required to emerge from endangered status within 10 years (same as current law)
	
	Election to be in endangered status: Plan sponsor may elect to be in endangered status if plan is projected to be in endangered status in next 5 years.
	
	Note: Seriously Endangered status is eliminated.
		• Subject to restrictions on adopting increases in benefits or accepting reduced contribution rates (see section on restrictions for more detail)
		• Must adopt funding improvement plan that targets:
		  o Emergence from endangered status by end of 10-year funding improvement period
		  o No funding deficiencies during funding improvement period
		• Funding improvement period:
		  o Initially, a 10-year period (same as current law)
		  o May be reset to fresh 10 years following adverse experience, provided that plan is still projected to meet funding improvement targets at end of new 10 year period
		• Funding improvement plan design:
		  o Default schedule must eliminate early retirement subsides; accrual rate must be reduced to equivalent of 1% of annual contributions (or current rate if lower)
		  o Alternate schedules are optional and may reduce or eliminate adjustable benefits
		• Additional restrictions:
		  o Plan may not be amended to be inconsistent with the adopted funding improvement plan
		  o Any plan amendment increasing benefits must be paid for with additional contributions not contemplated under the funding improvement plan, and the plan must still be projected to emerge from endangered status on time

<table>
<tr><th colspan="3">Summary of Zone Status Reforms</th></tr>
<tr><th>Status</th><th>Criteria</th><th>Requirements</th></tr>
<tr><td>Critical</td><td>• Not Declining, and
• Is described by <u>any</u> of the following tests:
o Actuarial liability funded percentage for current plan year < 65%
o Projected funding deficiency in current or next 6 plan years

Election to be in critical status: Plan sponsor may elect to be in critical status if:
• Plan is projected to be in critical status in next 5 years, or
• Plan was in endangered status for the preceding year and cannot reasonably emerge from endangered status</td><td>• Subject to restrictions on adopting increases in benefits or accepting reduced contribution rates (see section on restrictions for more detail)
• Emergence from critical status includes <u>all</u> of:
o Is not described by any of the initial critical tests,
o No projected funding deficiency in next 10 years
o Projected actuarial funded percentage in 15 years ≥ 100%
• Must adopt rehabilitation plan that targets either:
o Emergence from critical status by end of rehabilitation period, or
o Following exhaustion of all reasonable measures, either:
▪ Emergence at a later date, or
▪ Forestallment of possible insolvency
• Contribution surcharges (same as under current law) continue to apply
• Rehabilitation period:
o Initially, a 10-year period (same as current law)
o Following the exhaustion of all reasonable measures, period is extended to align with delayed emergence or forestallment of insolvency
• Rehabilitation plan design:
o Default schedule must eliminate early retirement subsidies; accrual rate must be reduced to equivalent of 1% of annual contributions (or current rate if lower)
o Alternate schedules are optional and may reduce or eliminate adjustable benefits
• Additional restrictions:
o Plan may not be amended to be inconsistent with the adopted rehabilitation plan
o No plan amendment increasing benefits may be adopted, unless required by law or de minimis
o If rehabilitation plan does not target emergence by the end of the 10-year period, no schedule may provide a future benefit accrual rate that exceeds 1% of annual contributions
o As under current law, lump sums and similar benefits are prohibited while a plan is in critical status</td></tr>
</table>

Summary of Zone Status Reforms		
Status	**Criteria**	**Requirements**

Declining	• Projected insolvency in the next 30 years, or
	• The Plan is described by <u>each</u> of the following tests:
	  o Was in critical status for immediately preceding plan year, and
	  o Is operating under a rehabilitation plan that targets forestallment of insolvency (rather than emergence).
	
	Note: Declining status is defined separately from Critical status.
		• With minor exceptions, prohibited from adopting increases in benefits or accepting reduced contribution rates (see section on restrictions for more detail)
		• Must adopt solvency plan that employs all reasonable measures to delay or avoid projected insolvency
		• Contribution surcharges (same as under current law) continue to apply
		• Solvency plan design:
		  o Default schedule must eliminate early retirement subsidies; accrual rate must be reduced to equivalent of 1% of annual contributions (or current rate if lower)
		  o Alternate schedules are optional
		• Plan may use MPRA tools to avoid projected insolvency
		• Additional restrictions:
		  o Plan may not be amended to be inconsistent with the adopted solvency plan
		  o No plan amendment increasing benefits may be adopted, unless required by law or de minimis
		  o Any increases in contribution rates cannot be benefit-bearing
		  o As under current law, lump sums and similar benefits are prohibited while a plan is in declining status

Contribution Reductions

Under the proposal, the plan sponsor of a multiemployer plan may not accept a collective-bargaining agreement or participation agreement that reduces the rate of contributions for any participants, suspends contributions with respect to any period of service, or directly or indirectly excludes younger or newly hired employees from plan participation, unless:

(1) The plan is currently in Stable or better status, and the plan actuary certifies that the reduction in contributions would not cause the plan to exit Stable status; or
(2) The change in contributions is accompanied by a reduction in benefit levels for the affected participants, and the plan actuary certifies that the combined effect of the changes in contributions and benefits is not projected to reduce the actuarial accrued liability funded percentage (*i.e.*, the reduction in contribution rate is accompanied by a reduction in future benefit accruals and does not reduce the commitment to legacy funding); or
(3) The plan sponsor reasonably determines that the acceptance of such agreement is in the best interests of plan participants and beneficiaries (*i.e.*, that the rejection of such agreement would adversely affect the overall health of the plan).

Adjustable Benefits Rules

The sponsor of a plan in endangered status, critical status, or declining status may reduce or eliminate adjustable benefits, as appropriate, as part of a funding-improvement plan, rehabilitation plan, or solvency plan. Adjustable benefits include: (1) benefits, rights, and features, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in payment status, and similar benefits; (2) any early retirement benefit or early retirement-type subsidy; (3) any benefit payment option, other than a qualified joint and survivor annuity; (4) benefit increases that were adopted or effective less than 120 months before the first day of the first year the plan was ever certified in critical status (rather than the current standard of 60 months); and (5) any 13th check provision.[91]

Benefits-Suspension Rules

In general, benefits are protected for participants and beneficiaries whose commencement date is prior to the date the plan sponsor first provided a notice of critical status (with the exception for plans in critical status or declining status, as described below).

Regardless of the plan's zone status, the plan sponsor may amend rules regarding return to work after commencement of benefits or commencement of benefits after normal retirement, including continued employment after normal retirement age. This provision also applies to benefits (including benefit accruals) granted for periods of service prior to participation in the plan. Any such changes will apply to prospective benefit payments only.

[91] A "13th check" is an additional monthly benefit payment paid to beneficiaries under a plan.

Special Actuarial Assumptions for Troubled Plans

The proposal clarifies the application of the actuarial assumptions used to determine "zone" status. As under current law, each individual actuarial assumption must be reasonable. However, the provision emphasizes that, consistent with current best actuarial practices, in the aggregate, the assumptions also must be reasonable and (with the exception of assumptions regarding future contributions) represent the actuary's best estimate of future plan experience. In other words, the actuary must avoid conservatism or optimism in multiple individual assumptions that result in a set of assumptions that is unreasonable in the aggregate.

Under the proposal, when selecting the investment-return assumption for projecting plan assets, the plan actuary must consider changes in expected returns over time and reflect reasonable estimates of future plan cash flow.

The plan actuary must develop assumptions for the projection of future contributions, including contribution base units (CBUs)[92] and contribution rates, based on information provided by the plan sponsor, which must act reasonably and in good faith. The plan actuary is ultimately responsible for the reasonableness of the assumptions.

With regard to future CBUs, if recent experience has shown a decline in CBUs, the plan actuary may assume future CBUs will continue to decline at the same annualized trend as over the last five plan years, unless the actuary determines there have been significant changes that would make such assumption unreasonable. If recent experience has been flat or increasing CBUs, the plan actuary may assume future CBUs will remain flat indefinitely, unless the actuary determines that there have been significant changes that would make such assumption unreasonable.

In general, projections of contributions are based on the contribution rates consistent with the terms of collective-bargaining and participation agreements currently in effect. If reasonable, the plan actuary may assume future increases in contribution rates consistent with the adopted funding-improvement plan, rehabilitation plan, or solvency plan.

