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Internal Revenue Service
Room 5205
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Mr. Joseph J. Shelton
Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW.
Washington, DC 20005-4026

Re: Request for Information on Suspensions of Benefits
under the Multiemployer Pension Reform Act of 2014
CC:PA:LPD:PR (REG-102648-15)

Dear Ms. Dvoretzky and Mr. Shelton:

On behalf of AARP, the largest non-profit organization representing approximately 38 million individuals age 50 and older, please accept these comments on the request for information issued by the Department of Treasury and Pension Benefit Guaranty Corporation (PBGC) to inform future guidance on the Multiemployer Pension Reform Act of 2014 (MPRA).

One of the most important developments of modern society has been the adoption of policies that enable individuals, after a lifetime of hard work, to retire and enjoy their final years with an adequate amount of income. In the United States, adequate income is built through a combination of Social Security, private pensions, savings and perhaps some form of work through a portion of retirement.

Social Security is the principal source of family income for about half of older Americans. Nonetheless, Social Security was never intended to be the only source of retirement income.

For many people, after Social Security, employee benefit plans are their main source of

retirement assets. The private employer-sponsored retirement system, through the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), permits workers to defer their wages through a defined benefit or contribution plan.

However, retirement security is more elusive than ever: fewer workers have defined benefit pensions and most find it difficult to accumulate retirement savings. Americans are living longer, but most cannot work significantly longer to finance that longevity. The agencies charged with protecting workers' retirement security must do everything they can to protect this retirement promise and ensure that employers set aside sufficient monies to fund this promise -- both for the long-term financial soundness of the plan on which millions of workers and retirees are relying and the soundness of the PBGC, which provides a critical backstop for those pension promises.

At the heart of ERISA is a simple promise: if employers promise workers a benefit, and workers meet the eligibility and vesting requirements, workers should be able to rely on these promises. Today, over 40 million private sector workers and retirees are counting on this promise. The anti-cutback rule is the core of ERISA's pension promise.

The Multiemployer Pension Reform Act (MPRA) – adopted at the end of the 113th Congress as part of the FY 2015 Omnibus Appropriation Act -- delivered a body blow to the anti-cutback rule. It was introduced the day before it was passed by the U.S. House of Representatives. No Member of Congress, other than its two sponsors, had an opportunity to review the language or amend the language. There were no hearings on the bill or Congressional debate over its impact. The Act permits certain severely underfunded multiemployer pension plans to cut (or "suspend" in the jargon of the MPRA) the accrued pension benefits of participants, including *current retirees* and their surviving and divorced spouses. AARP strongly opposed the passage of this legislation permitting multiemployer plans to renege on already earned retiree pension promises, and we are continuing to work to mitigate the negative outcomes of this law.

The Treasury Department also has a responsibility to do all it can to minimize the harm of this law and ensure that participants, and especially retirees who are already living on their pensions, are adequately protected. MPRA directs Treasury to issue guidance setting parameters and standards for the process. Consequently, we urge the Department to issue guidance that establishes the fairest possible rules to best protect earned benefits, especially for retirees already receiving and counting on their benefits. We also urge Treasury to provide rigorous review of a plans' claimed financial state and other possible steps taken before seeking approval to take the dramatic step of cutting retirees' benefits. We also urge all of the involved agencies to take affirmative early action to work with troubled plans to help them find alternative ways of improving their funding and fulfilling all of their benefit promises, particularly through helpful mechanisms such as merger and alliances.

PART I – PBGC

A. MERGERS AND PARTITIONS

AARP strongly supports the use of mergers and alliances. We urge the agencies to issue guidance and take action to maximize the use of these options. These are areas in which PBGC should be extremely creative and helpful in order to save as many plans and protect as many retirees as possible. PBGC should be constructive in its oversight of eligible plans and their concurrent efforts to take “all reasonable measures” to avoid insolvency.

PBGC and others estimate that the number of plans in troubled status ranges between 100-200 out of 1400 multiemployer plans (or 7% to 15% of plans). Reportedly, only a handful of these troubled plans are large plans. Rather, the overwhelming number of troubled plans is small plans. These small plans have relatively small numbers of workers and retirees and will need smaller dollar amounts to be contributed to make them financially solvent. Many of these troubled plans are negotiated by local affiliates of larger international unions. Because many international unions only have one or two small financially troubled plans, they have the ability to find alternative solutions. PBGC’s flexible and active merger and alliance assistance should enable all of these small plans to fulfill their pension promises.

