COMMENTS ON NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND APPLICATION FOR BENEFITS SUSPENSION

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These comments, originally submitted by the Pension Rights Center on November 14th, respond to the Department of the Treasury's request for comments on the application of New York State Teamsters Conference Pension and Retirement Fund (hereinafter "Pension Fund," or "New York Teamsters Fund," or "Plan") to reduce benefits for plan participants and beneficiaries. The Pension Rights Center is the country's oldest consumer organization dedicated solely to protecting and promoting the retirement security of American workers, retirees, and their families.

The comments have been slightly revised to reflect a forensic audit of the plan prepared by Benchmark Financial Services, *Trifecta of Imprudence: Forensic Investigation of "Critical and Declining" New York State Teamsters Pension Fund*. It is our understanding that a copy of that audit has been provided to the Department of the Treasury.

Since the passage of the Multiemployer Pension Reform Act of 2014 (MPRA), the Center has worked with thousands of participants who have sought assistance in understanding MPRA and the requirements that a multiemployer pension plan must meet in order to suspend accrued benefits. As we explain in these comments, we believe that the Pension Fund's application has serious deficiencies and that it does not satisfy the relevant statutory criteria for approval of the application. In particular,

- The application fails to demonstrate that the plan took all reasonable steps to avoid insolvency;
- The actuarial assumptions, particularly the projection on future investment returns and the projection of base hours, are unrealistic and will not result in the plan remaining solvent in the long term;
- The benefit cut distributions are not equitable, for a variety of reasons;
- The application violated explicit and implicit statutory requirements designed to ensure fairness and transparency.

For these reasons we believe that MPRA requires that the Department of the Treasury reject the application.

We also note that an approved application is subject to ratification by the participants and that Treasury may make adjustments to the proposed benefit suspensions if the participants vote against the application. Portions of our comments may be useful to the Department if participants vote against the application.

Our comments are divided into four sections:

1. The first section includes general thoughts about MPRA and the New York State Teamsters Plan's application, and the conflicts of interest that produced a strategy that singles out retirees and former plan participants for the harshest benefit cuts.

2. The second section shows that the Plan trustees have failed to take all reasonable measures to avoid insolvency, as required by the statute.
3. The third section demonstrates numerous ways in which the distribution of benefit cuts fails to satisfy MPRA's requirement that the benefit cuts are to be equitably distributed among the participants.
4. The fifth section explains why the benefit cuts, despite the remarkable pain they will visit on participants, particularly certain targeted groups of participants, are not likely to permit the pension plan to avoid insolvency indefinitely.

I. General Comments

MPRA gives unprecedented power to trustees of certain multiemployer plans to reduce vested benefits, even and especially to individuals already retired. It reverses an almost universally accepted view—a view that informs ERISA's treatment of both single and multiemployer plans—that a plan must use its assets in the first instance to support the benefits of already retired participants, since retirees are the least able to make up losses in retirement income. In effect, MPRA allows trustees, who operate under severe structural conflicts of interest, to upset this long-standing legal and moral paradigm giving retirees first call on plan assets, and allows trustees and to reach deeply into the pockets of retirees in order to help contributing employers and active employees.

MPRA was negotiated by a small group of lobbyists, which reportedly included lobbyists for the National Coordinating Committee for Multiemployer Plans, a trade group of which the New York Teamsters Fund is a significant members and a contributor. The negotiation sessions were closed to the public, and the product of those sessions, MPRA, was added to the must-pass Cromnibus legislation by a procedural rule. There was no committee vote or debate or floor debate on MPRA's substance in the House.

The Senate was then presented with the House-passed Cromnibus bill. Any Senate amendment to the legislation would have resulted in a closure of the federal government. The Senate thus accepted the bill without amending it. It is unlikely that the MPRA language could have survived any open and transparent legislative process.

