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Room 5205
Internal Revenue Service
PO Box 7604
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Washington, DC 20044

Re: Comments on Proposed and Temporary Regulations Under the
Multiemployer Pension Reform Act of 2014
RIN 1545-BM66 and RIN 1545-BM73

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 comments on proposed regulations (which also incorporate temporary regulations) implementing the benefit suspension provisions of the Multiemployer Pension Reform Act of 2014 (“MPRA”).

These comments are divided into ten sections. The first section provides general background on MPRA and the regulations. The second through ninth sections provide specific comments intended to help improve the proposed regulations in seven substantive areas: (i) plan eligibility to suspend benefits; (ii) post-suspension maintenance of records showing ongoing compliance with suspension conditions; (iii) equitable allocation of benefit suspensions; (iv) rules relating to disability benefits; (v) rules relating to benefits to alternative payees; (vi) rules relating to participant voting; (vii) rules relating to benefit improvements; (viii) method of communicating with participants; and (ix) the selection and function of the retiree representative.

1. Background

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, to meet some of the benefit commitments of plans that lacked the economic resources to satisfy their obligations.

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 have already retired have 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 rights of retired participants to plan assets to those of active workers and contributing employers. The negotiators also included \$2 billion in estimated cost savings to one large corporation, UPS, the result of which may be far steeper cuts to tens of thousands of retirees in the nation's second largest multiemployer plan, the Central States Teamsters Pension Fund. Retirees, and those representing their interests, were locked out of the closed-door negotiating sessions.

A last-minute House Rules Committee vote added this negotiated language to the 2014 end-year Omnibus spending bill, allowing it to escape vetting by any legislative 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 directed the Treasury to issue guidance on the procedures for suspending benefits within 175 days of MPRA's enactment. The Department of the Treasury issued temporary and proposed regulations on June 19, 2015.

We commend the Department of the Treasury's thoughtful and expeditious approach to this regulatory enterprise. In particular, the proposed regulations have identified sufficient substantive content to the sometimes vague and protean MPRA standards for plan eligibility for benefit suspensions and for distributing those suspensions equitably among participants to allow it to perform the review function that Congress assigned it. Many of the rules in the proposed regulations offer meaningful protections to participants, particularly elderly and disabled participants who are among the most vulnerable. But we also believe that changes are needed to ensure that the regulations adequately protect plan participants' interests. We believe that such protections are required by the statutory framework established by Congress, which provided discretion to plan sponsors but also directed the Department of the Treasury to ensure that plans fully satisfy all statutory protections for participants, whether those protections are specific (as in the case of limitations on suspensions) or take the form of standards (such as equitable distribution of benefit suspensions among plan participants).

Before turning to our specific comments, we wish to note four preliminary points:

1. MPRA's provisions abrogate two of ERISA's foundational tenets: that plan sponsors cannot reduce accrued benefits in ongoing plans 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.

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 legal actions challenging benefit suspensions. Thus, Treasury Department guidance is essential to ensure fair consideration of the concerns of retirees.

3. MPRA is hardly a model of legislative drafting, not 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 vulnerable elders 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 ERISA. 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 guidance must 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. On the whole, we think the proposed regulations take this approach.

2. Plan Eligibility to Suspend Benefits

MPRA permits a plan to suspend benefits only if the plan is in critical and declining status and if the plan is projected to avoid insolvency indefinitely after the benefit suspensions. The latter determination is made only after the plan has taken all other reasonable measures to avoid insolvency. The benefit cuts must be reasonably estimated to achieve, but not materially exceed, the level that is needed to avoid insolvency.

While we are generally supportive of the approach taken by the proposed regulations, there are six modifications of the regulations that in our view would strengthen protections for participants while contributing to the effectuation of the statutory rules and goals.

a. The materiality requirement should be reduced from 5% to 3%.

MPRA provides that the aggregate amount of benefit suspensions cannot materially exceed the level necessary for the plan to avoid insolvency. The proposed regulations, in turn, provide that this requirement is met “if an alternative, similar but smaller suspension of benefits, under which the dollar amount of the suspension for each participant were reduced by five percent, would not be sufficient to enable the plan to satisfy the requirement that the suspension be at a level that is reasonably estimated to enable the plan to avoid insolvency.” Prop. Reg. § 1.432(e)(9)(1)(d)(5)(iii). We believe that the threshold should be reduced to 3% to better protect retirees. The 5% materiality approach is borrowed from financial accounting and securities law, where 5% is often used as the threshold for materiality. But financial accounting and securities law is generally concerned with accurate disclosure to potential investors, customers, and creditors of a firm, while MPRA’s purpose and structure are to preserve critically and declining plans for participants. Given that retirees’ benefits are being cut to “rescue” plans, we believe that any cut will materially affect them. For this reason, we believe 3% is a more appropriate standard for materiality for this statute.

b. Future employment and contribution level information provided by a plan sponsor should be determined by an independent expert retained by the plan.