In addition to plan-provided information, the PBGC should use its own sources of information -- including the actuarial staff and talented experts working at the PBGC and Treasury -- to analyze the financial status of applicable plans and how they might be “saved” by merger or alliance. Moreover, as a matter of required process, PBGC should seek public comments and suggestions via an RFI or other public forum to evaluate mergers or other alternative options to save plans and minimize or avoid benefit cuts so plans can fulfill their pension promises to workers and retirees.

We urge the three governmental agencies responsible for overseeing ERISA plans to actively reach out to these troubled plans when they are in the yellow and red zone and work with them to help them find creative opportunities to improve their funding without cutting retiree pensions. Depending on the plan, they could attempt to improve their underfunding through additional employer or employee contributions, changes in other benefits (such as health insurance), or a modest amount of financial and other technical assistance from the PBGC. With aggressive action, the PBGC and Treasury have the ability to use solutions such as mergers to enable plans to meet their benefit promises.

Before any plan even considers the drastic and unfair step of cutting retiree benefits, it should make every effort to first attempt to merge with one or more other plans. Mergers can substantially reduce administrative costs benefitting the merged plans. Mergers

also do not require significant PBGC financial assistance, although PBGC should use some of its new premium resources to enable mergers and alliances.

Some plans may be unaware of other possible merger partners or be reluctant to reach out for a partner. PBGC has the most complete database of all plans and can assist them in finding the most suitable partners. Because there are a limited number of unions, the PBGC can assess the ability of the international union or affiliates to assist local and regional unions. Unions and employers typically engage in collective bargaining approximately every three years so all wages and benefits can be re-negotiated at that time.

Similarly, with partition, PBGC is in the best position to help troubled plans assess their options and determine if PBGC's assistance with certain terminated participants can enable the plan to maintain its obligations to all other participants. PBGC and plans should ensure that participants are timely notified of PBGC's consideration of partition and provided an opportunity for public comment on any proposed partition. PBGC should make every effort to ensure that plans and the PBGC provide participants an opportunity to meaningfully understand and participate in any PBGC related process. All materials and notices – regardless by whom they are issued – should be written in a manner that is understandable to the average participant. In addition to individual notices, all documents should be available on the PBGC website, plan website, plan offices, and employer human resources locations. PBGC should issue model notices whenever possible to ensure fairness and minimize plan burdens.

PBGC should direct plans on the assumptions to be used consistent with Treasury guidance. Plans should not be permitted to only partition retirees. Because the PBGC has been a supporter of partition as a possible solution for severely underfunded plans, the PBGC should facilitate such actions, without jeopardizing PBGC's financial ability to meet its other financial obligations.

Finally, PBGC should continue to assist and oversee plans post-merger or partition, as needed. Both plans and the PBGC should maintain all documents and ensure that all documents are timely provided to participants, PBGC, and the public.

B. THE ROLE OF THE PARTICIPANT ADVOCATE

Because of the PBGC's potential conflict of interest in policing benefit cuts, see Part II, A., *supra*, the Participant Advocate should act not only as a participant navigator/communicator, but should also take a more aggressive role in overseeing the PBGC's actions. The Advocate should ensure that the PBGC is aggressive in (1) causing employers to fund their plans, (2) confirming that plans actually fall into the "critical and declining" definition, and (3) certifying that the plans have taken all reasonable steps before partitioning. Where the PBGC is facilitating mergers, alliances

and/or partitions, the Advocate should be consulted to evaluate whether these actions are in the participants' interests. The Advocate's evaluation should not only include a determination of whether these actions are in the participant's best interests but also whether the PBGC took, at a minimum, the three steps outlined above. This evaluation should be issued in a public document which is available upon written request as well as posted to the website.

In addition, the Participant Advocate should affirmatively reach out to plan participants to explain the MPRA process and offer assistance. Participants and their representatives should be able to contact the Advocate during all working hours to ask questions and seek assistance. The Advocate should be a voice for participants in relation to the plan and assist both participants and the plan in considering and developing alternatives that do not require cuts to normal retirement benefits.

The Advocate should establish a process for dispute resolution. Participants should have the right to bring disputes to the Advocate and the Advocate should devise a mediation process to try to resolve disputes. Treasury should maintain a similar process or may delegate it to the Advocate. This is particularly important given that the MPRA rescinds a participant's right to court review of any benefit cut.

Clearly, the Advocate should be open to employers. However, we note that in this context, it is participants who are most at risk and in need of Advocate assistance.