MPRA vests in plan trustees decisional authority on whose benefits to cut and by how much, subject to modest statutory constraints. The trustees, however, in exercising this authority have clear and disabling conflicts of interest. Half of the eight trustees are appointed by contributing employers and half by the International Brotherhood of Teamsters, whose voting membership does not include retirees or former union members. Not surprisingly, the decisions made by these conflicted trustees treat retired and former employees—the ones without representation among the trustees—particularly harshly, while actually reducing the contribution obligations of contributing employers over the long term. The cuts for retirees are more than 50% greater than the cuts made to the accrued benefits of active workers.

We generally agree that a plan contemplating benefit cuts is constrained by what the active, voting members of the union can reasonably be expected to accept and by what the employers can afford to pay. But we do not agree that trustees appointed by voting union members and

employers are fairly positioned to make these difficult calculations and to balance fairly and objectively the competing interest of all participants. The proof is in the pudding: the New York State Conference trustees, within the statute's limits, protected the contributing employers and active employees at the expense of retirees, former employees with deferred vested benefits, and the beneficiaries of former and retired participants.

Those who negotiated MPRA tried to ensure that the trustees' decisions would be virtually unreviewable, by requiring the Department of the Treasury to accept their determinations unless "clearly erroneous." But, when applying a "clearly erroneous standard," Treasury should be cognizant of the extraordinarily disabling conflicts of interest under which the trustees operated. Here we note that the Supreme Court and lower courts have repeatedly and consistently held that conflicts are a factor in deciding whether trustees and other ERISA fiduciaries have abused their discretion. Thus, the Department, in reviewing the application, is fully justified in keeping strong focus on the powerful conflicting interests facing the trustees and how those conflicted interests influenced the trustees' decisions in favor of the businesses and active employees that appointed them.

We also note that the retirees we have spoken with have generally told us that they prefer steeper cuts a decade or more from now to cuts this July, so that they can begin saving and otherwise preparing for the cuts. Many also believe that a workable legislative solution for the multiemployer system, involving shared sacrifice and responsibility, can be crafted if all the stakeholders—employers, employees, retirees, labor organizations, and the government—are at the table.

As to the use of assumptions in projecting future plan solvency, we note that an arbitrator has noted the plan's previous "excessive" optimism and "dangerous speculation," qualities that have lead the plan to its current crisis but which continue to inform the plan's position that these benefit cuts will allow the plan to avoid insolvency over the long-term. The plan has used unreasonably optimistic assumptions to come to its pre-determined conclusion that the proposed benefit cuts will preserve the plan. But this plan, with its potential liquidity problems, its shrinking asset base, and its limited ability to raise contributions to address experience losses if and as they arise, should base its conclusions on conservative assumptions, especially given the purposes of MPRA to have plans that are likely to survive over the long-term.

II. The New York State Teamsters Fund Failed to Take Reasonable Measures to Avoid Insolvency

MPRA permits multiemployer plans that are in "critical and declining status" to "suspend" accrued benefits, but only if the plan has taken all reasonable measures to avoid insolvency. There are several reasonable measures that the Plan could have taken to avoid insolvency, and, while those measures may not have been sufficient in themselves to avoid insolvency indefinitely, they would have reduced the need for benefit suspensions. The reasonable actions that the plan should have considered are

(1) not reducing scheduled contribution increases, at least for those employers that can afford them;

(2) either revising the contribution rates for employers whose contribution/benefit schedule incudes subsidized retirement rates or reducing the subsidy;
(3) reducing plan administrative and investment management expenses; and
(4) exploring whether plan has viable legal actions against entities that maned plan investments and provided the plan with investment advice;
(5) replacing current trustees with a professional, trustee free of conflicts of interest.

(1) Contribution Increases. The Fund adopted rehabilitation plans that called for increases in contribution levels, which this application substantially reduces. The justification relies partly on an 8.5% projection of the contribution rate 20 years out, which is misleading and fails to account for productivity gains, inflation and the opportunity in the future to negotiate lower rates if circumstances in the future dictate.

(2) Addressing Current Early Retirement Subsidies. The Pension Fund eliminated most subsidized benefits effective in 2011, but then permitted employers to elect schedules that restored subsidized early retirement benefits in return for increased contribution rates. The Fund's application suggests that the actuarial value of the subsidy exceeds the value of the increased contributions, see page 22 of the Fund's application ("To the extent there was any additional liability associated with retaining the subsidies . . ."), but the application does not take steps to address this continuing drain on plan assets.

