PENSION RIGHTS CENTER

PROTECTING AND PROMOTING RETIREMENT SECURITY
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CC:PA:LPD:PR (REG-102648-15)
Room 5205
Internal Revenue Service
PO BOX 7604
Ben Franklin Station
Washington, DC 20044

Re: Request for Information: Suspensions of Benefits
under the Multiemployer Pension Reform Act of 2014

The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families. This letter responds to the Department of the Treasury's request for comments to help it craft guidance related to suspensions of benefits under the Multiemployer Pension Reform Act of 2014 ("MPRA").

<u>Background</u>

For the first half of the last century, participants in retirement plans generally had few legal rights. An employer sponsoring a pension plan, or plan trustees in the case of a multiemployer pension plan, could amend a plan to suspend, reduce, modify, or eliminate promised benefits. The Employee Retirement Income Security Act (ERISA), through rules governing benefit accruals, vesting, and prohibiting the reduction of a benefit once accrued, provided plan participants with assurances that the plan sponsor could not simply renege on pension promises made to the plan's participants and beneficiaries.

Pre-ERISA rules also failed to require that sponsors of retirement plans responsibly fund the plans and generally provided no safeguards against employer or plan insolvency. To remedy these problems, ERISA enacted funding rules for pensions and established a government-chartered insurance corporation, the Pension Benefit Guaranty Corporation (PBGC), to meet most of the benefit commitments of plans that lacked the economic resources to do so on their own.

The rules dealing with insolvent pension plans and PBGC guarantees (initially for single employer and subsequently for multiemployer plans) created mechanisms under which participants in pay status had first call on the pension's assets before the PBGC assumed responsibility for guaranteed benefits. These mechanisms recognized that participants who had already retired had greater financial vulnerability than active workers and that the harm they would suffer when plan benefits exceeded PBGC guarantees would be especially profound.

Last December, two members of a House Committee and lobbyists for a trade association, its corporate members, and some of its union members negotiated a complex and lengthy amendment to ERISA's multiemployer provisions, eliminating ERISA's core protections against forfeiture and reductions of accrued benefits, and subordinating the right of retired participants to plan assets to those of active workers and contributing employers. The negotiators also gave a $2 billion break to one large corporation, UPS, the result of which will be far steeper cuts to tens of thousands of retirees in the nation's largest multiemployer plan. Representative of retirees were locked out of the closed-door negotiating sessions.

A special last-minute rule added the negotiated language to the so-called "Cromnibus" bill and escaped meaningful vetting by any House committee. The bill was presented to the Senate as a fait accompli, without opportunity for the Senate to amend or even debate the controversial provisions.

The heart of the legislation provides trustees with unprecedented power to "suspend," i.e., permanently reduce, benefits of plan participants, including retirees under age 80. The suspensions are subject to approval by the Department of the Treasury and the legislation directs the Treasury to issue guidance on the procedures for suspending benefits within 175 days of MPRA's enactment. This letter responds to the request of the Treasury Department and the Internal Revenue Service for comments on such guidance.

Our comments respond to the specific questions that the RFI asks, but we also note these four points:

1. MPRA's provisions abrogate two of ERISA's foundational tenets: that plan sponsors cannot reduce accrued benefits once earned, and that plan assets are earmarked first to pay the benefits of those already retired. These changes threaten the financial security of millions of older Americans. A cardinal principle of statutory construction is that remedial statutes such as ERISA should be construed broadly and exceptions to reform statutes, such as those introduced by MPRA, should be construed narrowly.

Accordingly, the Department of the Treasury, as the only agency charged with direct regulatory oversight over benefit suspensions, should use its oversight responsibility:

a. to limit benefit suspensions to those plans in which there is a certainty that the suspensions will result in the plan being able to satisfy all post-suspension benefit commitments.

b. to ensure that a plan exhausts all other reasonable measures to extend plan solvency before applying for benefit suspensions;

c. to require plans to use accurate, objective, reasonable, and independently verifiable assumptions in determining the need for benefit suspensions, the amounts suspended, and the equitable apportionment of suspensions among classes of participants;

d. to ensure that benefit suspensions are imposed in a fair and equitable manner; and

e. to interpret and apply MPRA's procedural and substantive rights for retirees and other plan participants in a manner that results in meaningful protections.