PART II – DEPARTMENT OF TREASURY

A. TREASURY GUIDANCE SHOULD REQUIRE STRONG PROCEDURAL FAIRNESS.

Treasury needs to take a strong, active, assertive role under MRPA – both by issuing strict regulations and by carefully scrutinizing plan applications to cut accrued benefits – because the fact of the matter is that the PBGC has a potential conflict of interest under this law. The PBGC is charged with preserving plans and protecting participants to the greatest extent possible, but it also has a financial incentive to allow plans to avoid insolvency. Quite simply, to the extent, a plan avoids insolvency by forcing losses on participants, the PBGC avoids having to use its own resources to assist the plan in making pension payments to meet its obligations. Consequently, Treasury should always act to affirmatively approve or disapprove benefit cuts. Treasury approval by inaction evades Treasury's purpose and provides no protections to participants and retirees.

MPRA contains numerous rules and requirements that require careful Treasury guidance. The rules governing multiemployer plans are complex, and thus determining which plans are "critical and declining" is complicated. MPRA requires that actuaries determine whether a plan is "critical and declining" and "insolvent." Similarly, Treasury must establish standards for the complex determination of whether a plan first undertook "all reasonable measures" to avoid cuts, and if unavoidable, "equitably" allocated any cuts. To ensure fairness, Treasury must establish uniform rules to govern the interpretation of these rules. Further, since the financial well-being of hundreds of thousands of retirees and their families is at stake, Treasury should require a narrow pro-participant interpretation of these terms to best protect the promises made to these families and prevent abuse.

Treasury should also require plans to comply with and adhere to the highest level of procedural fairness. As required by MPRA, plans should be required to maintain written records and timely submit all documents to the Department and participants. Treasury should publish all submitted plan documents on its website as a back up for participants who do not receive the materials from their plan. Public disclosure of all documents and materials also will serve the further purpose of ensuring that plans rigorously follow Treasury's guidance before any cuts to retiree pensions are contemplated.

MPRA requires the plan to be amended to permit retiree cuts. The plan amendment and the requirement notice to participants should state: (1) the types of benefits that are being cut; (2) the percentage of the cut, *e.g.*, 50% reduction; (3) the date when the cuts will be instituted; (4) the intended duration of the cuts; (5) the date when the cuts will cease; if the intent is that these cuts will not be reinstated the notices should so state; and (6) the circumstances where the benefits of certain participants may be improved while the benefit cuts are still in place. Such an amendment should not be retroactive inasmuch as it establishes a benefit cut. In addition, if a plan is recovering an "overpayment" from a participant, the plan cannot collect an overpayment from a cut benefit.

Moreover, the amendment language must be clear and specific. The trustees should fully document that they have followed the appropriate procedures for amending their plan including (1) the date the amendment was adopted; (2) the effective date of the amendment; (3) the trustee vote on the amendment; and (4) a roll call vote specifying how each trustee voted. Treasury, participants and the PBGC Participant Advocate should receive this information as part of the plan's application documentation.

For those plans that Treasury has approved to cut benefits, Treasury should require that actuaries recertify, no less often than biannually, that plan conditions have not changed and that benefit cuts are still absolutely necessary to avoid insolvency. If the plan condition has worsened and can no longer avoid insolvency, a process will be needed for PBGC oversight.

B. CLEAR ACTUARIAL STANDARDS (Treasury question #1)

One of the critical requirements of the MPRA is the actuarial certification. Under the Act, the actuary must certify that the plan is critical and declining, that the plan would avoid insolvency if benefit cuts are made, and that the plan will not be insolvent after any cuts. The guidance should be clear that if insolvency will not be avoided, not just postponed, no benefit cuts are permitted.

Actuarial assumptions can vary greatly and can easily be manipulated to arrive at a desired result. A "reasonableness" standard is insufficient. Assumptions about interest rates, investment returns, investment losses, actuarial losses, etc. can greatly affect a plan's solvency or lack thereof.

Because cutting pension benefits is such a terribly drastic action, Treasury's guidance must ensure that plans truly are in actuarial trouble before plans are eligible to take advantage of the MPRA. Treasury should impose strict actuarial standards to ensure that plans are not perverting the Act. Thus, Treasury should provide actuaries with guidance on how to determine the critical concepts of "insolvency" in a manner that affords uniformity across plans. Treasury should either specify the assumptions that each actuary should use or should request an organization such as the Society of Actuaries or Academy of Enrolled Actuaries to specify them. The more standardized the actuarial assumptions, the more consistent the determination of insolvency will be. Another option is to require plans to provide a range of assumptions so the Treasury, participants and the public can see a best, moderate and worst case scenario, and to ascertain if the plan can be saved without cuts. The Social Security actuaries use such a model.