Information provided by the plan sponsor to the plan actuary in setting the assumption regarding future increases in contribution rates must take into account the ability of the participating employers to make contributions at the scheduled rates over time, considering relevant factors such as projected industry activity, the financial strength of participating employers, market competition, and the scheduled contribution rate to the plan relative to the overall wage package. All schedules under any funding-improvement plan, rehabilitation plan, or solvency plan must be based on the same set of actuarial assumptions unless it would be unreasonable to do so, taking into account the anticipated effect of the schedules on participant behavior and employer participation.

[92] In general, contribution base units are the basis on which an employer contributes to the plan, such as employee hours worked. *See* discussion accompanying note 31, *supra*.

Disclosure Requirements

The proposal expands the required disclosure with respect to the actuarial certification of plan status included as an attachment to Form 5500 Schedule MB.[93] All plans (not just plans in endangered, critical, or declining status) are required to attach documentation supporting the status certification, based on the actuary's best estimate assumptions. The documentation must include projections of the funding-standard account, funded percentage, and solvency.

All plans are required to attach an alternate projection of the funding-standard account, funded percentage, and solvency, based on the following assumptions: (1) annual future investment returns on plan assets equal to the actuarial interest rate assumption less 1 percent; (2) future CBUs projected using a trend equal to the lesser of (i) the annualized trend of actual CBUs over the last five years and (ii) no change in the annualized trend of future CBUs.

The attachment to Form 5500 Schedule MB with supporting documentation must clearly describe the key assumptions used in performing the projections, including investment returns, CBUs, and contribution rates. The attachment also must provide a five-year history of contributions, including CBUs, average contribution rates, and withdrawal-liability payments. The attachment may include other assumptions consistent with the projection based on the actuary's best estimate assumptions.

Effective Date

The provisions generally are effective for plan years beginning after December 31, 2020.

[93] Schedule MB ("Form 5500"), *Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information (2018),* Department of Labor, https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2018-schedule-mb.pdf.

C. Withdrawal Liability Rules for Multiemployer Plans

Present Law

The Multiemployer Pension Plan Amendments Act (MPPAA) requires an employer withdrawing from an underfunded multiemployer plan to make continuing payments to the plan to fund its share of the plan's underfunding. MPPAA prescribes methods and rules for computing withdrawal liability and determining a withdrawing employer's schedule of payments and annual payment amount, subject to certain exceptions.

Withdrawal

An employer is treated as withdrawing from a multiemployer plan when the employer permanently ceases to have an obligation to contribute under the plan (generally pursuant to a collective-bargaining agreement), or permanently ceases all covered operations under the plan (such as, closes all covered facilities). An employer also may become subject to withdrawal liability in the event of a partial withdrawal because of the occurrence of specified events that significantly decrease the employer's obligation under the plan.[94] There are certain industry exceptions to the definition of withdrawal, such as for the building and construction industry, because an employer's exit from a plan in these industries does not typically reduce the plan's contribution base.

Computation of Withdrawal Liability

MPPAA provides several methods for computing withdrawal liability, which generally base the computation on plan underfunding attributable to years for which the employer contributed to the plan or underfunding determined as of the end of the plan year preceding the employer's withdrawal. The employer's share of the plan's underfunding is generally determined as the employer's share of plan contributions during a five-year period preceding the year for which the underfunding is determined. (A more data-intensive alternative method computes the portion of the plan's underfunding that is attributable to service of participants with the employer.)

For withdrawal-liability purposes, underfunding may be determined using the plan's actuarial assumptions and methods, provided such assumptions are reasonable in the aggregate and offer the actuary's best estimate of anticipated experience under the plan. While the actuarial assumptions and methods are not required to be the same as the plan uses for funding purposes, in some cases plans use their long-term funding interest rate assumption for determining withdrawal liability.

Payment of Withdrawal Liability

An employer is required to pay its withdrawal liability in an annual amount roughly equal to the employer's highest contributions in the past 10 years (specifically, the employer's highest

[94] A partial withdrawal occurs when there is a decline of 70 percent or more in the employer's contribution base units or a partial cessation of the employer's obligation to contribute. ERISA, at §§ 4205, 4206, and 4208.

contribution rate and highest average three-year contribution base units (*e.g.*, employee hours worked)). The employer's payment schedule is the lesser of the number of years needed to amortize its withdrawal liability or 20 years.

Mass-Withdrawal Liability

In the case of a multiemployer plan that terminates by mass withdrawal of the participating employers, the 20-year cap on withdrawal-liability payments does not apply but the amount of the annual payment is not increased. The plan's total underfunding is re-measured so as to be fully allocated among employers contributing to the plan near the time of the plan's termination. Additionally, the plan's overall unfunded vested benefits are required to be calculated based on assumptions prescribed by PBGC for plan termination situations. In general, these assumptions are more conservative.[95]

Reasons for Change

When an employer exits a plan, it must make withdrawal-liability payments to the plan equal to the employer's share of the plan's total unfunded liabilities at the time of the withdrawal. After a withdrawal, the remaining employers continue to contribute as before under their individual collective bargaining agreements for their own employees, but the liability for the benefits of the withdrawn employers' employees ("orphan participants") remains with the plan. Even if the withdrawing employer makes withdrawal-liability payments to cover the entire liabilities of orphan participants, the existence of those participants' promised benefits raises the risk of future underfunding, because a withdrawing employer is not obligated to reimburse the plan for any investment losses on its withdrawal liability payments.[96] Such losses raise the total contribution that remaining employers must make to cover the shortfall and, therefore, increase the likelihood that the plan will become insolvent.

Withdrawal by one or more larger employers from a plan may precipitate a mass withdrawal by all employers, particularly in a declining industry. Historically, mass withdrawals have been costly to the PBGC because the withdrawal-liability payments that it has recovered from employers have been a fraction of the plans' funding shortfalls. One reason for this collections record is that withdrawal-liability payments typically receive lower priority in bankruptcy proceedings than other obligations. However, the MPPAA likely decreased the probability of mass withdrawals by permitting critically underfunded plans to require less than the minimum required contributions and also, under some circumstances, to reduce benefits.

Rules governing withdrawal liability are complex and vary by industry. Assessed withdrawal liability very seldom represents the unfunded liabilities of a withdrawing employer. [97] As a consequence, insufficiencies of withdrawal liability have been recognized since the enactment of the MPPAA in 1980 as creating a disincentive for new employers to join a multiemployer

[95] *See* ERISA, at § 4211(a).

[96] Even if full contributions are made, there may be a funding shortfall because of investment losses on those contributions.

[97] *Modeling the Costs*, *supra* note 67, at 40–42; *see also* Lisa Schilling, U.S. Multiemployer Pension Plan Withdrawal Liability Basics and Collectability (Society of Actuaries, Aug., 2018).

defined benefit plan. This disincentive can lead to a reduction in a plan's contribution base, as there are not enough fresh participants in a plan to replace withdrawing ones, and the contribution base is the main component of the multiemployer pension funding system. Statutory and practical limitations make it difficult for plans to collect the full amount of assessed withdrawal liability. These issues compound chronic underfunding of multiemployer plans.

Explanation of Provision

The proposal modifies the withdrawal liability rules to clarify the measurement of withdrawal liabilities, provide a new method for calculating payment schedules, improve reporting of withdrawal liability, and make other changes to remove disincentives for new employers to join a multiemployer plan. The proposed changes would replace the calculation of withdrawal liability under current law with a new basis for determining the liability based on a specified duration of annual payments that corresponds with the plan's funded percentage.

Determination of Withdrawal-Liability Payment

Under the proposal, the annual withdrawal-liability payment amount generally is equal to 100 percent of the employer's highest contribution base units in the last 20 years, 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.

Underfunding Measurement

Under the proposal, withdrawal liability must be measured on the same basis as the plan liabilities reported on the annual funding notice and as modified under minimum-funding standards described in Part A of Title II above.

Withdrawal-Liability Payment Schedule

The payment schedule for a withdrawing employer, as shown below, is based on the plan's funded percentage as of the beginning of the plan year in which the employer withdraws, determined using an interest rate assumption corresponding to the minimum-funding standards as revised in Title II, Part A of this proposal.

- If the plan is 140 percent or more funded, a withdrawing employer owes no withdrawal liability.
- If the plan is 100 percent to 139 percent 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 plan is 90 percent to 139 percent 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-percent 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 below); for example:

- If the plan is 80-percent funded, a withdrawing employer owes 10 years of payments.
- If the plan is 70-percent funded, a withdrawing employer owes 15 years of payments.
- If the plan is 60-percent 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 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).