2. In the vast majority of multiemployer plans, trustees are appointed by the employee organization(s) that have negotiated the plan and by the contributing employers. Retirees thus lack an effective trustee voice in the majority of unions in which they do not participate in elections of union officers, such as the International Brotherhood of Teamsters. Moreover, MPRA does not permit retirees to bring an action challenging benefit suspensions. Thus, Treasury Department guidance is essential to ensure fair consideration of the concerns of retirees.

3. MPRA is not a model of legislative drafting, hardly surprising given the last-minute secret maneuverings and hasty drafting that produced it. The bill includes seemingly inconsistent provisions and ambiguities. For the reasons noted above, questions of doubt should be resolved in favor of strong retiree and beneficiary protections and against minimally-regulated plan sponsor discretion to plunge the elderly into poverty.

4. Under a strand of the non-delegation doctrine, it is unconstitutional for a branch of government to delegate its powers to a private entity. Trustees under MPRA, however, have been granted broad discretion to determine whether their plan is eligible to reduce accrued plan benefits, otherwise protected by the statute. If the standards for making this determination are not sufficiently constrained, Congress would have, in effect, granted the trustees both legislative and executive powers that Congress is not permitted under our Constitutional framework to delegate to private entities. Thus, to mitigate constitutional objections to MPRA's authorization of benefit suspensions, the Department of the Treasury should issue guidance to ensure that the trustees apply the benefit suspension rules on the basis of objective and verifiable factual determinations and to ensure that the Department subjects those determinations to meaningful review.

<u>Responses to Specific Questions Raised In the Request for Information</u>

1. How should future guidance address actuarial and other issues, including duration, related to the following certifications and determinations?

a. The actuary's certification under section 432(b)(3) that a multiemployer plan is in critical and declining status.

Actuaries have been required to determine whether a multiemployer pension plan is in critical status for nearly a decade. MPRA defines a plan as being in critical and declining status if the actuary projects that the plan will become insolvent within (i) 15 years, or (ii) in 20 years if the plan either has an inactive-to-active ratio of more than 2 to 1, or has a funding ratio of less than 80%. In making this projection, the actuary is to use reasonable assumptions, estimates and methods that offer the actuary's best estimate of anticipated experience under the plan and to use its best estimate of anticipated experience under the plan. The statute provides some rules and principles for projecting the value of plan liabilities. The statute also requires that in making its determinations, the actuary obtain projections of future industry activity from the plan sponsor, which is to act reasonably and in good faith.

The actuary (and the plan sponsor, who chooses the actuary and provides the actuary with projections about industry activity) would have almost unfettered discretion to find that a plan in critical status was also in declining status, unless the actuary's discretion is constrained through the issuance of guidance and the application of meaningful oversight. We urge the Department of Treasury to adopt a range of presumptively reasonable actuarial assumptions and to provide that the actuary be required to provide Treasury with a compelling explanation for any departure from such a range. Defining a range of reasonable assumptions also will help ensure that similar statutory standards will apply to all plans considering benefit suspensions.

We also recommend that the Department of the Treasury consult with the Joint Board for the Enrollment of Actuaries, or another objective body, for guidance in defining the meaning of "reasonable" with respect to the assumptions and the methodologies used to project a plan's solvency over the applicable 15- or 20-year period, and for creating the aforementioned reasonable range of assumptions.

In addition to fleshing out the meaning of "reasonable," guidance should also address the following specific issues on the determination of declining status.

First, the statute generally provides that a plan is in critical and declining status if the actuary projects that the plan will become insolvent within a 15-year period, but extends the period to 20 years for plans under two sets of defined circumstances, one of which is that the plan is less than 80% funded – a benchmark that most plans in critical status will fall below. We note that a projection of plan solvency over a 20-year period is essentially arbitrary, given that even small variations in the many assumptions that go into the projection can materially vary the conclusion. Thus, in our view, the meaning of "reasonable" assumptions and methodologies should be further constrained by guidance in the case of plans that are deemed to be in critical and declining status only because their funding level is below 80%.