For example, MPRA permits a plan as high as 79% funded to cut benefits. Traditionally, this would be considered a fairly well funded plan. Pension law generally treats plans funded 80% and over as well funded. Treasury should require actuaries to compare and demonstrate that the changes required to keep plan funding over 80%, are substantially more onerous than the changes required to keep the plan at 79%. Quite simply, plans funded at 75% or over should have a more substantial burden to obtain approval for benefit cuts – an absolute certainty that the plan will be insolvent in 15 years unless cuts are instituted now.

All actuarial assumptions must be reasonable. All comparisons of active workers and retiree benefits must be converted to comparable relative values, i.e. apples to apples comparisons. Plans should be prohibited from expressing active and retiree benefits in nonequivalent monetary terms.

Again, it is critical that all actuarial assumptions and calculations are timely provided to Treasury, participants and the public, as part of both the application and review process.

We also urge Treasury to consider requiring plans to use an outside independent actuary. Most plans have likely used the same actuary for decades and have well established relationships and biases. A new party both provides another chance to find new solutions and minimizes the likelihood of a rigged process. We suggest that certification of the actuary's specific knowledge of multiemployer plans from an outside organization such as the Society of Actuaries or Academy of Enrolled Actuaries would be a good first step.

MPRA requires the plan actuary to use the ERISA section 4245 definition of "insolvency." Section 4245 defines insolvency as when the plan's available resources are not sufficient to pay benefits under the plan when due for the plan year...." Benefits are to be the "highest level which can be paid," whereas liabilities are "the plan's cash, marketable assets, contributions, withdrawal liability payments, less reasonable administrative expenses." This is a vague and speculative standard. Treasury, with PBGC's involvement, must provide plans with more specific and evenhanded guidance on how to fairly estimate a plan's likely insolvency. If plans are required to estimate the highest level of benefits, then they also should have to estimate the highest level of assets, contributions, and default payments for consistency in the assumptions. Actuaries should, under all but the most emergency circumstances, assume that all employers will make all agreed-to contributions for the entire 15 or 20 year insolvency test period. This is one of the most critical plan determination points, and without Treasury's imposition of strict actuarial standards, is easily manipulated to permit cuts to accrued benefits that are avoidable.

C. THE RETIREE REPRESENTATIVE

In many potential cases, there may be a fundamental conflict of interest between active employees and retirees. Workers vote for unions to represent their interests. But unions legally only represent active workers and thus must put the interests of active workers ahead of the interests of retirees. In times of economic stress, employers are pressed to use revenues for other business needs and unions are pressed to use employer payments for active workers. Neither the unions nor the employers, in their individual capacities or as trustees of the pension plan, are adequately able to represent the interests of the retirees. Even though the pension plan trustees, under ERISA, are legally required to act solely in the interests of all plan participants and beneficiaries, in reality, they cannot do so effectively. The retirees are the only voiceless parties in the new MPRA permitted process.

MPRA requires troubled plans with 10,000 or more participants to select a participant in pay status to act as a retiree representative to "advocate for the interests of the retired

and deferred vested participants and beneficiaries of the plan.” In order to determine the applicability of these provisions to a plan, Treasury should set rules to ensure plans consistently calculate their plan size. All participants including active employees earning a benefit, deferred terminated vested employees, all retirees (regardless of their age or whether they are disabled), and beneficiaries should be counted. The plan actuary should make sure the plan accurately counted the participants, and PBGC should double-check all plans within the 10,000-participant range for accuracy as well. The PBGC should also ensure that plans are not dropping participants and beneficiaries in attempts to circumvent the vote for a retiree representative. The agencies should ensure any intentional circumvention of the rules can be challenged through an appeal to the agency.

Covered plans should be required to notify retired participants of the retiree representative position as soon as practicable after the trustees have decided to move forward on cutting benefits. Plans should make clear in understandable language the rights and responsibilities of the representative. The plans should provide at least a 30-day period after retirees have received notice of the intent to cut benefits for retirees to apply for this position. AARP submits that retiree representatives should only be chosen from individuals who are facing benefit cuts; thus, disabled participants or those over 80 should not be eligible.