Mass-Withdrawal Liability

The proposal eliminates mass-withdrawal liability, and no additional liability applies upon a mass withdrawal or other termination beyond the regular withdrawal liability described above.

Prepayment of Liability

An employer prepayment of withdrawal liability (*e.g*., lump-sum payment) must be discounted at rate no higher than the rate used to measure liabilities for withdrawal liability. An exception applies for trustee settlements based solely on the financial health of the employer.

Exceptions

The proposal retains the building and construction industry exception from the withdrawal-liability requirements under current law, except that plans must amortize unfunded liabilities arising after the enactment of the proposal over 10 years. The provision retains the option under current law for withdrawing employers to apply to PBGC for additional exceptions and alternate rules.

Enhanced Disclosure

The proposal revises the withdrawal-liability notice requirements to measure potential liabilities more accurately, and to provide employers more information to evaluate withdrawal-liability amounts. The proposal requires plans to provide withdrawal-liability estimates to all contributing employers free of charge every three years and provides employers a direct cause of action to enforce the new disclosure requirements.

Effective Date

In general, 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 percent (rather than 100 percent) of the withdrawal-liability payment, as described above. The resulting withdrawal liability would continue to be payable for the duration of years corresponding with the plan's funded percentage. The transition rule is effective on the date of enactment of the proposal 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.

D. Providing Incentives for Mergers among Multiemployer Plans

<u>Present Law</u>

Current law generally requires a "Green Zone" plan to restore MPRA benefit suspensions by a critical and declining status plan after a merger of the two plans. Benefit suspensions may be maintained only if a plan is still projected to become insolvent unless benefits continue to be suspended. While the merger of a small weak plan into a Green Zone plan often obviates any further projection of insolvency, additional liabilities resulting from restored benefit suspensions can be a barrier to merger.

Under current law, a fiduciary's duties must be discharged solely in the interest of the participants and beneficiaries of the plan, and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses. Trustees of a relatively strong plan may have concerns that a decision to merge with a financially weak plan may not be in the interest of participants in the stronger plan, thereby failing to meet the fiduciary standard. Under ERISA, PBGC has the ability to grant a merger approval that protects trustees from prohibited transaction violations but not from other fiduciary violations.

Withdrawal liability following a merger is generally subject to PBGC regulations. However, ERISA requires that all the unfunded liabilities of a plan be accounted for in determining withdrawal liability. This prevents plans from fully insulating employers in a well-funded plan from the unfunded liabilities of a critical and declining plan at the time of merger. Additional withdrawal liability arising from the unfunded liabilities of a weaker plan in a merger may present a barrier to merger.

PBGC may only provide financial assistance to facilitate a merger between a critical and declining plan and another multiemployer plan if such financial assistance is necessary for the merged plan to become or remain solvent. The inability of a Green Zone plan to demonstrate that it requires financial assistance to remain solvent after a merger with a critical and declining plan may present a barrier to facilitated mergers.

<u>Reasons for Change</u>

The overall financial condition of the multiemployer system has curbed the use of mergers among plans. Plan sponsors are hesitant to propose mergers because of uncertainty concerning the economic conditions of both the plans and the industries in which the plans operate. Moreover, under the standard fiduciary rules, trustees of healthy plans may be less willing to merge with unhealthy plans for fear that they could be at risk for breach of their fiduciary duty if they assume the liabilities of the weaker plan. As a result, mergers have diminished in use as a tool for strengthening underfunded multiemployer plans.

Explanation of Provision

The proposal eliminates the MPRA requirement to restore benefit suspensions in a merger between a Stable Zone or higher plan and a Critical Zone plan as redefined under the proposal.

The proposal extends PBGC's current authority to provide trustees with protection from prohibited transaction violations to include fiduciary relief if PBGC determines that a merger between a declining plan and a Stable Zone or higher plan satisfies certain safe harbors. PBGC must prescribe safe harbors for fiduciaries by regulations that evaluate the likelihood that the merged plan will remain solvent and in stable or improving condition, based on factors such as the size of the plans and the financial health of the industry and employers in the declining plan.

Under the proposal, PBGC is directed to prescribe by regulation withdrawal-liability methods that permanently insulate employers in a Stable Zone or higher plan that merges with a declining plan from withdrawal liability attributable to the unfunded liabilities of a declining plan at the time of the merger.

Additionally, the proposal eliminates the MPRA requirement that financial assistance in a facilitated merger be necessary for the merged plan to remain solvent before PBGC may provide such assistance. The availability of financial assistance, however, will continue to be based on the expectation that it will reduce PBGC's expected long-term loss.

Effective Date

The proposal is effective on the date of enactment.

TITLE III – PLAN GOVERNANCE, DISCLOSURE, OTHER REFORMS FOR MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS

A. Plan Governance and Operations for Multiemployer Plans

Present Law

Under current law, plans in critical and declining status have limited regulatory oversight as they approach reliance on the pension insurance program. PBGC does not have authority to intervene in multiemployer plans to prevent certain operational practices that would put participant security or the insurance program at risk. Unlike PBGC's robust authorities in the single-employer insurance program, PBGC's authority with respect to multiemployer plans generally does not apply until after plan insolvency, when the insurable event has already occurred.

Appointment of Independent Trustee

MPPAA provides PBGC with authority to petition a court for appointment of an independent trustee to a multiemployer pension plan and provides a lenient standard for judicial approval (*i.e.*, an appointment must not be adverse to the interests of plan participants and beneficiaries in the aggregate). PBGC's appointment authority is limited to multiemployer plans that have previously terminated by mass withdrawal.[98] The authority also may be contingent on termination proceedings brought by PBGC against a plan, so that it cannot be exercised to make an ongoing multiemployer plan subject to the review and oversight of an independent trustee.

Termination Proceedings

Statutory standards for PBGC to initiate termination proceedings apply in the single-employer program. PBGC may initiate a termination if the possible long-run loss of the PBGC may reasonably be expected to increase if the plan is not terminated. For a termination to proceed, the court must find that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration in the financial condition of the plan or any unreasonable increase in the liability of the PBGC.

Investigatory Authority

Under current law, PBGC's investigatory authority is limited. PBGC is not authorized to require plans upon request to provide financial or plan information that would enable the agency to assess risk and exposure.

Financial Assistance

PBGC has a security interest in an insolvent plan's property – rights to employer contributions and withdrawal liability to offset financial assistance – but is limited in its ability to enforce this

[98] The statute currently retains an out-of-date reference to plans in "reorganization" status (a troubled plan status that was repealed by MPRA and largely replaced by "critical and declining status").

claim (for example, when an employer provides a "top-up" of participants' benefits (*i.e.*, the difference between the guaranteed benefit paid by PBGC and the participant's full benefit). PBGC's authority to impose equitable distribution requirements on the payment of financial assistance is unclear, especially in the case of a merger between two multiemployer plans.[99]

<u>Consolidation Authority</u>

Current law allows the boards of trustees of small insolvent plans, as well as small terminated not-yet-insolvent plans, to make decisions about the ongoing administration of the plans. There is no requirement, however, for PBGC or sponsors to consolidate small plans. The average administrative cost per participant of plans with fewer than 500 participants is more than twice the cost of larger plans with 5,000 or more participants. Similarly, plans with 1,000 to 4,999 participants also average higher administrative costs than larger plans.[100]

<u>Plan Transfers</u>

Under ERISA, PBGC reviews plan requests to transfer assets and liabilities from one multiemployer plan to another. PBGC generally must be notified at least 120 days in advance of a merger. Under current law, a merger may be approved provided that the benefits of a participant may not be immediately lower than prior to the merger; benefits of participants and beneficiaries reasonably may not be expected to be suspended due to insolvency; and recent actuarial information is made available.[101]

<u>Reasons for Change</u>

The partition assistance provided under the proposal to declining plans is a major reform of the multiemployer system (see Title I, Part A, above). The proposal reflects concerns about legal and structural flaws in the current system, but recognizes that assisting these plans to recover is costly to participants and the system overall. Based on these concerns, and to recognize the potential moral hazard of such financial assistance, it is appropriate to safeguard the retirement system and federal taxpayers by instituting new governance rules for poorly funded multiemployer pension plans.