MPRA provides that required actuarial projections must be reasonable but the actuary may base assumptions on future covered employment and contribution levels on information provided by the plan sponsor, which must act in good faith in providing the information. The information provided by the plan sponsor is a prediction about the future and should be factually based. In this context, the “good faith” referred to by the statute cannot be merely a sincerely held opinion, but should be an objective and rigorously examined conclusion. We believe that this requires the retention of objective experts not associated with the plan. Moreover, we believe that in order to ensure objectivity, the retained experts should agree to serve in a fiduciary capacity. The plan sponsor and/or actuary should also be required to make publicly available the sponsor’s prior predictions concerning future covered employment and contribution levels.

c. Consistency in actuarial assumptions.

The proposed regulations require that there be a justification if a plan uses different actuarial assumptions for projecting future employment and contribution levels for purposes of determining declining and critical status than for purposes of determining whether a plan will avoid insolvency after benefit suspensions. We believe that the regulations should be modified to provide that there be a “persuasive” justification based on an independent expert opinion provided by a person or entity who agrees to give such opinion in a fiduciary capacity.

d. Plans that qualify for critical and declining status based on funding levels below 80%.

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 regulations should place further restrictions on acceptable actuarial assumptions in projecting whether a plan will become insolvent within a 20-year period. The

Department might want to consider specifying safe-harbor actuarial assumptions in such circumstances and to require a compelling justification from an actuary for use of non-safe harbor assumptions and to require the use of independent experts in assessing assumptions related to future employment and business trends relating to the plan.

e. Assumptions should be reasonable individually and in the aggregate.

The final regulations 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

f. Determination of whether plan has taken all reasonable measures to avoid insolvency.

MPRA lists nine non-exclusive factors that a plan sponsor must use in determining whether it has taken all reasonable measures to avoid insolvency (short of benefit suspensions). Some of these factors depend on assumptions about the future that the plan sponsor, given its potential conflicts of interest and possible lack of business forecasting experience, should not be given unfettered authority to make. We suggest that certain of the factual predicates (such as compensation levels of active participants relative to employees in the industry generally, competitive and other economic factors facing contributing employers, and the impact of benefit and contribution level on retaining participants and bargaining groups under the plan, and contribution increases on contributing employers) be determined by independent experts who agree to give such opinion in a fiduciary capacity..

3. Maintenance and review of post-suspension record.

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). We were pleased that the proposed regulations took this requirement seriously and provided that benefit suspensions would end if the plan no longer satisfied the conditions for benefit suspensions or if the record were not maintained. We believe that the final regulations should provide additional rules relating to how the record is kept and maintained, including provision for public access to the record; and rules relating to the procedure and timing for periodic review of the record.

4. Equitable allocation of benefit allocations

MPRA requires that benefit allocations be distributed equitably among groups of participants, beneficiaries and alternate payees. The statute includes a list of non-exclusive factors that the plan sponsor may consider in allocating benefit cuts. The proposed regulations, in turn, require that the plan treat individuals within a given group consistently; that differences in treatment among groups is based on relevant factors; that such factors are reasonably selected; and that such selected relevant factors are reasonably applied. The regulations provide illustrations of proper and improper allocations of benefit suspensions. In general, we applaud

the approach taken by the regulations and the illustrations should be helpful to plan sponsors in their decision on how to allocate benefit suspensions among participants.

We have, however, several specific comments that we believe will improve the equity of distribution of suspensions:

a. Benefit cuts generally should not disproportionately affect retirees.

We agree with the principle illustrated in Example 7 in section 1.432(e)(9)-(d)(6)(iv) of benefit cuts that disproportionately cut benefits of retired and deferred vested participants compared to active employees. Here it should be noted that even nominally level cuts on a percentage basis will disproportionately harm retirees on a present-value basis. Moreover, as we have noted, the trustees of the plan will often have structural conflicts that may infect their view of equity in distribution of cuts. We thus believe that the final regulations should set out a specific presumptive rule that will prohibit less severe benefit suspensions on active participants than on other participants unless the plan sponsor offers a compelling justification.

b. Consideration of other negotiated retirement benefits.