(3) Reducing Administrative Expenses. The Fund's proposed plan does not take meaningful steps to review and address administrative expenses.

(4) Consideration of Civil Action Against Investment Advisors. Many plan participants believe that the firms that managed the fund's investment portfolio may have charged unwarrantedly large fees and imprudently invested plan assets. There is no indication that the Fund has explored whether there are plausible civil actions that might be brought against one or more of the Fund's investment advisors or managers.

(5) Many of the participants we have spoken with believe that some of the plan's financial issues are related to trustees actions and decisions over the years, including their continued reliance on unrealistically optimistic assumptions, their lack of experience in running a sophisticated financial entity, and their use of the plan's benefit structure and contribution obligations to achieve goals that may not be directly related to the exclusive purpose of providing benefits for plan participants and their beneficiaries. The Fund trustees, after years of presiding over the continuing financial deterioration of the Fund's assets should investigate whether the Fund would be better served by a professional trustee with adequate experience to administer the Fund and without the conflicting interests that both union- and management-appointed trustees necessarily bring to plan decision-making.

The Benchmark Financial Services report on the plan provides substantial support for the view that the trustees have lacked the skill and experience to manage this troubled enterprise and that their actions have and continue to contribute to the plan's difficulties. The Benchmark report also notes that the trustees, who now claim only severe benefit cuts can preserve the plan, informed plan participants as recently as 2014 that the plan was well positioned to pay all its benefits. In a 2014 newsletter, the trustees wrote:

> Every year, the question participants and beneficiaries ask the most is whether there will be sufficient money to pay pension benefits that have been earned and promised. The simple answer remains: Yes! Based on the best information and advice from the Fund's actuarial and investment professionals, the Trustees have taken the necessary steps to ensure that there will be sufficient assets to pay pensions.

III. Equitable Distribution of Benefit Suspensions

MPRA mandates that "any suspensions of benefits shall be equitably distributed across the participant and beneficiary population," and provides a non-exclusive list of factors that the trustees may consider in determining how to distribute benefit suspensions. The Secretary of the Treasury, in reviewing determinations made by the plan sponsor, must accept the plan sponsor's determination unless the Secretary finds that the determinations were clearly erroneous. We have noted earlier in these comments that the plan trustees, being appointed by the union (whose membership does not include retirees or most deferred vested participants) and the contributing employers, operate under conflicts of interest and that this should be a factor that is taken into account in determining whether the plan sponsor's determinations are clearly erroneous.

Any decision that relies on a decision-maker's broad discretion requires that the process relied upon be rigorous, fact-based, thorough, and fair. The trustees' decision-making on benefit distributions, however, sometimes relied on questionable speculation rather than on actual facts, failed to consider questions that bear directly on the equity of the suspensions, failed to provide meaningful input from retirees and deferred vested employees, and resulted in a distribution of benefit cuts that fails to satisfy MPRA's equitable distribution requirement.

The Fund adopted a schedule of benefit cuts that provided that the benefits of active employees (defined as an employee who had at least 500 hours of service in 2015, 2016, or the first half of 2017) would be cut 20%, and the benefits of all other participants—primarily retired participants, former employees, temporarily disabled or temporarily unemployed participants, and beneficiaries in pay status— would be cut 31%, a cut more than 50% deeper than applicable to the active participants. We discuss why this, and other aspects of the benefit cuts, are inequitable.

1. The Benefit Suspensions Severely Penalize Participants Who Became Disabled after 2010.

MPRA specifically provides that disability benefits under a plan may not be reduced and also provides that the plan sponsor should consider prior benefit reductions. The New York State Teamsters Fund eliminated disability benefits effective for participants who became disabled in 2011 and after. The loss of this benefit was a form of benefit reduction.