ERISA is ambiguous regarding PBGC's authority to initiate the termination of a multiemployer plan. As a result, PBGC has not used the threat of involuntary plan termination to negotiate protections for financially challenged multiemployer plans, such as an increase or a freeze in the amount of contributions to the plan where the bargaining parties are diverting contributions for another purpose.

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[99] Under present law, the equitable distribution requirements relate only to the benefit suspension rules under MPRA, which require plans applying to suspend benefits to demonstrate that the reductions are distributed equitably. Under these rules, the factors used to determine equitable distribution include the age and life expectancy of the participant; the length of time an individual has been receiving benefits; the type of benefit; years to retirement; and the extent to which participants are reasonably likely to withdraw support for the plan, which could cause employers to withdraw from the plan. ERISA, at § 305(e)(9)(C).

[100] *See e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: CHANGES NEEDED TO PROTECT MULTIEMPLOYER PENSION BENEFITS 36, GAO-11-79 (October 2010).

[101] ERISA, at § 4231(b).

Explanation of the Provision

Partition Program Plan-Governance Conditions

Under the proposal, plans approved for a liability removal under the new partition program are subject to the following conditions:

- *PBGC-Appointed Independent Trustee*. PBGC will appoint an independent trustee to the board of any plan that is approved for liability removal under the new partition program. Independent trustee powers will include broad monitoring authority, review and oversight responsibilities, voting rights on the board of trustees, and limited power to override board decisions. The independent trustee must furnish PBGC with periodic reports of the board's activities and plan's performance.
- *PBGC Authorized to Replace Board of Trustees*. PBGC is authorized to remove the board of trustees of a plan approved for liability removal, and replace the board with an independent trustee pursuant to a court order. Exercise of this authority requires that PBGC demonstrate that actions taken by the past and current board of trustees constitutes mismanagement of plan assets or has increased the risk of loss to participants or PBGC.
- *Trustee Term Limits.* The trustees of a plan approved for liability removal may not serve for more than a 10-year term, with a three-year interruption between terms. Under a transition rule for existing trustees on the date of enactment, current trustees may serve for a period equal to the greater of three years or the number of years remaining to complete a 10-year term.
- *Service Limits on Executive Director*. The executive director of a plan approved for liability removal may serve in such position for no more than 12 years (successively or cumulatively). Under a transition rule, an existing director as of the date of enactment may continue serving for a period equal to the greater of five years or the number of years remaining to complete a 12-year term.

With respect to all plans, the proposed changes would enable PBGC to monitor plans more effectively and negotiate with plans to improve their funded status, or in the case of a plan that will fail, to reduce the risk of loss to plan participants and the insurance program.

Termination Authority

PBGC is authorized to petition a Federal district court for authority to terminate a multiemployer plan in critical status or declining status, if the court determines that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or unreasonable increase in the liability of the insurance program. PBGC may require termination by either plan amendment or mass withdrawal.

Investigatory Authority

PBGC is authorized to investigate any facts, conditions, or practices that it determines necessary to aid in the enforcement of ERISA, to enable the agency to review the potential risks facing a distressed plan and how those risks might be managed, and to evaluate its own liability exposure.

Conditions on Financial Assistance

PBGC is authorized to impose equitable distribution requirements on the payment of financial assistance in the case of a merger between multiemployer plans if needed to protect the insurance program. The equitable distribution requirements mirror the benefit suspension rules under MPRA, which require plans applying to suspend benefits to demonstrate that the reductions are distributed equitably.[102] Factors to be used to determine equitable distribution include the age and life expectancy of the participant; the length of time an individual has been receiving benefits; the type of benefit; years to retirement; and the extent to which participants are reasonably likely to withdraw support for the plan, which could cause employers to withdraw from the plan.

Consolidation Authority

PBGC is authorized to merge or assume receivership over plans with fewer than 5,000 participants for purposes of appointing a common trustee and plan administrator. PBGC may use this authority to reduce administrative expenses of insolvent and terminated plans.

Plan Transfers

PBGC is authorized to facilitate liability transfer requests by a dominant employer from a near-insolvent plan, taking into account the interests of the remaining participants in the legacy plan and the insurance program. The associated employer withdrawal liability will be determined under the new liability measurement standards for withdrawal liability. Asset transfers from near-insolvent plans are prohibited. A withdrawal of an employer making substantially all contributions to the plan is treated as a mass withdrawal.

Compensation Limits

Under the proposal, multiemployer plans that have successfully partitioned are subject to a 21-percent excise tax on any remuneration in excess of $500,000 paid to covered employees (*e.g.*, the five highest compensated employees) of the Original Plan and the Successor Plan, for as long as the either the Original or Successor plan remains in Endangered or lower funding status under the revised zone-status rules. The excise tax is calculated in the same manner as under Section 4960 of the Code.

Effective Date

The provisions are effective on the date of enactment.

[102] ERISA, at § 305(e)(9)(C).

B. Reportable Event Rules for Multiemployer Plans

Present Law

ERISA sets forth specific reportable events that plans must report to PBGC within 30 days after the plan administrator knows or has reason to know that the event has occurred and in some cases 30 days before an event becomes effective. In response to the 1980 enactment of MPPAA, PBGC has waived reportable events with respect to multiemployer plans by regulation.

Reasons for Change

The reportable events requirements provide an "early warning" system to alert PBGC to multiemployer plan changes that may indicate financial problems with a pension plan or the sponsoring employer and that could potentially put plans and participant benefits at risk. Expanding reportable event filings will enable PBGC to take action to encourage plan continuation or, if other changes are called for, to protect plan participants.

Explanation of Provision

The proposal provides a statutory directive for PBGC to establish reportable events with respect to multiemployer plans, including but not limited to: (1) advance notice of any amendment (or acceptance of collective-bargaining agreements) excluding newly hired employees from participation or any amendment that would substantially reduce the rate of future benefit accrual or the contribution rate for any participants; and (2) advance notice of the establishment of any new retirement plan (including all plans qualified under Code Sec. 401(a) and any plans that would otherwise be characterized as a welfare benefit plan under ERISA Section 3(b)(ii)) that substantially overlaps with the active participants in a plan.

Effective Date

The provision generally is effective for first plan year after the date of enactment. For advance reporting, the provision is effective with respect to events anticipated to occur within 90 days following the date of enactment.

C. Funding Notices to Participants in Multiemployer Plans

Present Law

All multiemployer plans are required to provide an annual funding notice (AFN), within 120 days from the end of each plan year, to plan participants and beneficiaries, the bargaining parties, and PBGC. The AFN contains financial and actuarial information about the plan, including information about whether the plan was certified to be in critical or endangered status, for the prior plan year and the two preceding plan years. More specifically, the AFN is required to include: the plan's funded percentage, underlying assets and liabilities, and fair market value of assets for the prior plan year and two preceding plan years; participant counts by status as of the valuation date; the plan's asset allocation of investments and funding/investment policies; a summary of the funding-improvement or rehabilitation plan for a plan in critical or endangered status; any amendment, scheduled benefit increase or other known event with a material effect on plan assets or liabilities for the current plan year; a summary of reorganization and insolvency rules and of PBGC guarantees; and the participant's right to obtain a copy of the plan's annual report and funding-improvement or rehabilitation plan.

In addition, plans that are certified to be in endangered or critical status for the current plan year must, within 30 days after the date of the certification, provide notification of the plan's endangered or critical status ("zone status notice" (ZSN)) to participants and beneficiaries, the bargaining parties, the Department of Labor, and PBGC. Plans in critical status must provide an explanation that adjustable benefits may be reduced for participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided for the first year the plan is in critical status.

Participants in endangered or critical status plans receive two notices at about the same time each year providing financial information about the plan for *different* plan years.

Reasons for Change

The AFN is lengthy and duplicative given disclosures made through other means to plan beneficiaries and stakeholders, and confusing to participants. Streamlining the AFN provides simpler and more easily understood information to plan participants, is less costly for plans to prepare, and provides more timely information to the oversight agencies.

Explanation of Provision

Under the proposal, information related to the plan's endangered or critical status will be shifted from the AFN to the ZSN. A more streamlined AFN will provide information relevant to participants in better funded plans. A simplified ZSN will offer more targeted information to participants in distressed plans. The revised AFN and ZSN must be provided, based on the same due date as in current law, to participants and beneficiaries, the bargaining parties, and jointly in electronic format to the PBGC, and the Secretaries of the Treasury and Labor.