Second, plan trustees are charged with providing the actuary with predictions of industry activity over a 15- to 20-year period, with the constraint that the trustees act reasonably and in good faith. This prediction, standing alone, can have a significant impact on whether a plan is projected to become insolvent within the relevant period. Treasury should consider issuing guidance on the circumstances under which such data is reasonable and provided in good faith. At a minimum, the plan trustees should have to engage independent ERISA fiduciaries to develop such predictions.

Third, small variations in the assumptions related to future plan contributions can have significant impact on whether a plan is projected to become insolvent. Guidance designed to ensure objective predictions is important to ensure the integrity of the projections of future plan insolvency.

Fourth, guidance should clarify that each individual assumption must be reasonable in its own right and that the assumptions must also be reasonable in the aggregate. For example, there should be a presumption of unreasonableness if an actuary consistently selects the most conservative assumptions in a range of plausibly reasonable assumptions, even if each assumption in isolation were reasonable.

b. The actuary's section 432(e)(9)(C)(i) projection of continued solvency (taking into account the proposed suspension and, if applicable, a proposed partition under section 4233 of ERISA).

The actuary's projection of continued solvency should incorporate the same assumptions used to project that the plan is in critical and declining status, i.e., the actuary should not be able to use different assumptions concerning employer contribution levels, withdrawals, and similar factors.

c. The plan sponsor's section 432(e)(9)(C)(iii) determination that the plan is projected to become insolvent unless benefits are suspended.

Section 432(e)(9) requires that the plan sponsor determine, in a written record to be maintained throughout the period of the benefit suspension, that the plan is still projected to become insolvent unless benefits are suspended, although all reasonable measures to avoid insolvency have been taken (and continue to be taken during the period of the benefit suspension). The section includes a non-exclusive list of factors that the plan sponsor may take into account. The statute is silent on the nature of the written record, on how the record is periodically reviewed, and the effects of either a failure to maintain the record or the impact of a change in circumstances in which the plan is now projected to remain solvent without the benefit suspensions. We believe guidance would be helpful on five issues raised by section 432(3)(9)(c)(ii)'s requirement that the record be maintained throughout the period of benefit suspensions:

1) guidance describing how the record is kept and maintained, including provision for public access to the record;

2) guidance describing the procedure and timing for periodic review of the record;

3) guidance describing the consequences of a finding that benefit suspensions are no longer needed for the plan to avoid insolvency or that the plan will become insolvent notwithstanding the benefit cuts;

4) guidance describing the consequences of a review of the record that finds that the plan is not taking all reasonable measures to avoid insolvency other than benefit suspensions;

5) guidance concerning the continuing role of a retiree representative in reviewing and commenting on the written record as it is periodically revised.

We are also concerned that there is no objective meaning to the term "all reasonable measures to avoid insolvency," which is a precondition to the plan sponsors' ability to suspend benefits. The factors that the trustees are to consider in deciding whether "all reasonable measures" have been taken are general and unless fleshed out will provide little basis for the Department of the Treasury to exercise its statutory responsibility to approve an application for benefit suspensions. We would encourage the Treasury to define with specificity the meaning of the statutory factors. In addition, the Department should consider issuing guidance that creates a rebuttable presumption that "all reasonable measures" to avoid insolvency include the elimination of all optional forms of benefits under the Pension Protection Act; the elimination of any so-called "13th checks" (to the extent that such checks have not become accrued benefits); a significant reduction in the rate of future benefit accruals; and an appropriate increase in the rate of employer contributions, determined after an independent fiduciary prepares a study on current competitive conditions in the businesses conducted by the contributing plan sponsors. In determining whether there has been a significant increase in the rate in future benefit accruals, all negotiated plans in which employers contribute should be aggregated.