Retirees should vote on who they want to represent them. That vote should be honored, except in circumstances that the trustees can demonstrate a clear and convincing reason why the retirees’ preferred representative should not be selected. If there is such a dispute over the selection of the retiree representative, the Participant Advocate should be involved to resolve the dispute. The Participant Advocate must ensure the retiree representative is able to adequately represent the retirees. Among those considerations is whether certain retirees, e.g., current or former plan trustees, union officers and union employees, may have conflicts that will preclude them from adequately representing the retirees.

Plans should not be permitted to consider cutting benefits until a retiree representative has been selected, approved, in place, and had an opportunity to hire and undertake the legal and actuarial analysis MRPAs require the plan to provide and to propose other solutions to the plan trustees and the Department. The plan may be required to provide hotel, plane fare, computer access, and office space for a representative who needs to be located near the plan headquarters to participate in plan meetings, etc. Treasury should also require that the representatives be afforded timely access to retiree addresses and emails to contact other retirees. Representatives must be apprised of and have the right to submit complaints to Treasury and the Participant Advocate and receive assistance if needed from Treasury and the Advocate, including actuarial assistance.

The regulations should clarify that participants have the right to a retiree representative for the duration of the benefit cuts, and should be provided all necessary resources from the plan and the agencies to continue to act as an effective advocate for the plans' retirees for as long as needed. If the elected retiree representative can no longer serve, then the regulations should provide for another vote.

**D. ALL REASONABLE MEASURES MUST BE TAKEN BEFORE
BENEFIT CUTS ARE INSTITUTED.**

Under MPRA, the plan sponsor must determine, in a written record, that the plan is projected to become insolvent unless benefits are cut "although all reasonable measures to avoid insolvency have been taken (and continue to be taken...)." The Act lists illustrative measures, including prior reductions and benefit cuts but it did not provide an exhaustive list. Treasury should require plans to provide documentation of these actions as well as additional actions plans could take to prevent benefit cuts. Treasury should require plans to submit a list with all accompanying documentation demonstrating every action the plan (and trustees) has taken and for which group of represented participants. Treasury should develop a list of all possible actions and ask plans to specify the reasons for not taking any of the listed permissible actions.

Because plans have a variety of options that should first be taken to ensure the plan is adequately funded, Treasury should establish a high standard in order for plans to cut benefits, notably:

- Before permitting a plan to cut benefits Treasury should require plans to demonstrate plans have already acted to reduce *future* accruals.
- Treasury should require plans to reduce all non-core "adjustable" benefits, as permitted since 2006 in the Pension Protection Act, such as early retirement benefits, death benefits, etc. There is evidence that many plans have refused to make these types of cuts although they still remain in critical status. No plan should be permitted to propose cuts to any core accrued benefits until all adjustable benefits have been eliminated for all participants in the plan. This was clearly the intent of the law's sponsors.
- Certain additional payments such as 13th checks, Christmas bonuses or other post-retirement additions should be eliminated prior to cutting benefits if they have not become an accrued benefit.
- Treasury should also examine plan funding, including the need to increase employer contributions to the plan. There should be an examination of the entire compensation and benefit package, including non-pension benefits. For example, if the plan (or trustees) maintains a comparable health plan, retiree health plan or any other employee benefit plan maintained by many of the same union and employers, then the parties should be required to provide documentation on the amounts annually contributed by each employer on a benefit-by-benefit basis.

Reductions to other non-accrued benefits should be considered, e.g., increased cost sharing for health care, before any accrued pensions are cut. Any savings from cost-sharing or other benefit reduction should be redirected to the troubled pension plan.