The proposal modifies the AFN as follows:

- The plan administrator is not required to furnish the AFN if the plan is in endangered, critical, or declining status;
- The AFN retains information on the plan's funded percentage and underlying assets and liabilities; fair market value of assets; and participant counts by status;
- The AFN eliminates information relating to plan's endangered or critical funded status (as currently defined) for the prior plan year and two preceding plan years (including summary of funding-improvement or rehabilitation plans), because the AFN will be furnished only to participants in better funded plans in the current plan year;
- The AFN eliminates the summary of rules governing insolvency, because the AFN will be furnished only to participants in better funded plans in the current plan year;
- The AFN eliminates the description of benefits eligible for PBGC guarantee, limitations on the guarantee and circumstances under which such limitations apply, because AFN will be furnished only to participants in better funded plans in the current plan year. The AFN retains a statement of how to obtain a general description of the PBGC guarantee and limitations;
- The AFN eliminates the statement setting forth the plan's funding policy and year-end reporting of the plan's allocation of investments (*e.g.*, percentage of assets invested in preferred and non-preferred stocks, public and private debt instruments, partnerships, loans, trusts, entities, accounts, etc.), and investment policies. The AFN must include a statement explaining the right to request this information; and
- The AFN eliminates the disclosure of plan amendments or other events with material effect on assets or liabilities, because this information is available to employers and participants under other provisions of the proposal.

The proposal modifies the ZSN as follows:

- The plan administrator is required to furnish only a ZSN, and not the AFN, if the plan is in endangered, critical, or declining status for the plan year;
- The ZSN retains the disclosure of the plan's current zone status, and includes disclosure of the plan's zone status for two preceding plan years. It also includes a summary of funding-improvement or rehabilitation plan, and a statement regarding a participant's right to request a copy;
- The ZSN includes the summary of rules governing insolvency and PBGC guarantees and limitations from the AFN, as information relevant to plans in distressed status;
- The ZSN includes the funded percentage and underlying assets and liabilities for the current plan year, prior plan year and two preceding plan years; the fair market value for same years; and participant counts;
- The ZSN eliminates information on plan amendments or a scheduled benefit increase, because this information is available to employers and participants under other provisions of the proposal, a summary of material modifications and information from the union; and
- The ZSN includes a statement explaining that upon request, the plan will make available a statement setting forth the plan's funding policy and year-end asset allocation of investments and investment policy.

Both the AFN and ZSN will set forth:

- A stress test to estimate changes to plan cash flow based on the loss of more than 10 percent of contributions from any contributing employer that contributes more than 5 percent of the plan's total contributions;[103]
- A stress test based on a downturn in the securities market, followed by a contraction in contribution base units (*i.e.*, basis on which an employer contributes to the plan, such as employee hours worked);
- Contribution base units experience on an annual basis for the plan year, and the nine preceding plan years, and the assumption for the next 10 plan years;
- A stress test based on a 3-percent increase in the plan's active participant to retiree ratio;
- The percentage of benefits that will be paid as premiums directly for benefits of participants in payment status, based on the plan's current zone status; the date on which such premiums will begin to be deducted; and a chart setting forth the percentage that would be payable by the participant for each zone status;
- A statement of whether a stakeholder co-payment is payable by employers and unions; and
- Any further information PBGC deems necessary to ensure that participants and beneficiaries are fully informed about the financial condition of the plan.

The contribution base unit experience and projections must be set forth in chart and graphical form. A separate notice of Endangered or lower zone status will accompany a zone status notice for plans that are approaching plan failure (projected to become insolvent within five years), beginning when the plan is within 10 years of insolvency.

Effective Date

The provisions are effective for plan years commencing after the date of enactment. Plans must provide a special notice to participants no later than July 30, 2020, detailing the amount of any active employee or stakeholder or retiree co-payments.

[103] The 5-percent test is based on the filing requirements for Form 5500, Schedule R, Part V. For purposes of this test, withdrawal liability is included in the calculations of the 10-percent loss.

D. Penalties for Failure to Provide Notices

Present Law

The penalty for failure to provide the annual funding notice (AFN) is a court-imposed penalty of up to $110 per day on a plan sponsor who fails to provide required information to a participant or beneficiary, and a right to enjoin the plan or obtain equitable relief. There is no penalty for failure to provide an endangered or critical zone-status notice (ZSN). The Department of Labor may assess a penalty of up to $2,140 per day on a plan administrator for failure of an actuary to file the required actuarial certification.

Reasons for Change

Overall, the proposal is intended to improve multiemployer pension plan funding. The Department of Labor and PBGC have been concerned about AFN disclosure, including in recent years in which a substantial numbers of plans completely failed to file or filed the required information very late.[104] Enhancing the reporting and disclosure with respect to multiemployer plans' financial conditions and changes to plans that may alter funding or threaten the delivery of promised benefits is a critical component of necessary reforms. Improving the disclosures to active workers and retirees is also of vital importance. To encourage better disclosure, penalties for failure to provide information to regulators and participants are established or increased under this provision.

Explanation of Provision

Under the proposal, the Department of Labor is authorized to assess a civil penalty against the plan sponsor of up to $110 per day from the date of failure to provide the AFN or ZSN to participants and beneficiaries, and up to $2,140 per day for failure to file the actuarial certification (including the new information required under the proposal) with the Secretary of Labor and PBGC.

The Department of Labor also may assess a penalty against a plan administrator of up to $110 per day for failure or refusal to provide any interested party with a funding policy, asset allocation, or investment information, upon request.

Effective Date

The provision is effective for notices required to be filed after the date of enactment.

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[104] *See e.g.*, *Private Pensions*, *supra* note 97, at 36.

E. Model Notice Requirements

<u>Present Law</u>

The Secretary of the Treasury, in consultation with the Secretary of Labor and the Director of the PBGC, is required to prescribe a model notice for plans to use to provide the zone-status notice (ZSN) required under current law. The annual funding notice (AFN) is to be provided in a form and manner prescribed by the Secretary Labor and must be written in a manner calculated so as to be understood by the average plan participant.

<u>Reasons for Change</u>

The required plan disclosures, including the AFN, are lengthy and duplicative given disclosures made through other means to plan beneficiaries and stakeholders, and confusing to participants. Improving the transparency and readability of the AFN and ZSN will provide more easily understood information to plan participants, and increase accountability and risk assessment for all stakeholders in the multiemployer pension plan system.

<u>Explanation of Provision</u>

The provision directs the Departments of the Treasury and Labor, and the PBGC to develop jointly a model AFN and a model ZSN based on the reporting requirements as revised under this proposal. The model notices are to be issued within one years after the date of enactment.

The agencies must convene their respective Advisory Committees/Councils or comparable administrative bodies to review and provide comments on usability and understandability during the development of the proposed model notices, which must be made available for, and take into account, public comment.

<u>Effective Date</u>

The provision is effective on the date of enactment.

F. Joint Filing of Zone Status Certification and Funding Notices

Present Law

Under current law, a plan's actuarial certification of funded status must be filed with the Secretary of the Treasury within 90 days of the beginning of the plan year. PBGC and the Department of Labor receive copies of zone status notice (ZSN), in any format chosen by the plan, within 30 days after the certification is filed. PBGC receives a copy of the annual funding notice (AFN), in any format chosen by the plan, within 120 days after the end of the plan year.

Reasons for Change

To manage multiemployer plan risks better for plan participants and taxpayers, the regulating agencies need better and more timely access to information from the plans. Modernizing the system prevents the *ad hoc* transmission of documents between agencies and avoids unnecessary delays in processing, evaluating, and analyzing critical plan information.

Explanation of Provision

The proposal requires that the actuarial zone status certifications, ZSNs, and AFNs be electronically filed jointly with the regulating agencies and promptly transmitted to PBGC and the Secretary of the Treasury.

Effective Date

The provision is effective for notices required to be filed with respect to plan years commencing on or after January 1, 2020.

G. Actuarial Certification Zone Status Requirements

Present Law

The plan's actuary must provide an actuarial certification of funded status to the plan sponsor and the Department of the Treasury within 90 days after the beginning of the plan year. This certification is a current-year certification as to whether the plan is in endangered status, or is or will be in critical or critical and declining status, and whether the plan is making progress in meeting the requirements of its funding-improvement or rehabilitation plan. This certification involves projections of the plan's ability to meet minimum-funding requirements, projections of assets and liabilities, and projections of solvency.