Several collective bargaining agreements now provide defined contribution plans in addition to defined benefit plans. Moreover, several labor organizations have expressed interest in negotiating new varieties of hybrid plans. Thus, active employees will sometimes have opportunities to prepare for retirement outside the plan for which benefit cuts are proposed. The existence of such plans and amounts contributing employers are putting into the plans for active workers should be added to the list of factors that trustees should consider in deciding how to allocate benefit suspensions.

c. Forms of benefits.

We also recommend that the final regulations clarify that, generally, reductions pursuant to MPRA should not depend on the optional form of benefit elected by the participant. Participants who elected a form of benefits before the effective date of a reduction should not get different treatment depending on what they elected, and, similarly, participants making elections among optional forms of payment thereafter should be able to make those elections based on their specific needs (such as spousal coverage), rather than how MPRA reductions are applied. This general rule could be subject to an exception that a reduction might apply to a subsidy but with two caveats. First, for participants in pay status who have thus already enjoyed a portion of the subsidy, the plan should consider the participants' expectations and vulnerability.

For example, assume two retirees with identical service are currently receiving an identical benefit, but one commenced retirement at age 60 on a fully subsidized benefit and the other commenced retirement at age 65. A reduction going forward will likely affect the two individuals in similar fashion, even though one of the retirees had received the benefits for an additional five years. The trustees should provide careful consideration to this impact and not focus solely on the differential, particularly with participants receiving relatively small benefits.¹

¹ In applying the limit based on 110% of the PBGC guarantee, we understand that the underlying guarantee may apply to a social security leveling option differently than it applies to a straight life annuity, so the trustees may be statutorily constrained in the manner reflected in Example 3 of Prop. Reg. section 1.432(e)(9)-1(d)(2)(v).

A second caveat is that no special class reduction is ever equitable for a subsidized qualified joint and survivor annuity. The original decision to subsidize such a benefit reflects a core plan benefit design decision and often was designed to encourage participants to select the joint and survivor benefit form and thus mitigate old-age poverty for the spouse. It would be wrong to apply a steeper reduction a subsidized joint and survivor benefit for widows or widowers already in pay status more than to a single life annuity. Such an action would undo the core benefit structure of the plan, which was not the intent of MPRA and would not conform to the statutory requirement that benefits suspensions be equitably apportioned.

d. Recognition of “financial vulnerability.”

We are pleased that the regulations specifically recognize that the special financial vulnerability of certain classes of participants is an important factor for the trustees. However, we would suggest that the final regulations go further and create a presumption that a distribution of benefit suspensions is not equitable if financial vulnerability was not considered by the plan sponsor.

5. Disability Benefits.

MPRA explicitly recognizes the special vulnerability of individuals who receive disability pensions. In our view, the proposed regulations correctly recognize that the disability benefit is the benefit paid during a period of disability and that any reduction of that amount, whether before or after regular or early retirement under the plan, violates the MPRA requirement.

6. Alternative Payees

The proposed regulations provisions on QDROs are helpful and we believe reach the correct results in applying appropriate age limitations, depending on whether the QDRO provides the alternate payee with a shared interest or a separate interest. We note that since some QDROs include elements of both shared and a separate interest formulas, the rules might address how the age limitations apply to such QDROs.

7. Participant Voting

MPRA requires that a proposed suspension of benefits be presented to the plan participants before it can be implemented. Unless a majority of plan participants vote against the proposed suspensions, the suspensions become effective following the vote. The plan sponsor prepares the ballot, which is then reviewed by the Department of the Treasury to ensure that it conforms to statutory criteria, which include a summary of comments received in opposition to the proposed suspensions.

We offer two sets of comments on participant voting: the ballot itself and the procedures related to the vote.

a. Comments on the ballot

i. Preparation of statement in opposition.

The plan sponsor, who has applied for approval of the benefit suspensions, prepares the ballot, including the summary of comments in opposition to the proposed suspensions. 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 review draft ballots prepared by the plan sponsor. Such a process could be coordinated through the Special Master and/or the PBGC's Plan Sponsor and Participant Advocate. The Special Master and/or the Plan Sponsor and Participant Advocate would review the participants' concerns and 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.

ii. Statement concerning the PBGC.