2. For purposes of the section 432(e)(9)((d)(iii) limitation that a suspension is not permitted to apply to benefits based on disability (as defined under the plan), how can a plan sponsor identify which benefits are based on disability?

The MPRA disability limitation recognizes both the extra financial needs of people with disabilities and their limited means of addressing those needs. The provision itself seems straightforward for individuals who are receiving disability pensions, but we anticipate a need for guidance in several areas, identified below:

1) Participants attain normal (or early) retirement age.

(i) The prohibition on a MPRA suspension of a disability retirement benefit should continue beyond retirement age, at least if there is no enhancement of the benefit following the attainment of retirement age.

(ii) If the conversion of a disability benefit to a retirement benefit results in an increase in the amount of the monthly benefit, any otherwise applicable suspension to the normal retirement benefit should be prorated, with only the additional increment subject to the suspension. For example, assume that a plan paid a disabled participant a monthly benefit of $80, which will increase to $100, when the person turns 65. Assume further that the benefit suspension applicable to the participant's class was a 25% reduction. The reduction should only be applied to the excess of the retirement benefit over the disability benefit. The participant's benefit, after the pro-rated suspension, should thus be $95 ($80 plus 75% of the $20 increase.)

(iii) In cases in which a benefit enhancement results from a plan crediting a disabled pensioner with benefit accruals during the period of disability, the resulting benefit accruals should be considered part of the disability pension and thus outside the scope of benefit suspensions.

2) Offsets for disability and worker's compensation.

Some plans reduce normal retirement benefits by disability insurance payments or worker's compensation payments. For purposes of the suggested calculation of a benefit suspension approach described above, the disability benefit should be considered before the offset. In any event, any offset should be applied to the benefit prior to applying the benefit suspension.

3. For participants who have not yet retired:

(a) What practical issues should be considered as a result of the fact that their benefits are not yet fixed (for example, their benefits could vary as a result of future accruals, when they decide to retire and which optional form of benefit they select)?

As we discuss at the end of these comments, we believe that benefit suspensions are generally not equitable unless they are apportioned pro rata, at least in nominal terms, among similarly situated retirees, former employees with vested deferred benefits, and active participants. Accordingly, we would apply the formula for benefit suspensions applicable to a class of individuals at the time they enter into pay status to all future benefit accruals, unless the rate of future benefit accruals is reduced proportionately to a percentage of benefit suspensions for retirees. We would recommend requesting advice from the Joint Board for the Enrollment of Actuaries or another independent body on these and related technical issues.

(b) What practical issues should be considered in the case of a suspension of benefits that is combined with a reduction of future accruals or a reduction of section 432(e)(8) adjustable benefits (such as subsidized early retirement factors) under a rehabilitation plan?

As suggested in our response to the previous question, our position is that formulaic percentage reductions of benefits for participants who are active employees should be imposed at the time of benefit commencement, unless such benefits suspensions are combined with a proportional reduction of future benefit accruals. In such cases, the reduction in future benefit accruals will be mathematically equivalent to applying a benefit suspension formula at retirement and can serve as an alternative.

4. For participants who have retired, what practical issues should be considered regarding the section 432(e)(9)(D)(ii) age limitations on suspensions, the application of the section 432(e)(9)(F) rules on benefit improvements, or other provisions?

(a) Age and benefit suspensions: MPRA provides limitations on benefit suspensions for participants who are between the ages of 75 and 80 and a prohibition on benefit cuts for participants who have attained age 80. The limitations and prohibition should be applied as of the date the benefit suspensions are approved by the Treasury, rather than when they are submitted to the Department. The plan sponsor and plan actuaries should calculate the benefit suspensions as of the date that they estimate the Department will approve the plan's application to avoid the need for recalculation of the benefit cuts and questions concerning the accuracy of the application's projections.