Plans prepare more extensive information than they are required to submit with their actuarial certifications and have other readily available information that supports the certification. Although some supporting information and documentation is included on the Form 5500 annual report, the Departments of the Treasury and Labor and the PBGC receive this information nearly two years later.

Reasons for Change

Changes to the zone-status rules are a central part of the overall reforms under the proposal. In order to provide a forward-looking estimate of a plan's financial condition, the new rules require more robust and timely analysis and disclosure. This information will provide plan participants, regulators, and the plans with better information in order for these stakeholders to make the best-informed decisions about the soundness of a plan and whether the plan must take corrective measures to improve its funding status.

Explanation of Provision

The proposal requires that a plan's actuarial zone certification be accompanied by a report that includes the information prepared in connection with the certification, as well as other readily available information. The actuarial certification and report must be provided by the plan sponsor to the regulating agencies.

The following information, which already is prepared by plans in connection with the certification determination under current law (using reasonable approximations where data are unavailable), must be included in the report:

- Documentation underlying the plan's certified status for the plan year, and whether the plan is projected to be in critical status for any of the five succeeding plan years;
- A plan's funded percentage and underlying assets and liabilities, as of first day of the plan year;
- Projection of the plan's funding-standard account on a year-by-year basis for the current plan year and the 15 succeeding plan years;
- Projection of the plan's cash flows on a year-to-year basis (using market value of assets) for the current plan year and the 15 succeeding plan years, including actuarial assumptions;

- Whether the plan is making scheduled progress in a funding-improvement or rehabilitation plan and, if not, a summary of the primary reasons for insufficient progress; and
- A copy of any funding-improvement or rehabilitation plan, with any updates.

The additional information below, though not prepared by plans, is readily available to plans and also is required to be filed as part of the report:

- For the prior plan year, the total value of benefits paid, the total value of contributions made, and the total value of all investment gains and losses;
- For the prior plan year, any changes to the contribution rate or accrual rate;
- For the prior plan year, whether contributions received by the plan met the actuary's projection of contributions needed for net credits to equal or exceed net charges to the funding-standard account (disregarding credit balance);
- For the current plan year for which a plan amendment or scheduled benefit increase or decrease is taking effect and has a material effect on plan liabilities or assets, an explanation of such amendment or such increase or decrease and its effect on the plan; and
- A good faith statement describing the withdrawal of any employer during the prior plan year and the percentage of total contributions made by that employer during the prior plan year; any material reduction in total active participants, contributions or withdrawal-liability payments (including amounts written off as uncollectible) of any employers, and the reason for such reduction; the annual withdrawal-liability payment, if any, each employer is obligated to make for the plan year, whether that amount was collected, and the remaining years on the employer's obligation to make payments.

The regulating agencies are authorized to determine jointly from time to time future changes to the actuarial certification and report, the AFN, and the ZSN. Changes are treated as an information collection, subject to at least 60-day public notice in the Federal Register and an Office of Management and Budget comment period under the Paperwork Reduction Act.

Effective Date

The provision is effective for certifications and reports required to be filed for plan years commencing on or after January 1, 2020.

H. Consistency of Criminal Penalties

Present Law

Current law provides criminal penalties of five years imprisonment for false statements or concealment in ERISA-required documents and for theft or embezzlement from employee benefit plans, and three years for the offer, acceptance, or solicitation to influence operations of an employee benefit plan.

Reasons for Change

The proposal's overall reform approach is to improve multiemployer pension plan funding. Enhancing the reporting and disclosure with respect to a plan's financial condition and changes to plans that may alter funding or threaten the delivery of promised benefits is a critical component of these reforms. In order to guard against false or misleading disclosures, the proposal increases the associated criminal penalties.

Explanation of Provision

Under the proposal, the penalty for false statements or concealment in ERISA-required documents and for theft or embezzlement from an employee benefit plan is increased from five to 10 years in prison. Similarly, the penalty for the offer, acceptance, or solicitation to influence operations of an employee benefit plan is increased from three to 10 years.

Effective Date

The provision is effective on the date of enactment.

TITLE IV – MPRA REFORMS

Present Law

The Multiemployer Pension Reform Act of 2014 (MPRA) allows certain plans that face insolvency within 20 years to address their projected insolvency through suspensions, partitions, and facilitated mergers. Eligible plans are required to be in critical and declining status, and be projected to become insolvent unless benefits are suspended, although all reasonable measures to avoid insolvency have been taken. Plans are allowed to cut back earned benefits in order to attain solvency if, by doing so, the plan is projected to avoid insolvency and preserve benefit levels above the amount of PBGC guarantee levels. Additional conditions apply.

Plans that are able to demonstrate solvency, maintain benefit levels at a minimum amount above PBGC guarantee levels, and meet other conditions, have the opportunity to apply to the Department of the Treasury for a suspension of benefits. Plans that would need to cut benefits below the minimum levels specified in the law are allowed to apply to PBGC for liability relief via a partition, in conjunction with the maximum allowable cut in benefits (*i.e.*, to the minimum levels allowable under a suspension).

Voting and Ballots

Under MPRA, within 30 days after the application approval, the Department of the Treasury must administer a participant and beneficiary vote on the proposed benefit suspension. The plan sponsor is required to provide a ballot for the vote (subject to approval by the Department) that includes an individualized estimate of the effect of the suspension, a statement from the plan sponsor in support of the suspension and a statement in opposition to the suspension (compiled from comments received pursuant to the notice published in the Federal Register). The ballot must also state that the suspension has been approved by the Department of the Treasury; that the plan sponsor has determined that the plan will become insolvent unless the suspension takes effect; that insolvency of the plan could result in benefits lower than benefits paid under the suspension; and that insolvency of the PBGC would result in benefits lower than benefits paid in the case of plan insolvency. Within seven days after the vote, unless a majority of all eligible participants and beneficiaries vote to reject the proposed benefit suspensions, the Department of the Treasury must issue a final authorization to allow implementation of the benefit suspensions.

MPRA permits the Department of the Treasury, in certain circumstances, to override the participant vote on the proposed benefit reductions for systematically important plans.[105]

PBGC Solvency Findings

On application by the plan sponsor of an eligible multiemployer plan for a partition, the PBGC may order a partition of the plan. In order to approve a partition, PBGC must reasonably expect that a partition of the plan will reduce the PBGC's expected long-term loss with respect to the

[105] Under MPRA, a systemically important plan is a plan with respect to which the PBGC projects the present value of projected financial assistance payments exceeds $1 billion (indexed) if the proposed benefit reductions are not implemented. ERISA, at § 305(e)(9)(H).

plan and that a partition is necessary for the plan to remain solvent. Furthermore, PBGC must certify to Congress that the PBGC's ability to meet existing financial assistance obligations to other plans (including any liabilities associated with multiemployer plans that are insolvent or that are projected to become insolvent within 10 years) will not be impaired by the partition.

Plan Requirements

Plans that are projected to be within five years of insolvency immediately after removal of the suspension will be treated as failed plans and must immediately reduce participant benefits to the PBGC guarantee level. Plans that are not projected to be within five years of insolvency must restore plan benefit amounts prospectively and apply for partition under the one-time MPRA partition program.

Application Processing

No later than 30 days after submitting an application to the PBGC for partition, the plan sponsor must notify the participants and beneficiaries of the application, in the form and manner prescribed by PBGC regulations.

PBGC must make a determination regarding a partition application no later than 270 days after the application is filed (or, if later, the date the application is completed) in accordance with PBGC regulations. No later than 14 days after a partition order, the PBGC must provide notice thereof to any affected participants or beneficiaries as well as to the House Committees on Education and the Workforce and on Ways and Means and the Senate Committees on Finance and on Health, Education, Labor, and Pensions.

Equitable Distribution of Benefit Suspensions

In general, any suspensions of benefits must be equitably distributed across the plan participant and beneficiary population. In addition, any suspensions of benefits must be at the level reasonably estimated to achieve, but not materially exceed, the level that is necessary to avoid insolvency.