The statute and proposed regulations require that the ballot include a statement that the Pension Benefit Guaranty Corporation's insolvency could result in benefits lower than benefits paid in the case of insolvency. In order to avoid misleading participants, the statement should require that this statement be written by independent experts who give participants a comprehensive and objective picture of the PBGC's finances. This statement should inform participants that the PBGC has enough money to pay current obligations and would only face significant funding shortfalls beginning 10-15 years in the future if certain critical and declining plans were to become insolvent over the same time frame. Participants should be told that such a crisis could be averted if Congress took steps to pass legislation to provide additional money to the PBGC so that the agency can remain strong and can continue to assist financially-troubled multiemployer plans. Without such facts, we fear that participants will get a skewed picture of the PBGC which could frighten them into voting for cuts.

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

i. Electronic Voting.

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, as noted below, should generally be mailed first class certified mail return receipt requested and include instructions on how to make this election). If someone receives a ballot electronically, there should be affirmative confirmation that the individual has received the e-mail and been able to download the ballot.

ii. Period for voting.

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

iii. Accommodation for participants with cognitive decline.

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, the Treasury Department should consider a procedure in which a spouse or child could qualify to cast the participant or beneficiary's vote.

iv. Counting ballots.

The proposed regulations provide that participants that are not sent a ballot because the plan does not have the participant's address are treated as voting for or against the suspension in the same proportions for those who actually receive a ballot. We support this regulatory rule, which is necessary to ensure the integrity of the vote, and believe the same principle should apply to participants whose ballots are returned because of a non-current address or where there is no affirmative confirmation of a ballot delivered electronically..

8. 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. If such a rule is not put into place, it would open an easy strategy to evade the rules on benefit improvements for active employees.

We also recommend that the Department require that calculations of present value use actuarial assumptions no less favorable to retired participants than those used in projecting plan insolvency.

Finally, older retirees will have experienced larger losses from suspensions than similarly situated younger retirees. The benefit adjustments should therefore generally be weighted to reflect the amount of loss experienced as of the time of the benefit adjustment.

9. Communication with Participants.

i. Delivery of Notice.

The proposed regulations provide that the notice of suspension to participants may be provided in written, electronic, or other appropriate form to the extent it is reasonably accessible to those persons to whom notice is furnished. We strongly urge the Department to narrow the circumstances under which electronic notice can be provided to participants. Unlike many communications with participants, this communication will be sent to many older individuals, many of whom will not have access to or facility with electronic mail and documents. Moreover, the notice will be perhaps the most significant communication participants will have received from the plan, akin to notices sent to participants when a single employer plan is terminating or a multiemployer plan becomes insolvent. At the very least, we believe that the rules provided at 29 CFR Section 4000.15, which apply to PBGC notices, should be applicable to electronic delivery of notices to participants of proposed suspensions. Alternatively, if a plan uses

electronic filing, it should be required to send a hard copy to any participant who does not affirmatively acknowledge receipt.

ii. Notice should inform participants of counseling or other services.

Many participants will require assistance to understand the notice and its effects, and will also require assistance to comment on the proposed suspensions. We urge the Department's model notice to inform participants about the U.S. Department of Labor's Employee Benefits Security Administration's Benefits Advisors program, and the availability of U.S. Administration on Aging's regional pension counseling projects and the American Academy of Actuaries' Pension Assistance List (PAL), both of which furnish services without charge to participants in retirement plans.

10. The Retiree Representative.

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. We applaud the proposed regulations for encouraging smaller plans to consider the appointment of a retiree representative.

We urge the Department, however, to consider developing new rules which require that an independent expert work with the plan sponsor (i.e., the plan trustees) to appoint a retiree representative who is committed to meaningful representation of the retirees in this process. As it stands, the plan trustees have serious conflicts of interest that might affect their decision-making. How can trustees, who have made the decision to cut benefits, be expected to be neutral in choosing a retiree representative who would be opposing their interests? Indeed, we have heard reports from participants that a retiree representative already appointed by the trustees of a large pension fund has not been responsive to retiree concerns and does not appear to view her role as a forceful advocate for their interests. To address the conflict and to ensure that retirees have an adequate and effective voice at the table, 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 and the Special Master consult with the PBGC's Plan Sponsor and Participant Advocate to develop a fair selection process that truly protects retirees.

Respectfully submitted,



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