Prior to the reduction, a participant who became disabled would have received an immediate and subsidized pension, one that under MPRA's rules could not be reduced, because Congress recognized that such participants had substantial financial needs and could not return to work. Under the Fund's proposed reduction, however, a disabled participant not only has to wait until retirement age to commence benefits, but now faces a 31% reduction of that benefit, even though he may have an identical work record (in terms of pension accruals before and after 2004) to an

active employee who retires the same day as him. The non-disabled participant's benefit will be 33% larger than the benefit of the disabled participant with identical service. Thus, a person that Congress would have immunized against benefit cuts had he become disabled one year earlier, is A vulnerable person that Congress to whom Congress would have forbidden cuts if he had now cut more severely than an otherwise identically situated non-disabled retiree.

2. The Benefits Create Arbitrary Distinctions Among Participants.

Participants with substantially similar service records will have markedly different benefits because of the date on which they became inactive. In the most extreme example, a participant with 25 years of service who retired in 2015 with 499 hours of service will receive a markedly smaller benefit than an employee with 25 years of service who retired with 501 hours of service. There are thousands of people who will suffer dramatic differences in cuts due to irrational cliff that the Fund has created.

Another example of a starkly unfair result would be an employee of an employer that entered bankruptcy without paying withdrawal liability. One of its employees, after a period of non-covered employment, finds a job with a new contributing employer in 2014 and retires in 2016. Another employee, with an identical accrual record retires from a contributing employer in 2014. The former employee retires with a substantially larger benefit, even though his employer left the plan without paying withdrawal liability.

3. The Fund Justifies The Cliff With A Misleading Illustration.

The Fund application attempts to show the fairness of its higher cut rate for retirees by comparing a currently retired participant with 30 years of service to an active participant who retires in the future with 30 years of service. The Fund does this with a misleading example, that appears to assume that the active employee's service will be entirely (or mostly—the application does not explicitly say) comprised of post-2003, low-accrual service, and the retired participant has 30 years (or almost 30 years—again the application does not indicate) of service before the cut in accrual rates. But the reality is that many recent retirees will have significant, and in some cases, only post-2003 accruals. And many active employees will have substantial pre-2004 accruals. Moreover, the application involves UPS employees, who are on a different benefit schedule than the employees of most other contributing employers, further undermining the comparison.

Moreover, if contribution rates increase over time, the lower accrual rates will be applied to a higher base, creating a more favorable ratio of net benefit accruals before and after the accrual rates changed in 2004.

4. Effects of Inflation

The trustees did not consider the effects of future inflation. Inflation will erode the real value of retired participants' benefits, while active employees' retirement savings—being dependent on future employer contributions to all retirement plans—may well reflect inflationary gains. For example, if there is inflation, employer contributions to the plan are likely to increase and benefits will thus reflect those gains. Moreover, active employees can invest supplemental savings in riskier assets whose returns will reflect the effects of inflation. Retirees cannot capture these gains unless they are willing to accept inappropriate amounts of risk . The high rate of return on investments used by the actuary reflects the belief that there will be at least moderate inflation in the future. But the trustees did not consider the more severe impact of inflation on retirees.

5. Active Employee Support

The application contends (without any survey or other empirical support) that active employees will withdraw support from the plan if already accrued benefits were reduced at the same rate being applied to retirees and inactive employees. But active employees in determining the value of the plan to them in the future should and we believe will focus on the value of future accruals rather than accruals that they have already earned. And the trustees are not proposing reducing future accrual rates from where they have been for the most recent 12 years.

We also note that if employees withdraw support from the plan, resulting in withdrawal, they will receive no future benefit accruals from the plan but their employers will be subject to substantial withdrawal liability, which will reduce the amount available for their total compensation. Moreover, as the Fund's application notes, the retirement benefits for plan participants are richer than those offered by most non-union trucking companies. The trustees seemed to have ignored these considerations in designing the proposed benefit suspensions.

6. Capacity to Save

The application also fails to consider the likely effect of active employees saving through existing 401(k) plans or through other retirement savings plans that may be negotiated in the future. The availability of such retirement savings mechanisms will help active employees increase tax-sheltered savings to make up for losses in their accrued benefits; it will do nothing for already retired participants or former employees.