- If benefit cuts are necessary, reductions in some forms of accrued benefits should be considered first. For example, plans should be required to revoke any pension benefit increase made after the enactment of the Pension Protection Act in 2006. At that time, it was clear that many multiemployer plans were in trouble; any benefit increases made after 2006 are suspect. Plans should also be required to first make other adjustments prior to any reductions for those in pay status, such as requiring an increase in the early retirement age (some plans permit workers to start drawing as early as age 48) and the elimination of certain benefit triggers such as “30 and out.”
- In addition to actions with respect to plan benefits, plans should be required to specify and document all employer contributions and changes (up or down) for each participating employer. Plans should provide information with all documentation on any employer’s delinquent or underpaid required contributions and report on their financial soundness or lack thereof. Documentation of all plan efforts to collect withdrawal liability from employers with defaulted, missing or forgiven contributions should be provided to the Treasury.
- Treasury should require the plan or applicable member unions and employers to provide information on the plan participants who also are participants in a 401(k) plan or similar plan and any employer contributions to such plans. The information should also make clear if plan retirees are receiving benefits from the 401k plan or only active participants. No multi-employer plan accrued benefits should be permitted to be reduced so long as any employer contributions or matches continue to be made to a 401(k) or other defined contribution plan, as this would fall short of all reasonable steps taken to improve the funded status of the underfunded plan. Because the total of all retirement benefits should be considered together, defined benefit plans should not be cut so long as contributions to defined contribution plans continue.
- Finally, the plan should also submit the plan’s prospective administrative budget. Any plan that needs to cut benefits should first be required to reduce and/or eliminate trustee salaries, per diems, conferences, training and other discretionary expenses. Plans should document that all service provider contracts were reviewed to reduce expenses. In addition, the plan should be required to document how all plan employees and any union or employer officials may be eligible for benefits under the plan and if so, whether and to what extent their pensions are affected or have taken a proportional cut.

MPRA requires Treasury actively to review all of the plan’s required information; it is likely Treasury may have questions and will seek follow-up information or clarifications. We proposed that the definition of a “submitted” application is one that is complete to

Treasury's satisfaction. Consequently, Treasury's 225-day timeframe for approving or denying an application would not begin until the application is deemed complete and submitted. If the 225-day period starts before the application is deemed complete, the already short application process would be more of a sham. Treasury should only accept the plan sponsor's determinations that are supported by facts and for which the plan has provided objective and documented evidence. Only if Treasury, participants and the Participant Advocate are satisfied that the plan has genuinely taken "all reasonable measures" should Treasury start the process for a fair participant vote.

E. EQUITABLE BENEFIT CUTS

MPRA states that the trustees' proposal to cut pensions must be "equitably distributed across the participant and beneficiary population." We urge the Department to establish guidelines on the definition of "equitable" cuts. We suggest two options that we believe could work to define "equitable."

First, where plans impose the largest or entire suspension on active workers under age 55, there should be a presumption or safe harbor that this is an equitable suspension. Although a difficult impact on younger active workers, they have at least some opportunity to make alternative plans for retirement, including by continuing to work and save more. Most retirees do not have other options to earn additional income, and it is not realistic to expect them to re-enter the workforce. In short, the active workers have other options. The retirees do not.

Second, the "equitable" concerns of fairness to elderly retirees and widows and widowers is so overwhelming, Treasury should establish a presumption that disproportionate cuts to retirees are per se "unequitable." Instead, Treasury guidelines should encourage that any cuts that must be made be done on a pro rata basis for each participant and beneficiary (who are subject to the total cuts) based upon the amount of their pension and years of service. This certainly would meet common sense standards of equity. Cuts that are not in line with an individual's pension amount and years of service would be deemed disproportionate. While we believe many multiemployer plans can find alternatives to cutting current retiree pensions, or, if needed, alternatives that are similarly equitable, we urge the Department to set guidelines to ensure that any approved cuts are as fair as possible.

F. DISABILITY PENSIONS (Treasury question #2)

MPRA states that disability pensions may not be cut. We support the Act's priority that disabled retirees should suffer no cuts in their pensions. Disabled individuals are among the poorest and most vulnerable members of our society. They, by definition, cannot work and are dependent on their pension income for their survival.

It is our understanding that some multiemployer plans change disability pensions to normal retirement pensions at specific ages (similar to the way Social Security disability benefits automatically convert to retirement benefits at retirement age). For purposes of MPRA, we believe that disability pensions should retain their characterization as disability pensions for the entirety of a retiree's life. For this purpose, MPRA should control eligibility for benefits, not the plan provisions that provide for conversion. The spouses and widows of disabled retirees should receive similar protection from pension cuts.

**G. PARTICIPANT VOTE
(Treasury question #8)**

A critical aspect of MPRA's enactment is the requirement that plan participants must vote to approve the benefit cuts. That vote governs unless the plan is a "systematically important plan." For a systematically important plan, the Treasury can override the vote of the participants.

For the plans for which the vote will be dispositive, we urge the Treasury to ensure that the vote is fair in all possible respects. The plan should be required to ensure that it has the most recent contact information for all participants and beneficiaries. Both the PBGC and the DOL have had concerns over missing participants, and we expect that the plans will follow the procedures established by the DOL and PBGC to find these participants. These steps are not novel and are similar to those that employers take to "scrub" their data when offering a lump sum distribution to "de-risk" their plans. Treasury must review the contact lists, where the information is derived, and ensure they are reasonably accurate.