Equitable distribution may take into account a number of factors that include one or more of the following: age and life expectancy; length of time in payment status; amount of benefit; type of benefit, such as survivor, normal retirement, early retirement; the extent to which a participant or beneficiary is receiving a subsidized benefit; the extent to which a participant or beneficiary has received post-retirement benefit increases and any history of benefit increases and reductions; the number of years to retirement for active employees; discrepancies between active and retiree benefits; the extent to which active participants are reasonably likely to withdraw support for the plan, accelerating employer withdrawals from the plan and increasing the risk of additional benefit reductions for participants in and not in payment status; and the extent to which benefits are attributable to service with an employer that failed to pay its full withdrawal liability.[106]

[106] In the case of a plan that includes benefits attributable to service with an employer that withdrew prior to enactment of MPRA, paid the employer's full withdrawal liability, and pursuant to a collective-bargaining agreement assumed liability for providing benefits to participants and beneficiaries under a separate single-employer

Reasons to Change

The complexity of MPRA, with its significant interactive provisions, makes its operation difficult and sometimes burdensome for multiemployer pension plans applying for MPRA relief to comply with and cumbersome for the PBGC to implement. Clarifying and streamlining a number of MPRA provisions to make them easier to apply and more equitable in their application will improve the overall operation of the statute, reduce plan and regulator costs, and coordinate MPRA with the other reforms included in the proposal.

Explanation of Provisions

Voting and Ballots

The proposal changes the voting procedures under MPRA to require that only returned ballots are counted and that the participants' votes are binding in all circumstances.

PBGC Solvency Findings

The proposal clarifies the definitions of "impair PBGC's ability to provide financial assistance" and the certification requirements for PBGC to provide financial assistance with respect to mergers as well as partitions.

Application Processing

For purposes of the MPRA rules relating to the projection period for avoiding insolvency, the proposal amends MPRA to require a demonstration that each suspension has a 65-percent chance of maintaining plan solvency through a period of least 20 years after the suspension effective date.

For purposes of the suspension application process, the proposal directs the Department of the Treasury to create clear, straightforward safe harbors for the investment rate of return, contribution base units, mortality table, and other assumptions to be applied with respect to a suspension.

The proposal clarifies that the Department of the Treasury is not required to provide additional notice and comment through the Federal Register where changes to the application have a *de minimis* effect on the suspension.[107] These changes will not require new notice by the plan to participants. If the only defect with respect to an application is a lack of notice and comments to participants, the Department of the Treasury is permitted to extend the deadline for a decision.

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plan in an amount equal to any benefit reductions resulting from the plan's financial status ("Tier III" employer), benefit suspensions are applied in relation to three tiers: first to benefits attributable to service with an employer that withdrew and failed to pay its withdrawal liability ("Tier I"), second to all other benefits that may be suspended ("Tier II"), and third to benefits of employers described in Tier III.

[107] For example, a change that results in a post-suspension benefit that is 5 percent larger or smaller than that proposed in the initial application, or a later suspension date would not be subject to notice and comment.

Suspension Notice

The proposal directs the Department of the Treasury to use an appropriate methodology to develop a plain language, single cover-page format as part of its model suspension notice providing a universal framework for the individualized benefit-cut information.

Equitable Distribution of Benefit Suspensions

The proposal establishes a safe harbor for a flat percentage across-the-board cut for purposes of the MPRA rules regarding the equitable distribution of benefit suspensions.

The proposal extends protection to benefits of participants who have already qualified for social security disability benefits regardless of whether they are receiving disability benefits under the plan and restricts all disability-based suspension limits to participants who are disabled or receiving disability benefits as of the effective date of the suspension.

Miscellaneous

The provision clarifies that trustee duties remain subject to fiduciary standards, even if a trustee also serves as the retiree representative.

Effective Date

The provisions are effective on the date of enactment.

TITLE V – ALTERNATIVE PLAN STRUCTURES FOR MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS

A. Composite Plan and Legacy Plan Structure and Operations

Present Law

Under current law, multiemployer pension plan sponsors generally are permitted to offer only a traditional defined benefit pension plans or defined contribution plans.

Reasons for Change

Within the multiemployer pension system, market volatility and defaults by sponsoring employers are frequently beyond the control of other contributing employers. These conditions, however, create unpredictable and unacceptable risks for employers participating in these plans, particularly in the construction trades and similar industries. The resulting unfunded liabilities create withdrawal liability that leads to lending and bonding issues for many employers. Difficulties with respect to quantifying risk associated with these plans creates barriers to new employers entering multiemployer system and an incentive for current employers to leave the plans, further destabilizing the plans and the system overall. The provision addresses these limitations by providing a new optional hybrid retirement program for companies participating in a multiemployer pension plan – called a "composite plan."

The option for employers to participate in a composite plan will provide these employers more certainty in their retirement-plan funding obligations, by fixing contributions amounts, removing risk to employers for investment losses, and through relief from liability rules related to the exit of contributing employers from multiemployer plans. Employees gain access to secured lifetime income and more certain streams of employer contributions backing their promised benefits. The composite plans provide plan sponsors protection from demographic and actuarial risk inherent in defined benefit plans. A composite plan option provides a new model for providing retirement benefits with more flexibility to plan sponsors.

Explanation of Provision

The proposal establishes a "composite plan" as a new kind of multiemployer pension plan that has certain attributes of a defined benefit plan and certain attributes of a defined contribution plan. Composite plans provide an annuity benefit to plan participants, but limit a participating employer's financial obligation to a fixed, negotiated contribution level. Benefit payments will only be available to the extent of plan assets. In other words, should the plan not have enough assets to cover benefits, those benefits are required to be reduced through a negotiated process.

Composite plans are not covered by PBGS guarantees; thus, the plans are not required to pay PBGC premiums. Employers contributing to a composite plan also are not subject to withdrawal liability.

Under the proposal, the trustees of a multiemployer defined benefit plan (called a "legacy plan") may establish a composite plan for the benefit of the employees and beneficiaries of the participating employers. A multiemployer defined benefit plan taking the option to establish a composite plan is treated as a single legacy plan for the rules under this proposal, but legacy plans would be permitted to join together to establish a composite plan.

All benefits under a composite plan are required to be calculated under a prescribed formula determined by the plan's trustees, and all benefits must be provided in the form of a life annuity. Employer contributions remain at a fixed amount (as negotiated between labor and management) and are not required to increase in response to underfunding. Composite plans are required to maintain a projected funding ratio of 120 percent. If the amount of the plan's assets are insufficient to pay 120 percent of the promised benefits, the plan would be required to take corrective action to restore the funding ratio to 120 percent.

Plans sponsors of a composite plan are required to provide an annual notice to participants describing the participant's benefits and explaining that benefits are subject to reduction based on the plan's funded status. Accrual of additional benefits under the legacy plan are prohibited on or after the date that the trustees elect to adopt a composite plan.

A composite plan is permitted to be a stand-alone plan or a component of an existing multiemployer defined benefit plan, provided that the legacy plan is not, and will not be, certified as being in Critical status in the current or any of the succeeding five years. For an existing multiemployer defined benefit plan to adopt a composite plan as a component, the composite plan must apply to all collective-bargaining agreements and participants.

Under the proposal, for a multiemployer plan that has a composite plan component and a legacy defined benefit plan component, the applicable provisions of ERISA and the Code continue to apply to each component of the plan as if each were a separate plan. The assets of both components may be held in a single trust, with the assets of each component accounted for separately and held and managed for the exclusive benefit of that component's participants and beneficiaries. The assets of one component cannot be used to pay benefits under the other component.

A plan sponsor must notify the Secretary of Labor of its intent to establish a composite plan or component at least 30 days in advance of the effective date of such action.

Under the proposal, the minimum-funding and insolvency rules do not apply to a composite plan but a composite plan is treated as a defined benefit plan.

Composite-Plan Funding Requirements

Each year, a composite plan is required to provide to the Department of Labor and PBGC actuarial certification of the plan's current funded ratio and projected funded ratio. The projections may consider reasonable contribution increases beyond the terms of collective-bargaining agreements up to 2.5 percent per year unless it is unreasonable to assume contributions would increase by that amount. As under the overall reform proposal, actuarial assumptions and methods applied with respect to the composite plan must each be reasonable and in aggregate offer the actuary's best estimate of anticipated experience, with any changes certified and explained in the annual report.[108] *See* Title II, Part A above. For purposes of the funding requirements, the value of the plan's assets are the fair market value of the normal cost and plan liabilities are based on the most recent actuarial valuation under the unit credit funding method.[109]

For new composite plans, the proposal requires plan contributions for the first year to be at least 120 percent of the normal cost for the plan year and requires an annual valuation of the plan's liabilities. The proposal also requires an annual actuarial certification of the plan's current and projected funded ratio.