(b) Benefit improvements: MPRA requires that benefit improvements for active workers be accompanied by equivalent benefit improvements for retirees on a present value basis. Benefit improvements might include increases in the rate of future benefit accrual; restoration of previous benefit suspensions; improvements in previously accrued benefits; creation of, or improvements to, benefit options and features. Guidance should clarify that benefit improvements include improvements or additions to benefits provided in other qualified plans, to the extent that such benefit improvements or additions are funded by employers who contribute to the plan. To prevent abuse, the Department should also require that calculations of present value use actuarial assumptions no less favorable to retired participants than those used in projecting plan insolvency.

In addition, older retirees will have experienced larger losses from suspensions than similarly situated younger retirees. Given that Congress believed that present value rather than nominal adjustments were appropriate, the benefit improvements should be distributed in a manner that ensures equivalent present value among participants similarly situated except for age.

5. With respect to the section 432(e)(9)(F) requirement to provide notice to plan participants and beneficiaries concurrently with the submission of the application for approval:

(a) What suggestions do commenters have for the steps that are needed to satisfy the requirement to provide notice to the plan participants and beneficiaries "who may be contacted by reasonable efforts," including the application of that requirement to terminated vested participants?

Because notice to participants is to be provided concurrently with the submission of the application for benefit suspensions to the Treasury Department, the plan should ensure that notice is calculated to reach plan participants on the same day that the application will reach the Treasury. Thus, if the application is hand-delivered to the Department, or if the application is sent to the Department by any form of expedited delivery, the notice to participants should be sent by first class mail to the last known address of each participant three days prior to the date the Treasury will receive the application.

The plan should be required to verify and confirm all addresses prior to the date that notice is provided to participants. When notices are returned, the plan sponsor has a fiduciary obligation to find a current address. If addresses cannot be found, the participant should not be counted in the denominator of the vote.

Because of the critical importance of the notice and because many individuals, particularly older individuals, may not regularly read e-mails, the initial notice should not be provided in electronic form except in the following circumstances: (i) when a participant has affirmatively consented to electronic delivery of plan communications; (ii) when the plan, after using due diligence, cannot locate a participant's physical address but has a verifiable e-mail address; or (iii) a plan makes both physical and electronic delivery of the notice. If the plan cannot locate a participant but has an e-mail address, there must be certification that the individual has received the information.

A notice should also be posted on any website maintained by the plan.

(b) What practical issues do plan sponsors anticipate in providing individual estimates of the effect of the proposed suspensions on each participant and beneficiary?

N/A

(c) If the suspension is combined with other reductions as described in request number 3.b, how will the notice of proposed suspension interact with the notices required for those other reductions?

The notice should provide all relevant information to a participant, even if some of the information is also provided in a separate notice. In addition, the notice should provide any relevant information about plan partition. In our comments to the PBGC on partition, we suggested that, to avoid participant confusion, a single notice should be provided when partition and benefit suspensions are combined.

(d) What issues arise in coordinating benefit protections that are measured as of the date of the suspension (such as the restrictions on suspensions that apply to a participant or beneficiary who has attained age 75 as of the effective date of the suspension) with the timing of the application, notice, and voting process?

See answer 4a.

6. With respect to item 5, please provide any examples of notices of proposed suspension that commenters would like to be considered in the development of a model notice.

The Pension Rights Center has not yet prepared suggested language for a model notice but we have the following comments on the notice:

a. The notice should satisfy the general requirements applicable to ERISA's disclosure requirements, including the requirement that the notice be written so that average plan participant is able to understand the contents of the notice. The notice should not use complex language and should prominently note relevant information on the benefit suspensions.

b. The notice should not include references to the solvency of the PBGC or make predictions about whether Congress will permit the PBGC to fail.

c. The notice should indicate in tabular form for each retiree and beneficiary the benefits they are currently receiving or entitled to receive; the benefits they would receive if the proposed suspensions are approved; the date the plan is projected to become insolvent; and the guaranteed benefits they would receive if the plan were to become insolvent on that date.

d. The notice should describe the measures that the plan sponsor has taken to push back the projected date of plan insolvency and available measures that the plan sponsor has opted not to take.

e. The notice should satisfy translation requirements applicable to other ERISA disclosure requirements.

f. The notice should inform participants of their rights to obtain plan documents and should provide an accelerated schedule by which such documents will be made available.

g. The notice should inform participants of the availability of counseling services, such as the U.S. Administration on Aging's regional pension counseling projects and the American Academy of Actuaries' Pension Assistance List (PAL).