Treasury should provide a model ballot for plans to use. The ballot should specify the scope of the cuts, the size of the cuts, and the duration of the cuts. It should also specify if, and when, the plan can expect to regain solvency and the trustees' conditions for reinstating benefits. Treasury, the PBGC Participant Advocate and the retiree representative must review and approve the ballots. In their review, they should ensure the ballots are objectively and understandably worded. One method to ensure objectivity is to include an objective plain language description of the plan amendment and then permit the plan trustees, retiree representative or other party to give a limited statement setting forth arguments for and against the amendment. (We note that this is similar to voter guides in some states). The ballot should specifically include information about individuals who are exempted from any cuts.

Ballots should be required to be mailed, not electronically delivered, unless affirmatively requested by the participant or beneficiary. Treasury may also need to carry out public service announcements in local communities to make sure participants know about the

vote.

Participants and beneficiaries should have a reasonable period of time to vote, no less than 30 days from the date they receive the ballot. Treasury should develop a timeline to ensure that all parties have a clear understanding and opportunity to fairly contribute and participate in the voting process. All parts of this process, including the voting results and all plan communication efforts, should be made public, by the plan and the agencies.

Most importantly, the guidance should clarify that the vote should be based on a majority of participants voting inasmuch as the statute is not entirely clear. MPRA states “a majority of all participants and beneficiaries of the plan.” The vote should not count participants for whom no addresses or current addresses are verified.

H. TIMELY, UNDERSTANDABLE AND UNBIASED NOTICE (Treasury questions #5 and #7)

Treasury is required under MPRA to issue guidance to plans on how and when notices are to be provided to participants. We urge the Treasury to issue guidance that requires all plans that may seek to cut earned pensions to provide timely and understandable notices to all participants and beneficiaries. Addresses of participants and beneficiaries should be verified and confirmed. Notices should be mailed to the last known address of the participant and beneficiary. If mailed notices are returned, the plan has an obligation to attempt to find a better address; again this is not dissimilar to DOL guidance on missing participants or scrubbing of data for lump sum de-risking offers. If addresses cannot be verified and notices are returned, those participants and beneficiaries should not be in the denominator of the vote.

Although electronic notices may be used, they should not be used in lieu of mailed notices. Many participants and beneficiaries may not have email addresses or may not read email. Numerous surveys have found that individuals prefer to receive financial and legal information in writing on paper. Older workers and retirees are especially likely to prefer and need paper notices.

Notices should be provided well in advance of any decision, determination or action. Participants would likely need no less than 60 days advance notice before any action is taken. Plans should be encouraged to notify participants before they apply to Treasury to cut earned pensions. Workers and retirees worked a lifetime to earn their pensions and made plans for their retirement. It is unconscionable to think that a retiree can quickly or at all adjust to losing 10, 20, 30% or more of their pension income without imposing a devastating impact on their family.

Notices should follow many of the requirements under ERISA's reporting and disclosure requirements.

- they should be clear, to the point;
- written so that the average pensioner for that particular industry can understand the notice;
- important information should be prominently highlighted (and not be buried in dense legalese or pension-ese);
- if the plan meets the requirements for translation into another language other than English those rules should be followed; and
- they should apprise participants of their right to obtain all plan documents and the manner for requesting the documents.

Not only should Treasury issue model notices, but plans should be required to either use the model, or receive approval from Treasury for alternative notices. In either case, the notice should include information on where and to whom participants can ask questions and seek additional information. The notice should provide a telephone number that participants can call for further assistance. The information should be provided through multiple formats: written material mailed to participants and beneficiaries; on the plan website; in the HR offices of each employer; the labor organization's website and office; and to any former employee retiree organization. To the maximum extent possible, notices from the plan, Treasury, PBGC and DOL should be coordinated to prevent confusion among participants.

Finally, all notices also should be filed with the Treasury so it can monitor plan compliance with the law. The Treasury also should make every effort to put notices and other relevant information on its website to ensure participants and the public see the information. If there is any doubt that the plan has accurate contact information for all participants, then the plan also should publish notices in local newspapers and similar areas of the applicable community to widely disseminate news of the plans status and actions. The pension plan should coordinate with the health plan, other benefit plans, and employer human resources departments to cross check participants addresses and contacts.