V. Indefinite Avoidance of Insolvency

MPRA requires any benefit cuts must be at a level that is reasonably estimated to enable the plan to avoid insolvency indefinitely. The regulations indicate that the plan must use a period of at least 30 years to test plan solvency. In running the relevant calculations, the Fund uses an assumption that plan assets will yield a 6.75% rate of return (geometric) for a ten-year and a 7.5% rate of return thereafter. The plan also used a mortality assumption, with Blue Collar adjustment loaded by 15% and projected generationally using 50% of the MPRA 2015 projection scale. These projections are not reasonable.

1. Rate of Return Is Overly Optimistic Given The Purposes of MPRA

The Fund actuary (Horizon), based on the Fund's unorthodox asset allocation, applied an investment return assumption in its MPRA deterministic solvency calculations of 6.75% for the initial ten-year period, and a 7.5% thereafter. The actuaries came to this determination by noting that its median estimates, based on the firm's annual actuary survey of capital market assumptions, was 7.3% for ten years, given its asset allocation, and 8.35 for 20 years. (The comparable figures for a traditional 60/40 equity/bond portfolio was 5.95% for ten years and 7.11% for 20 years.) A private investment advisor estimates were somewhat higher (8.8% for a 20 year period, given the plan's asset allocation). The plan actuaries, based on the survey results and the investment firm's estimates, determined that an 8.5% return assumption was reasonable for the plan to use for funding purposes, but discounted that for MPRA purposes because of (i) negative cash flow and declining plan assets; (2) the materiality of investment returns in the early years of the projection; and (3) possible changes in asset allocation because of liquidity concerns. Thus, the actuaries arrived at the 6.75/7.5% return assumption as being reasonable.

These assumptions, however, are unduly optimistic given the purposes of MPRA.

An assumption is only reasonable if it is "appropriate for the purpose of the measurement." Actuarial Standards of Practice, 3.6a (September 2013). Congress, in enacting MPRA, conditioned benefit suspensions on the plan being projected to avoid insolvency after the benefit cuts. This MPRA requirement provides participants meaningful assurance that the plan will not be forced to request further benefit cuts and similarly ensures that the plan is likely to avoid future insolvency, an important purpose of MPRA's sanctioning of benefit reductions. Thus, assumptions under MPRA are appropriate only if they are at the conservative end of the range of reasonableness and thereby provide assurance that MPRA benefit reductions will result in satisfying the statute's goals.

The plan actuary begins with an approach that assumes a plan can allocate its way to solvency through an investment risk that exposes the plan to higher levels of risk. (Horizon's survey shows far more volatility in the asset classes in which the plan invests in higher concentrations than most plans.) Horizon largely ignores the greater volatility posed by the Fund's asset allocation. This approach is not suited to MPRA, particularly in the case of a plan such as the Fund that claims that its contributing employers lack the capacity to increase contributions if expected returns are not realized.

Moreover, Horizon's initial 8.5% return assumption (pre-discount) is itself higher than the median returns shown on Horizon's survey and exceeds by even a greater amount the assumptions at the conservative end of its survey responses.

Horizon does apply a discount to reflect the Fund's the possibility that the plan may encounter future liquidity needs that require it to adjust its investment allocations. But Horizon does not appear to take into account that moving to more liquid investments may require selling illiquid investments at distressed prices, resulting not only in expected lower returns on assets after reallocation, but in additional investment loss.

VII. Conclusion

The Fund's application is seriously flawed and does not meet the statutory requirements for benefit suspensions established by the Multiemployer Pension Reform Act. The application, which most harshly disadvantages retired and former employees, exposes the clear and disabling conflicts of the trustees, making it impossible for them to fairly and objectively balance the interest of all the stakeholders in the Fund. In particular, the application fails to demonstrate that the plan has taken all reasonable steps to avoid insolvency; it has not satisfied the requirements that the benefit cuts be equitably distributed among the participants; and, most troubling, the application fails to show that it will actually lead to the long-term solvency of the fund. The proposed benefit cuts would cause devastation to tens of thousands of retirees and their families without sufficient assurance that the Fund would not fail within their lifetimes. For these reasons, we believe that the Department of the Treasury must reject the application.

Respectfully submitted this 21st day of December, 2016,

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