The Treasury Department should issue a model notice and should review all notices before they are sent to participants for clarity and accuracy. This would mean that the Department will have to set up a procedure to review the notices prior to the submission of an application for benefit suspension, since the notice has to be sent at the same time as the application.

7. What issues arise in connection with the section 432(e)(9)(G)(ii) requirement to solicit comments on an application for suspension of benefits?

Some participants will need assistance to prepare their comments. We reiterate the importance of our comment in 6g that notice include information on the availability of counseling services.

(a) Should comments received from contributing employers, employee organizations, participants and beneficiaries, and other interested parties be made available to the public?

Comments should be generally available to the public. However, participants and beneficiaries should be allowed to elect to have all or part of their comments kept private, since their comments may jeopardize their future employment or have a detrimental effect on their relationships with other plan participants and thus may result in some affected participants not filing comments. These concerns are not applicable to employers, employee organizations, and other interested parties.

(b) How long should the comment period last?

Participants will need time to decide whether to file comments and to prepare them, since they will need to analyze the effects of the proposed benefit suspensions and typically will not have ready access to legal or counseling services. Thus, we would propose at least a 60-day initial comment period, although comments from participants arriving after 60 days should be reviewed to the extent practicable. Participants should also be given an opportunity to reply to comments made by labor organizations, employers, and other parties, as long as they are filed within a reasonable time following the close of the initial comment period.

8. With respect to the section 432(e)(9)(H) participant vote, what issues arise in connection with:

(a) Preparing the ballot, including developing a statement in opposition to the suspension complied from comments and obtaining approval of the ballot within the statutory time constraints for conducting a vote.

MPRA charges the plan sponsor with preparing the ballot used in the ratification process, but the plan sponsor, who has applied for approval of the benefit suspensions, has an obvious conflict of interest in preparing the statement in opposition. The Treasury Department thus must ensure that the statement in opposition faithfully and clearly reflects the arguments against the benefit suspensions. A procedure should be developed to enable participants and beneficiaries who oppose the benefit suspensions to form committees to review draft ballots prepared by plan sponsors, The committees should be permitted to submit comments on the ballot, along with possible revisions, to the plan sponsors and, if the plan sponsor does not adequately address the comments, to the Department of the Treasury.

The Department should prepare model language for those parts of the ballot other than the plan sponsor's statement of support and the statement of opposition. For example, statements suggesting that the Pension Benefit Guaranty Corporation's insolvency could result in benefits lower than benefits paid in the case of plan insolvency should note that Congress may decide to raise PBGC premiums to enable the agency to avoid insolvency.

The Department should also review the ballot to ensure (i) that the plan sponsor's statement is objective and accurate and (ii) that the statement in opposition accurately reflects comments received from participants and beneficiaries opposed to the proposed benefit suspensions.

(b) Conducting the vote and obtaining certification of the vote.

1. Participants and beneficiaries should have an opportunity to elect to vote electronically or by mail, but plan sponsors should be required to mail the ballots to the participants by first class mail unless a participant has affirmatively elected an electronic delivery of the ballot after receiving the notice of the benefit suspensions (which should include instructions on how to make this election). If someone receives a ballot electronically, there should be confirmation that the individual received the e-mail.

2. Participants and beneficiaries, many of whom are elderly and may be confused by the voting process, should have an adequate period of time in which to cast their ballots. We suggest a 60-day period at a minimum.

3. The voting procedure should specify the procedure for voting by those participants and beneficiaries who have suffered serious cognitive decline. It may not be plausible for family members to obtain a power of attorney in a timely manner; thus, Treasury should consider a procedure in which a spouse or child could qualify to cast the participant or beneficiary's vote.

4. Guidance should clarify that suspensions should not go into effect if they are rejected by a majority of all of the plan participants and beneficiaries *who cast ballots*. Although the statute states that the suspensions can be rejected only by a "majority of all participants and beneficiaries of the plan," a literal reading would result in a very unfair voting procedure. It would mean that those participants who do not cast ballots, because of illness, incapacity, or simply because they are unaware of the vote or its importance to their future retirement security, would be presumed to have voted in favor of the suspensions. Since it was the intent of the law's sponsors to give retirees a "voice" in the ratification process, it is unlikely that they would have contemplated such an undemocratic outcome.

5. In no event should "participants" for purposes of the ratification vote include individuals for whom current contact information is not available.

9. What other practical issues do commenters anticipate will arise in the course of implementing these procedures?

1. MPRA requires that plans with at least 10,000 participants select a participant in pay status to represent the interests of the retired and deferred vested participants and their beneficiaries. The plan sponsor (i.e., the plan trustees) appoints the retiree representative. The plan trustees, however, having voted to propose the benefit suspensions, have a serious conflict of interest when selecting the person to represent the participants and beneficiaries most likely to oppose the benefit suspensions. To address this conflict, the Department should set standards and a procedure for selecting a representative who will be committed to representing the interests of retired and deferred vested participants and their beneficiaries. Moreover, the independence, competence, and actions of a retiree representative should be considered in deciding whether the plan sponsor's decision to suspend benefits was clearly erroneous. We suggest that the Treasury consult with the PBGC, including the Plan Sponsor and the Participant Advocate, to develop a fair selection process that truly protects retirees.

2. We anticipate that guidance will be helpful when dealing with QDROs.

3. Under MPRA, the Department's failure to act on an application for benefit suspension is treated as approval of the application. The Department should adopt a procedure in which it can request an extension from the plan sponsor if it concludes that the plan sponsor has not created a sufficiently reviewable record or if the Department requires addition information. If the plan refuses an extension, the Treasury should deny the application.

4. MPRA provides that a plan is in critical and declining status if it is projected to become insolvent within either a 15- or 20-year period. At this point, a plan can reduce benefits in some cases to 110% of the monthly benefit level guaranteed by Title IV of ERISA. However, a plan can become insolvent and be able to support a level of plan benefit in excess of 110% of the guaranteed monthly benefit. The Department should clarify that a plan may not suspend benefits unless it projects that the plan will require PBGC financial assistance within the applicable 15- or 20-year time period.

5. MPRA creates priority categories for benefit suspensions, providing that suspensions be applied to the maximum extent permissible to benefits attributable to a participant's service for an employer which withdrew from the plan and failed to pay (or is delinquent in paying) the full amount of its withdrawal liability under section 4201(b)(1) or an agreement with the plan. In order to comply with this statutory provision, the employer should have accurate and complete records enabling it to apportion service among employers for whom a participant has been employed. Guidance should also clarify that withdrawal liability is considered paid in full by a discharge of the obligation in bankruptcy proceedings. We also believe guidance is necessary to clarify that service for an employer who does not satisfy its withdrawal liability obligations does not include service for a predecessor employer. Finally, guidance should clarify that benefit suspensions must be restored when an employer remedies any delinquency in payment of withdrawal liability.

6. MPRA requires that benefit cuts be distributed equitably. Guidance should clarify that benefit cuts are not equitable if the projected benefit for active employees at retirement, including both the accrued benefit immediately following the benefit suspension and future accruals projected through retirement age, would exceed the benefit of a current retiree with a comparable participation history in the plan. Guidance should clarify that benefit suspensions are not equitably distributed unless any classifications of participants for purposes of benefit cuts unless there is an reasonable basis for such classification. Guidance should also clarify that MPRA's use of the term "maximum extent permissible" is subject to the provision that benefit cuts be equitably distributed among all participants.

If you have any questions about these comments, my contact information is (205) 410-0989, nps32@drexel.edu.

Sincerely,

Norman P. Stein
Senior Policy Advisor