PENSION RIGHTS CENTER
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March 16, 2010

The Honorable Sander Levin, Chairman
Committee on Ways and Means
United States Congress
Washington, D.C. 20515

Dear Chairman Levin:

When you mark up the pension provisions of the "Small Business and Infrastructure Jobs Tax Act of 2010" in Committee tomorrow, we urge you to include measures that promote the continuation of defined benefit plans and that enhance protections for the employees and retirees who depend on these retirement plans to retire with adequate income.

This letter addresses four potential legislative issues that are of vital concern to the retirement security of American workers, retirees, and their families: (1) protecting the benefits of employees in those defined benefit plans that would become eligible for funding relief under the legislation; (2) limiting certain abusive practices -- particularly so-called Q-SERPs -- that exploit loopholes in the Internal Revenue Code's non-discrimination rules; (3) relaxing the Pension Protection Act's (PPA) automatic freezing of future benefit accruals for certain plans; (4) restricting the ability of businesses to adopt ad hoc amendments to their retirement plans to use plan assets for non-retirement purposes.

(1) Funding Relief

The funding relief bill has gained new urgency in today's recessionary economy, because companies have argued that they need more time to fund their plans so they can use those resources -- contributions that otherwise would have funded the plan -- to preserve and create jobs. However compelling these arguments may sound, it is important to note that funding relief is not free. It is essentially an unsecured loan to companies from participants and the pension trust. If companies are relieved from making payments today and they default on their obligations in the future, it is workers (and the Pension Benefit Guaranty Corporation) who will ultimately pay the price. Thus, we believe that any targeted funding relief should reflect the interests of workers and retirees and be conditioned on the following:

(i) Funding relief should be two-tiered, with more extensive relief provided to companies with active defined benefit plans, i.e., those in which employees continue to earn new benefits. Ongoing plans reflect a partnership between employee and employer, and greater relief for such plans will reward companies that have stood by their plans while other businesses abandoned theirs.

(ii) Businesses that accept funding relief should be required to make matching contributions to the pension plan if they use corporate resources to pay excessive compensation or to make

excessive payments to shareholders. If companies have enough money to make excessive payments to executives and shareholders -- whether through dividends or stock buy-backs -- then it is questionable whether they genuinely need funding relief. The purpose behind funding relief is to free up cash to preserve jobs, not to free up corporate cash to make excessive payments to executives and shareholders. Thus, we support the concept of cash-flow matching requirements, similar to what was passed by the Senate recently as part of the tax bill. However, we believe those provisions are too weak, and we urge the House to tighten the cash-flow matching rules to adequately safeguard against potential abuses. In particular, we support strengthening the provisions in the following ways:

- There should be a stronger definition of executive compensation without exceptions for certain grandfathered compensation and commission-based pay. All cash compensation and amounts added to non-qualified deferred compensation funding vehicles should be included.

- While we recognize the provisions on stock buy-backs and extraordinary dividends have been contested by business groups, we also believe these are critically important and should be fine-turned to protect against asset-stripping by heavily-leveraged firms (particularly firms that were acquired in leveraged buyouts.). Here it should be impossible for firms, at least highly leveraged firms, to make payments to shareholders -- whether as dividends or stock redemptions -- in excess of the firm's actual income. The Senate bill substantially distorts the definition of income by adding to actual income the amount that the corporation has *paid* in interest and taxes. This definition of "income" would allow, for example, a private equity firm that has acquired a corporation through substantial debt financing to strip that corporation of much of its value. Such a stripped-down firm will not preserve or create jobs. It is likely to become insolvent and leave behind a substantially underfunded pension plan. We think it is almost certain that such abuses will occur unless the House includes and strengthens the cash-flow matching requirements.

- The cash-flow restriction period should extend through most of the period of funding relief, rather than the three- or five-year periods in the Senate bill.

(2) Limiting Abusive Practices

Some businesses have exploited loopholes in the "non-discrimination" Treasury regulations to provide special benefits in a defined benefit plan for a small group of executives. These special benefits -- often referred to as Q-SERPs (qualified supplemental executive retirement programs) -- are brought within the letter of the regulations by including a small number of low-paid employees, often part-time employees who will never actually be paid these special benefits. Q-SERPs and similar aggressive plan designs were never contemplated by the drafters of the non-discrimination regulations, and should be re-examined. We strongly support the compromise language developed by the Committee, which directs the Department of Treasury to review its regulations for loopholes and amend the tax law to limits the ability of businesses to qualify Q-SERPs with part-time employees.

(3) <u>Reversing Automatic Benefit Cuts</u>

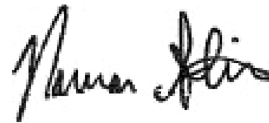
The PPA requires that plans cut off future benefit accruals if a plan's funding level falls below 60 percent. We support provisions that forestall automatic benefit cuts by "looking back" to funding levels before the 2008 recession.

(4) <u>Limit Ad-Hoc Amendments Providing Lump Sum Payouts</u>

We support language that would prohibit companies from making lump-sum severance payments out of pension plans -- unless either the plan from which the payments are made has a 120 percent funding cushion or the payments were negotiated as part of a bona fide collective bargaining agreement.

There is no question that defined benefit plans should be encouraged and preserved. We applaud the Ways and Means Committee for working on a bipartisan compromise to address this issue, and we urge you to include important participant protections in the bill you mark up on Wednesday.

Sincerely,



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