Composite-Plan Realignment Programs

The proposal requires the composite-plan trustees to take remedial action in a plan year if the projected funded ratio for the plan year is below 120 percent. Specifically, the plan is required to adopt a realignment program intended to return the projected funded ratio to 120 percent, and the realignment program must be updated every year until the projected funded ratio is at least 120 percent.

The realignment program consists of three levels of options, graded in severity, to be undertaken by the trustees or proposed to the bargaining parties to enable the plan to achieve a 120-percent projected funded ratio.

- The least severe (first level) options include proposed contribution increases, reductions in the rate of future accruals (but not below 1 percent of contributions on which benefits are based), and modification or elimination of adjustable benefits such as early retirement subsidies or recent benefit increases.
- If the first level options are not sufficient, the trustees may consider (second level) adding reductions in accrued benefits for participants not yet in payment status or reductions of non-core benefits (*e.g.*, cost of living adjustments) for participants in payment status.[110]
- If the first and second level options together are not sufficient, additional reductions (third level) may include reducing the rate of future accruals (without regard to the 1-percent limitation), or reduction of retiree benefits (including core benefits) until the plan's projected funded ratio is at least 120 percent or, at the trustees' election, the plan's projected ratio is at least 100 percent for the following year and the current funded ratio is at least 90 percent.

The proposal requires a notice to participants, beneficiaries, bargaining parties, and the Secretary of Labor no later than 30 days after the certification that the projected funded ratio is below 120

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[108] "Experience" refers to the actual plan results for a plan year, including investment results, contribution receipts, and demographic changes.

[109] The unit credit funding method is based on the benefit earned (accrued) at the beginning of the year and earned during the year. Under the unit credit funding method, the benefit cost incurred is the present value of the benefit earned during the year. *See* Treas. Reg. § 412(c)(3)-1.

[110] Core benefits are defined as accrued benefits payable in the normal form of an annuity commencing at normal retirement age and determined without regard to any early retirement benefit, subsidies, or other rights or features, and any cost-of-living increases effective after the date of retirement.

percent and that remedial steps, including contribution increases or benefit reductions required under the new “realignment” rules described above, are being implemented.

Similarly, the proposal requires a notice to participants, beneficiaries, and bargaining parties about reductions to future benefit accruals or to adjustable benefits or core benefits at least 180 days before the general effective date for all participants and beneficiaries.

The Secretary of Labor is required to issue model notices and permit electronic delivery.

Limitation on Increasing Composite-Plan Benefits

Trustees of a composite plan are permitted to increase benefits by up to 3 percent if the plan meets the following criteria: (1) the plan’s current funded ratio is at least 110 percent (not including increases); (2) the current funded ratio is at least 100 percent and projected funded ratio is at least 120 percent (including increases); and (3) expected contributions for the current plan year cover at least 120 percent of benefits earned that year.

The 3-percent cap is lifted if, after taking benefit increases or new benefits into account, the current funded ratio is at least 140 percent and the projected funded ratio is at least 140 percent in the succeeding 15 years.

In the event of a benefit increase, the trustees must determine an equitable distribution of benefit increases (as applied to future payments) across the participants and beneficiaries taking into account any benefits previously reduced for retirees.

Composite-Plan Restrictions to Preserve Legacy-Plan Funding

The proposal specifies that a multiemployer defined benefit pension plan will be a legacy plan with respect to the composite plan under which the employees who were eligible to accrue benefits under the legacy plan become eligible to accrue a benefit under the composite plan.

An employee is eligible to accrue a benefit under a composite plan as of the first day on which the employee completes an hour of service under a collective-bargaining agreement that provides for contributions to and accruals under the composite plan in lieu of accruals to the legacy plan. Special rules apply to legacy-plan participants who are no longer actively employed by a sponsoring employer.

The trustees of a composite plan are prohibited from accepting a collective-bargaining agreement with a multiemployer defined benefit plan that has been certified to be in Critical or lower status for the current year or any of the five succeeding years, or that does not require all employers to make transition contributions to the legacy plan, regardless of whether employees of that employer previously accrued benefits under the legacy plan.

Employees of an employer that enters into a collective-bargaining agreement after February 5, 2018, that provides for the cessation of contributions to a multiemployer plan are prohibited from earning benefits under a composite plan for a five-year period beginning on the date the employer entered into the collective-bargaining agreement.

Legacy-Plan Contribution Transition Rules

Special transition rules apply to contributions to the legacy plan. Under these rules, the legacy plan is required to be in Stable status or above, and the participating employers are required to maintain contributions to the legacy plan through "transition contributions." These contributions are required to fund the normal cost of the legacy plan for the plan year, but permit the legacy plan to amortize the plan's initial unfunded liabilities in level installments over 25 years. Legacy plans are permitted to amortize over 15 years subsequent changes in the plan's unfunded liability due to experience gains or losses including those due to contributions greater or less than those made under the contribution rate over the previous five plan years prior to the date of enactment, changes in actuarial assumptions, changes in the legacy plan's benefits, or changes in funding method.

If the legacy plan is certified to be in Endangered or Critical status, as revised under this proposal, 25 percent of the employer transition contributions are reserved for future accruals in the composite plan. Employers may make supplemental contributions in addition to transition contributions.[111] The transition contributions cease when the legacy plan is fully funded (using PBGC assumptions except for the plan's assumptions on the benefit-start date) for at least five of the immediately preceding seven plan years, and is projected to remain fully funded for at least the following 15 plan years.

Years of service determined under each of the legacy plan and composite plans (or components if both are part of a single plan) are treated as years of service under the other, for employees that satisfy certain requirements.

Mergers and Asset Transfers of Composite Plans

Composite plans are permitted to engage in mergers or transfers only with other composite plans, provided that accrued benefits are not lower immediately after the transaction than before and that, in the case of a transfer, the value of assets transferred reasonably reflects the value of amounts contributed with respect to benefits transferred.

After a merger or transfer, the legacy plan(s) to which the employer contributed immediately before a merger or transfer is the legacy plan(s) to which it remains obligated to contribute.

Enforcement

If the trustees of the composite plan fail to adopt a realignment program or to update or comply with the program, the Secretary of Labor, contributing employers, or the union may bring a civil

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[111] "Transition contributions" are contributions to the Legacy plan based on the zone funding rules under ERISA sec. 305(b)(3) to fund the plan's normal cost and to amortize any unfunded liability over a 25-year period and any experience gains and losses over 15 years. Special rules would apply should the Legacy plan be certified to be in Endangered or Critical status.

action for an order compelling the trustees to comply. The Secretary of Labor is authorized to assess a civil penalty of $1,100 per day against the trustees if the composite plan's actuary fails to certify in a timely manner the current or projected funded ratio or in the event the trustees fail to adopt a realignment program. The Secretary also may assess a civil penalty of $100 per day against the trustees for failing to comply with required notice provisions related to the composite plan's realignment program. Additionally, the Secretary of Labor is authorized to assess a civil penalty of $100 per day against the trustees for failing to comply with required notice provisions related to the intent to establish or adopt a composite plan or component, as applicable, or related to failures in collective-bargaining agreements.

Disclosure Requirement for Composite Plans

The proposal extends annual funding notices, annual reports, and pension benefit statements disclosure requirements to composite plans to the extent provided in Department of Labor regulations.

Application of ERISA Premiums and Guarantee

The proposal generally exempt a composite plan or component, as applicable, from PBGC premium requirements and the PBGC guarantee. In addition, contributions to the composite plan and the legacy plan (or components, if applicable) are not taken into account for purposes of withdrawal liability.

A legacy plan has no unfunded vested benefits if the plan is fully funded (using the assumptions as amended by this proposal); has had no unfunded vested benefits for at least three of the last five plan years; and is projected to be fully funded for the next 15 plan years.

Additional Provisions

A special funding rule for a legacy plan is available when all future accruals under the multiemployer defined benefit plan or component have ceased and allows the trustees to combine the outstanding balance of all charge and credit bases and amortize that combined base in level installments over 25 plan years beginning with the plan year following the date that all defined benefit accruals ceased.

The proposal permits additional contributions by employers to the composite plan to the extent the plan's current funded ratio does not exceed 140 percent.

Effective Date

The provision applies to plan years beginning after the date of enactment. Special rules allow a single date for all adopting collective-bargaining agreements.