All comments should be available publicly and adequate time (no less than 60 days) should be afforded for all parties to submit comments

I. AGE LIMITS ON BENEFIT "SUSPENSIONS" (Treasury question #4)

MPRA prohibits suspensions on retirees over age 80 and prohibits no more than phased suspensions for retirees age 75-80 "as of the effective date of the suspension". Treasury guidance should make clear that the effective date of the suspension can be

no earlier than the date of actual implementation of approved benefit cuts rather than when a plan first proposes to cut benefits. It could take a year or more until the process of application, documentation, Treasury consideration, voting, etc. occurs and the regulations should “err” on providing the most vulnerable older retirees with the maximum protection available under this law. These proposals are going to be so traumatic and harmful to affected families that the law should be interpreted to protect every possible elderly family.

J. BENEFIT IMPROVEMENTS AND RESTORATIONS (Treasury question #4)

The RFI solicits comments on the practical issues Treasury should consider with regard to benefit improvements after a multiemployer plan has instituted benefits cuts. There are three kinds of benefit improvements: 1) improvements to the benefits of active workers *at the same time* that retirees’ benefits have been and remain cut, 2) a reinstatement of the “suspended” benefits of those in pay status, and 3) an equitable increase to the benefits of all participants and beneficiaries.

With regard to number one above, the regulation should not even contemplate such an improvement. Presumably, the reason that a plan was compelled to take the drastic step to cut benefits in the first place was to save the plan from insolvency. MPRA allows such improvements for active workers while retirees have had their pensions cut, but only so long as the plan sponsor does not “increase the liabilities” of the plan. However, money is fungible. Any benefit improvement by definition increases the liabilities of the plan, *unless* other plan benefits are reduced. In addition, if employers and active workers have “other” funds to contribute to new-and-improved benefits in the original plan or to a new plan, they have, in fact, the funds to contribute toward a reinstatement of the benefits already cut and/or to improve the solvency of the original plan.

Second, the plan should first seek to reinstate all or a portion of the “suspended” benefits of those in pay status. This should be seen as the top priority if any “improvements” are made at all. Such reinstatements should be done on an equitable basis. That could be defined as reinstating the benefits for older participants -- for example, those who have newly entered the older protected class defined in the statute (those age 75 and older). Alternatively, benefits could be reinstated on a pro rata basis for all those in pay status. Whichever definition is used, benefits for surviving spouses and beneficiaries of deceased participants should have their benefits reinstated as if the participant had been alive. Thus, if benefits are reinstated for those participants who enter the older protected class, the benefits of surviving spouses and beneficiaries would be reinstated as if the participant is alive; if the participant would have been older than 75 years the benefits of the surviving spouses and beneficiaries would increase. Once these benefits are reinstated for the older protected class, the plan cannot cut them again.

Third, plans may seek to increase or improve the benefits of “all participants and beneficiaries,” but only if such increases are “equitable.” We suggest the same equitable basis as in number two above. AARP notes that any improvements or restoration solely to the benefits of active workers should be considered presumptively inequitable. It would most likely be a breach of the trustees’ fiduciary duty to act in the best interests of all plan participants by favoring only active workers.

All critical and declining plans that have cut the accrued benefits of any participant or beneficiary should be required, no less than biannually, to file with Treasury a complete and detailed report on the funding and solvency status of the plan. These reports should also estimate the duration of the benefit cuts, time the plan will be able to reinstate benefits and the conditions under which the plan would do so. The reports should include the progress toward meeting those conditions, and if the plan is not making progress, an explanation for its failure. In addition, Treasury should issue detailed regulations on the assumptions and strict standards to be used in determining the solvency of a plan. If Treasury finds that “other” funds could have been contributed to the insolvent plan and were not, Treasury should deem the plan in violation of the law. For transparency purposes, plans should be required to periodically re-apply – we recommend at least every five years -- to continue the suspension with appropriate notice and a public comment period.

Moreover, as previously stated, any participant notice of a proposed benefit cut should set forth the plan’s estimate of the duration of the benefit cuts and time the plan will be able to reinstate benefits and the conditions under which the plan would do so.

Finally, Treasury should initially issue interim guidance since the timeframe for issuance is very short, and should leave open the ability to amend and improve its guidance as further experience demonstrates the effectiveness or ineffectiveness of the initial rules.

CONCLUSION

AARP appreciates having the opportunity to provide its views on the implementation of the MPRA. If you have any questions, please do not hesitate to contact Michele Varnhagen on our Government Affairs staff at 202-434-3829.

Sincerely,



David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs