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H.R. 2830, the *Pension Protection Act of 2005*
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Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the provisions of H.R. 2830 that are aimed at reforming and strengthening the funding rules that govern multiemployer defined benefit pension plans. The Segal Company is an international employee benefits, compensation and human resources consulting firm that serves close to 30% of the nation's multiemployer pension plans. Our clients provide a secure retirement income for more than half of the workers covered by multiemployer plans.

I appear here on behalf of a broad coalition of plans, employers, employer associations and labor organizations that sponsor multiemployer plans. The Coalition has put forth a carefully negotiated, balanced proposal for multiemployer pension plan reform, which has evolved through the efforts of many of the system's largest stakeholders. It is important to note that they represent the overwhelming majority of employers and virtually all of the unions in the construction, trucking, entertainment, service and food industries, as well as the membership of the National Coordinating Committee for Multiemployer Plans (NCCMP), which directly represents over 600 jointly-managed multiemployer pension, health, training and other trust funds and their sponsoring organizations across the economy.

I am pleased to see that you will also be hearing today from Mr. Timothy Lynch, President of the Motor Freight Carriers Association, which is part of our Coalition. We are also hoping to welcome the supermarket industry, today represented by Mr. Scroggin, to the group, as our shared goals for multiemployer pension reform are much stronger than our current differences over the details of how to reach them.

The NCCMP is a non-profit, non-partisan advocacy organization formed in 1974 to protect the interests of plans and their participants following the passage of ERISA and the increasingly complex legislative and regulatory environment that has evolved since then. The Segal Company has been the technical advisor to the NCCMP since its formation; I have been a member of its Working Committee for 25 years.

Initially, I want to congratulate Chairman Boehner and his staff for the care that you have taken to address the special issues facing multiemployer plans as distinct from the single-employer issues and problems. We appreciate the considerable effort that you have made to understand the

special characteristics of multiemployer plans, the industries that support them and the labor-relations contexts in which they function, and to shape legislation appropriate for the multiemployer community rather than attempting to shoehorn multiemployer plans into the very-different single-employer requirements. We look forward to working together to refine the multiemployer provisions to be sure they achieve your goal and ours – stronger plans that do an even better job of meeting the needs of their participants, their employers and the industries that foster and sustain them.

Background

There are nearly 1600 multiemployer defined benefit pension plans in the country today. They provide benefits to active and retired workers and their dependents and survivors in virtually every area of the economy. Because of their attractive portability features, multiemployer plans are most prevalent in industries, like construction, which are characterized by mobile workforces. According to the latest information from the Pension Benefit Guaranty Corporation, multiemployer plans cover approximately 9.7 million participants, or about one in every four Americans who still have the protection of a guaranteed income provided by a defined benefit plan. With few exceptions, these are mature plans that were created through the collective bargaining process 40, 50 or even 60 years ago and have provided secure retirement income to many times the current number of participants since their inception. Although some mistakenly refer to them as “union plans,” the law has required that these plans be jointly managed with equal representation by labor and management on their governing boards since the passage of the Labor Management Relations (Taft-Hartley) Act in 1947.

This active participation by both management and labor representatives (many of whom are also participants in the plans) provides a clear distinction between single employer and multiemployer plans. Multiemployer plans are regulated not only under the tax and employee benefits laws and regulations and the watchful eyes of the Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation, with which all private-sector benefit plans must comply. In addition, they are subject to a second overlay of regulation, the federal labor-relations laws. Most important among these laws and regulations, the Taft-Hartley Act requires that the union and management fiduciaries who serve on these joint boards operate these plans for the “sole and exclusive benefit” of plan participants. This, of course, echoes and reinforces the capstone of ERISA, which imposes fiduciary obligations on plan fiduciaries that put at risk the personal assets of those who fail to meet their obligations.

It is estimated that over 65,000 employers contribute to multiemployer pension plans. The vast majority of these are small employers. For example, in the construction industry, which makes up more than 50% of all multiemployer plans (but just over one-third of the participants), it is estimated that as many as 90% of all such employers employ fewer than 20 employees. By sponsoring these industry plans, employers are able to ensure that their employees have access to comprehensive health and pension benefits and, through the jointly managed training and apprenticeship plans, the employers have access to a readily available pool of highly skilled labor, none of which would be feasible for individual employers to provide.

Funding for multiemployer plans comes from the negotiated wage package agreed to in collective bargaining. For example, if the parties agree to an increase in the wage package of \$1.00 per hour over three years, the \$1.00 may be allocated as 40¢ to the health benefit plan, 20¢ to pensions, 5¢ to the training fund and the remaining 35¢ taken in increased wages. Although for tax purposes the contributions that employers make to employee benefit plans are considered to be employer contributions, the funding comes from monies that would otherwise be paid to the employees as wages, health coverage or the like. Through collective bargaining the employees explicitly agree to take less in pay in order to fund the pension, so many of them feel as though they are making the contributions.

For the overwhelming majority of contributing employers, their regular involvement with the plans is limited to remitting their monthly payments to the trust funds as required pursuant to their collective bargaining agreements. For these small companies, the funds are the perfect substitute for making a large financial commitment to human resources functions, providing administrative services and meeting today's complex compliance requirements while providing economies of scale that would otherwise make such benefit plans unaffordable for small business. In effect, the employers have outsourced their employee benefits operations to the multiemployer plans and their labor-management boards of trustees.

Since the passage of the Multiemployer Pension Plans Amendments Act of 1980, participants of multiemployer plans have been covered by the benefit guarantee provisions of the PBGC. Unlike single employer plans, however, the PBGC is more like a reinsurer of last resort for multiemployer plans. Instead of having PBGC pick up the pieces when an employer goes out of business, all of the employers who contribute to these plans self-insure against the risk of failure by one another. Under the multiemployer rules, employers who no longer contribute, or cease to have an obligation to contribute to the plan, must pay their proportionate share of any unfunded vested benefits that exist at the time of their departure. This obligation, known as withdrawal liability, recognizes the shared obligations of employers in maintaining an industry-wide skilled labor pool in which employees may move among contributing employers dozens of times during their careers.

This system of shared risk has protected both the participants and the PBGC, as evidenced by the fact that it has had to intervene in fewer than 35 multiemployer cases over the past 25 years. The reduced risk to the PBGC is also reflected in a much lower premium for multiemployer plans - \$2.60 per participant per year, versus \$19 per participant per year plus a variable premium for single employer plans. The PBGC guarantees a much lower benefit for multiemployer plans. The guarantee formula is expressed as an accrual rate, with the maximum at \$35.75 per month per year of service. This works out to \$12,870 per year for a participant with 30 years of service, compared with a maximum guaranteed annual benefit for single employer plans of roughly \$45,000, for someone who retires at age 65. As of the last fiscal year, PBGC's multiemployer guaranty program showed a small deficit - about \$236 million - which was in fact an improvement over the prior year. So the multiemployer program, which covers more than 20% of the people with PBGC-guaranteed pensions, has a projected deficit equal to about 1% of that projected for the single employer program.

The multiemployer system of pooled risk and mutual employer financial guarantees has been both one of the greatest strengths and major weaknesses of the multiemployer system. In the early 1980s, the presence, or even the threat of withdrawal liability produced a chilling effect on the growth of multiemployer plans that has persisted in several industries despite the fact that most have had no unfunded benefits for most of that time. On the other hand, for many, the threat of unfunded liabilities provided an incentive to plan fiduciaries to adopt and follow conservative funding and investment policies that, in combination with a robust economy, led the plans to become fully funded.

Nevertheless, rather than being able to build a buffer against future economic downturns, this success led plans to experience problems at the top of the funding spectrum. In the late 1980s and throughout the 1990s, plans began to hit the full funding limits of the tax code. Under these provisions, employers that contribute to plans in excess of these limits were precluded from receiving current deductions for their contributions to the plans. Compounding the situation, employers who continued to make their contributions also faced an excise tax for doing so, despite the fact that the collective bargaining agreements to which they were signatory obligated them to continue to make them. Although in rare instances the bargaining parties negotiated “contribution holidays,” timing considerations and the fact that in most cases the plan fiduciaries and bargaining parties were different people meant that plan trustees had no choice other than to increase plan costs by improving benefits to bring plan costs up to the level of plan income to protect the deductibility of employer contributions. Further, once adopted, the actions taken to improve the plan of benefits in order to protect the employers cannot be rescinded under the anti-cutback provisions of ERISA. We estimate that over 75% of multiemployer defined benefit pension plans were forced to make benefit improvements as a result of the maximum deductible limits, even when the trustees were skeptical about being able to cover the costs in the long term. Overall, multiemployer plans were very well funded as the plans approached the end of the millennium, with the average funded position for all multiemployer plans at 97% (see *The Segal Company Survey of the Funded Position of Multiemployer Plans - 2000*).

In the three years that followed, however, these same plans, like all investors, suffered significant losses as the markets plunged into a deep and prolonged contraction. For the first time since the ERISA funding rules were adopted in 1974 – in fact, for the first time since before the beginning of World War II – the markets experienced three consecutive year of negative performance. Not only were plans unable to meet their long term assumed rates of return on their investments, like just about all investors the plans saw their principal decline. For many of these mature multiemployer plans that depend on investment income for as much as 80% of their total income, the loss of significant portions of the assets caused a rapid depletion of what for most had been significant credit balances in their funding standard accounts. The most recent Segal Company multiemployer funding report shows a significant decline from the 97% in 2000, although the average funded position is still relatively healthy at 83%. Nevertheless, these investment losses have left a number of plans at all levels of funding facing credit balances approaching zero, meaning these plans face a funding deficiency in the near future (see *The Segal Company Survey of the Funded Position of Multiemployer Plans – 2004*, attached). According to the most recent estimates, as many as 15% of all plans are projected to have a funding deficiency by the year 2008 and an additional 13% face the same fate by 2012 (assuming benefit levels and contribution rates remain unchanged).

The implications of a funding deficiency for contributing employers, the plans and their participants are potentially devastating. Once a plan's credit balance drops below zero, contributing employers may have to be charged additional amounts to make up the shortage so that the plan can meet its minimum funding requirements. This is above the amounts they have promised to pay in their collective bargaining agreements. In addition, they are required to pay an excise tax by the IRS equal to 5% of that assessment. If the full shortfall is not made up in a timely fashion, the excise tax may be increased to 100% of the shortage.

For many of the contributing employers, especially those in industries like construction that operate through competitive bidding and traditionally have small profit margins, they have bid their work throughout the year based on their fixed labor costs (including the negotiated pension contributions). For them, receiving an assessment for what could be multiples of the total contributed for the year, could be enough to drive them into bankruptcy. In this instance, the concept of pooled risk among contributing employers means that the shortage amounts as well as the excise taxes owed by the bankrupt employers would be redistributed among the remaining employers, invariably pulling some at the next tier into a similar fate. As more and more employers fail, those companies that are more financially secure begin to worry about being the "last man standing." The result is that they will also seek ways to abandon the plan before all of their assets are at risk. When all of the employers withdraw, the assets of the plan will be distributed in the form of benefit payments until the assets on hand are sufficiently depleted to qualify for assistance from the PBGC. At that point, participants' benefits will be reduced to the maximum guaranteed levels, as noted above, which are likely to represent only a fraction of the amount to which they would otherwise be entitled.

A Balanced, Negotiated Industry-Wide Response

Trustees of most plans faced with the prospects of an impending funding deficiency have already taken action to address the problem to the extent possible. For the most part, that has involved reducing future accrual rates or ancillary benefits that have not yet been earned, as the current anti-cutback rules prohibit reducing benefits that have already accrued, including all associated features such as early retirement subsidies and the like. In many cases, this has involved substantial reductions (e.g. 40% by the Western Conference of Teamsters, 50% by the Sheet Metal Workers National Pension Plan and the Central States Teamsters Pension Plan, and 75% in the case of the Plumbers and Pipefitters National Pension Plan). But financial impact of adjusting only future benefits is limited, especially for mature plans that have relatively small numbers of active workers earning new benefits. These actions on their own may be insufficient to avoid a funding deficiency. Moreover, it can be counterproductive to take too much away from the active workers, because they are the ones who must agree to increase funding for the pension plan.

Additionally, the modest recovery of the investment markets experienced in 2004 is only marginally helpful. For example, a \$1 billion fund in 2000 that suffered a 20% decline in assets through 2003 would have to realize an annualized rate of return of 15% every year for the remainder of the decade to get to the financial position by 2010 it would have had it achieved a steady rate of 7.5% for the full ten year period. Other relief, including funding amortization

extensions under IRC Section 412(e) or the use of the Shortfall Funding Method, have been effectively precluded as options by the IRS. Consequently, the only alternative available requires a legislative solution.

When the Pension Funding Equity Act of 2004 failed to give multiemployer plans short-term relief to help them over the current crisis, various groups began to evaluate alternatives. The objective was to find ways to strengthen plan funding to avoid or minimize risks that the trustees and the parties can control, and to provide additional tools to the plan fiduciaries and bargaining parties for plans that face imminent funding crises so that they can bring their liabilities and resources into balance. A broad cross section of groups that deal with many varieties of multiemployer plans from many different perspectives entered into extensive negotiations to develop a set of specifications for reform that all could agree on. The resulting specifications for reform reflect a carefully conceived compromise between employer and labor groups, undoubtedly quite different from what either group would have designed independently, but reflective of a desire by all parties to preserve the plans as valuable sources of retirement income security on a cost-effective basis. The result was the current coalition proposal, a copy of which is attached as an addendum to this testimony. Here is a summary of that proposal:

Summary of Coalition Proposal

The proposed specifications for multiemployer reform include three major components, supplemented with several clarifying and remedial changes intended to make the system work more effectively for plans, their participants and their contributing employers.

The first component is applicable to all multiemployer plans and has two major provisions geared to strengthening funding requirements for plan amendments that increase or decrease plan costs (specifically unfunded actuarial accrued liabilities) related to past service and to require that new benefits designed to be paid out over a short period, like 13th checks, be amortized over that payout period.

The other major provision would allow plans to build a “cushion” against future contractions in investments, and to save for the lean years when times are good, by increasing the maximum deductible limit to 140% of the current limits and repealing the combined limit on deductions for multiemployer defined benefit and defined contribution plans.

The second component of the Coalition proposal applies to plans that have potential funding problems, defined as those with a funded ratio of less than 80%, using the market value of assets compared to the actuarial value (as used for minimum funding) of its actuarial accrued liability. Such plans would be required to develop and adopt a “benefit security plan” that would improve the plan’s funded status. Plans in this category would not be able to adopt amendments to improve benefits unless the additional contributions related to such amendment more than offset the additional costs to the plan. Amendments that violate that restriction would be void, the participants would be notified and the benefit increase would be cancelled.

To provide additional tools to help multiemployer plans deal with looming funding problems, they would have “fast track” access to five-year amortization extensions and the Shortfall

Funding Method if certain criteria were met. IRS authorization could be withheld only in certain circumstances and applications would need to be acted upon within 90 days or the approval would be automatic. Additional restrictions that currently apply to plans with amortization extensions would also apply, although it would be clarified that plans could increase benefits if the result would be to improve the plan's funding because the increase generates contributions above and beyond the amounts needed to pay for the benefit increases.

The third and most critical component involves plans that have severe funding problems or will be unable to pay promised benefits in the near future. The intent is to prevent a funding deficiency that could trigger a downward spiral of the plan and its contributing employers and ultimately thrust the funding of the benefits onto the PBGC. This would be accomplished by providing the bargaining parties and plan fiduciaries with additional tools beyond those currently available to bring the plan's liabilities and resources back into balance.

The Coalition proposal modifies the current multiemployer-plan reorganization rules to provide a useful mechanism for plan sponsors, much like a Chapter 11 bankruptcy reorganization. ERISA currently has reorganization rules governing plans that are nearing insolvency, but those rules were adopted at a time when the major concern was a plan's ability to meet its payment obligations to current pensioners. Today, even those plans with the most severe funding problems have sufficient assets to meet their obligations to current pensioners. The Coalition proposal suggests several new triggers to reorganization that reflect the problems of mature plans, recognizing that funding ratios below 65%, a plan's short term solvency and a plan's demographic characteristics (i.e. the relationship between the present value of benefits earned by inactive vested and retired participants to that of currently active participants) can play an important role in a plan's ability to meet its obligations to all participants, current and future.

Once a plan is in reorganization, notice would be given to all stakeholders and the government agencies with jurisdiction over the plans that the plan is in reorganization and describing the possible consequences. Once in reorganization, plans would be prohibited from paying out full or partial lump sums, social security level income options for people not already in pay status, or other 417(e) benefits (except for the \$5,000 small annuity cashouts). Within thirty days, contributing employers would be required to begin paying a surcharge of 5% above their negotiated contribution rates. If the bargaining agreement covering such contributions expires more than one year from the date of reorganization, the surcharge would increase to 10% above the negotiated rate and remain there until next round of bargaining. Once in reorganization, the normal funding standard account continues to run, but no excise taxes or supplemental contributions will be imposed if the plan encounters a funding deficiency.

Not later than seventy-five days before the end of the first year of reorganization, the plan fiduciaries must develop a rehabilitation plan to take the plan out of reorganization within ten years. The plan would set forth the combination of contribution increases, expense reductions (including possible mergers), benefit reductions and funding relief measures (including amortization extensions) that would need to be adopted by the plan or bargaining parties to achieve that objective. Annual updates to the plan of rehabilitation would need to be adopted and reported to the affected stakeholders. Although the proposal anticipates the loosening of the current anti-cutback rules with respect to ancillary benefits (such as subsidized early retirement

benefits, subsidized joint and survivor benefits, and disability benefits not yet in pay status), a participant's core retirement benefit at normal retirement age would not be reduced. Additionally, with one minor exception which follows current law regarding benefit increases in effect less than 60 months, no benefit for pensioners already in pay status would be affected. Finally benefit accruals for active employees could not be reduced below a specified "floor" as a means of ensuring that the active employees whose contributions support all plan funding, remain committed to the plan.

The proposal anticipates that these ancillary benefits become available as part of a menu of benefits that can be modified to protect plans from collapsing under the weight of previously adopted plan improvements that are no longer sustainable, but that cannot be modified under the current anti-cutback restrictions. Without such relief participants would receive lower overall benefits on plan termination and the plan would be eliminated for future generations of workers. Within seventy-five days of the end of the first year a plan is in reorganization, the plan trustees must provide the bargaining parties with a schedule of benefit modifications and other measures required to bring the plan out of reorganization under the current contribution structure (excluding applicable surcharges). If benefit reductions alone are insufficient to bring the plan out of reorganization, the trustees shall include the amount of contribution increases necessary to bring the plan out of reorganization (notwithstanding the floor on benefit accruals noted above). The trustees shall also provide any other reasonable schedule requested by the bargaining parties they deem appropriate.

The bargaining parties will then negotiate over the appropriate combination from among the options provided by the trustees. Under this proposal, benefits for inactive vested participants are subject to reduction to harmonize the impact on future benefits for this group as well as for active participants.

The proposal includes suggestions for: bringing the current rules on insolvency in line with the proposed reorganization rules; strengthening withdrawal liability provisions; and providing construction industry funds with additional flexibility currently available to other industries to encourage additional employer participation. It also includes provisions that address recent court rulings. One suggested change would allow trustees to adjust the rules under which retirees can return to work and still receive their pension benefits and another would confirm that plans can rescind gratuitous benefit improvements for current retirees adopted after the date they retired and stopped generating employer contributions.

The Challenge

For more than half a century, multiemployer plans have provided benefits for tens of millions of employees who, using standard corporate rules of eligibility and vesting, would never have become eligible. They offer full portability as workers move from one employer to another, in a system that should be held out as a model for all defined benefit plans. More importantly, the system of collective bargaining and the checks and balances offered by joint employer – employee management has enabled the private sector to take care of its own without the need for government support.

Yet the current funding rules, previously untested under the unprecedented unfavorable investment climate experienced in recent years, have the potential not only to undermine the retirement income security of millions of current and future workers and their dependents, but to force large numbers of small businesses out of business and eliminating participants' jobs.

Your Committee has an ideal opportunity to enact meaningful reform supported by both the employer and employee communities, who have coalesced behind a responsible proposal that will enhance plan funding and provide safeguards to plans, participants, sponsoring employers and the PBGC, without adding to the already burgeoning debt. We know that our proposal is unlikely to be the last word, of course, and we embrace the opportunity to work with the Committee and with others, including others in the private sector with a stake in multiemployer plans, to strengthen and polish the ultimate result. Along those lines, there are a few points regarding the way H.R. 2830 adapts the ideas that have been put forth that we believe deserve mention at this stage.

Section 202 of the Bill contains new funding and other requirements for multiemployer plans that are in "endangered" status that go well beyond what the Coalition has recommended for plans facing potential funding problems (colloquially referred to as the "Yellow Zone"). While we think there may be some merit in further tightening the reins on plans that may be heading for serious trouble, it is important that the standards not be so stringent that they could create insupportable costs for employers and thereby harm rather than help with plan funding. With that in mind, we are continuing to work with all concerned to come up with workable targets and correction mechanisms to help endangered plans to recover.

Section 202 also creates a new category – multiemployer plans in "critical" status – which is set up to address the special problems of plans that are near the brink of failure. As noted, the Coalition agrees that a program like this is needed (in our proposal, it takes the form of a redesigned approach to plan reorganization). However, the role of plan trustees at this point is vital to plan survival and, we believe, they need additional authority to restructure and revitalize seriously troubled plans substantially beyond what is proposed in H.R. 2830. Again, we anticipate working with you and your staff to come up with a suitable solution to these important policy questions, as well as to deal with the inevitable technical issues that arise in any legislative effort in this extraordinarily complex area.

Conclusion

The Coalition understands that whatever legislation is ultimately passed will include some provisions that are distasteful to the employers, the employees or both, because it will of necessity be a compromise. Our aim is to make sure that, in the end, the environment for multiemployer plans will be improved, so that they, their contributing employers and their participants are all well-served. The alternative is not the continuation of the status quo, but a much worse fate that includes: the loss not only of accrued ancillary benefits, but a substantial portion of a participant's normal retirement benefit as plans are assumed by the PBGC; the demise of potentially large numbers of small businesses and the loss, not only of pension benefits, but the jobs from which such benefits stem; and an increase in taxpayer exposure at the PBGC, an agency that is already overburdened.

In closing, I would like to thank you for taking the time to engage in this important discussion and for the opportunity to be with you here today.

Multiemployer Pension Plan Coalition

Specifications for Multiemployer Pension Funding Proposal

5/10/2005

I. For All Multiemployer Plans

A. Faster funding

- Ten-year amortization of the net increase or decrease in unfunded actuarial accrued (past service) liability (AAL) due to a plan amendment increasing or decreasing benefits.
- If the increase or decrease in AAL results from an amendment adding a benefit (not payable as a life annuity) that is payable over less than 10 years, amortization over the benefit payout period.

B. Deductibility

- The deduction limits for negotiated employer contributions to multiemployer pension plans would be 140% of the otherwise applicable funding limits spelled out in IRC section 404(a)(1).
- The combined limit on deductions for defined benefit and defined contributions would be repealed for multiemployer plans.

II. Multiemployer Plans with Potential Funding Problems

A. Trustee-Designed Program for Funding Improvement

- If, as of the first day of a plan year, a multiemployer plan's funded ratio is less than 80%, the trustees shall design and adopt a benefit-security program that is reasonably expected to improve the plan's funded status. The benefit-security program shall be adopted by the due date, plus extensions, and filed with the plan's Form 5500 for that first plan year, and shall be updated and modified annually thereafter until the plan's funded ratio reaches 80% or more.

B. Restrictions on Amendments Increasing Past Service Benefits

- If a multiemployer plan's funded ratio would be below 80% after taking into account an amendment increasing the amount or value of the plan's AAL (benefits related to past service), the amendment is prohibited unless--

- 1) the plan is not in reorganization and will not be put into reorganization as a result of the increase, *and*
- 2) reasonably anticipated employer contributions for the plan year equal or exceed the sum of the plan's normal cost plus the annual payment needed to amortize either --
 - a) the increase in the plan's unfunded AAL attributable to the benefit increase over a 10-year period and the remaining (pre-existing) unfunded AAL over a 20-year period, *or*
 - b) interest on the plan's unfunded actuarial accrued liability (including liability attributable to the benefit increase) and the plan is not projected to have a funding deficiency by the end of the 10-year period.

Technical Notes: Paragraph a), above, is determined as if all the provisions of the plan amendment and the current contribution rate or, if applicable, the ultimate (last) contribution rates provided for under the then-current collective bargaining agreements take effect on the first day of such year.

The actuarial determinations under a) or b) may be based on a reasonable estimate of the plan's AAL and normal cost as determined in the actuarial valuation for the preceding plan year. For purposes of applying 2), any credit balances are not taken into account.

Enforcement of benefit restrictions. A benefit increase that violates the above restrictions would be void, and the participants would have to be notified that the benefit increase is cancelled.

C. IRC Section 412(e) Extensions of Amortization Period

- Fast-track extensions for multiemployer plans. The Secretary shall grant a 5-year extension of amortization periods to a multiemployer plan that demonstrates, with such supporting documentation as the Secretary may require, that the plan:
 - 1) is projected, using reasonable actuarial assumptions, to have a funding deficiency within 10 years, unless benefits are reduced, contributions are increased and/or the amortization extension is granted; *and*
 - 2) has developed and is carrying out a formal remedial plan that, in combination with the amortization extension, would improve the plan's long-term funded status, including the ratio of assets to accrued liabilities, and prevent the funding deficiency from materializing ("Remedial Plan"); *and*

- 3) would require substantially greater benefit reductions or contribution increases in the absence of the extension to avoid the funding deficiency, *and*
 - 4) is projected to have enough assets to meet its anticipated cash-flow needs if the extension is granted.
- The extension shall be granted unless, within 90 days, the IRS denies it on the ground that the submission is incomplete or that the actuary's analysis or projections are erroneous or unreasonable.

Technical Note. If a rejected submission is resubmitted within 30 days, the initial 90-day IRS consideration period, plus an additional 45 days, applies. If a plan fails to take the steps described in its remedial plan (including modifications in the remedial plan that are agreed to by IRS), the fast-track amortization extension would expire as of the first day of the plan year following the failure and the remaining unfunded portion of each charge would be amortized over the remainder of the original amortization period, in accordance with the regular funding rules.

All of the conditions of IRC section 412(e) (as modified below) apply to a fast-track extension.

- Additional provisions regarding benefit restrictions for multiemployer plans receiving an amortization extension under IRC section 412(e). The existing section 412(e) benefit restrictions would apply. To encourage increased net contributions to the plan, a benefit increase would be permissible if the enrolled actuary certifies (and submits the supporting demonstration) that the additional charges to the funding standard account attributable to the benefit increase would be lower than the projected increase in credits due to a contribution rate increase that takes effect no later than the effective date of the benefit increase. A contribution increase can only be counted against the cost of a benefit increase if the added contributions were not identified in the remedial plan as a source of the plan's improved funding or, if so identified, if the related benefit increase was addressed in the plan as well.

D. Shortfall funding method

- A multiemployer plan may adopt the shortfall funding method, or go off the shortfall method, once every five years, without IRS permission, but only if it is not currently on a fast-track extension of amortization period under IRC section 412(e).

Technical Note. In the legislative history to ERISA, Congress called on the IRS to create the shortfall funding method to protect employers from a funding deficiency between collective bargaining sessions (but not for more than 5 years).

The proposed change would not affect the plan's ability to adopt an IRS-approved funding method without consent, or to adopt or go off shortfall before the end of a 5-year period with IRS consent.

- Prohibition on Benefit Increases. Amendments increasing benefits would be restricted in a plan that elects an automatic change to the shortfall method in the same manner that they are restricted in a multiemployer plan that has an amortization extension under IRC section 412(e).

III. Multiemployer Plans with Severe Funding Problems -- Reorganization

A. In General

- Plan reorganization is a process, like Chapter 11 of the Bankruptcy Code for a corporation, that provides a plan with additional tools to bring its benefit promises and resources into balance.
- A plan enters reorganization if it is expected to have a funding deficiency or to be unable to pay promised benefits in the near term (B, below).
- A plan in reorganization has latitude to reduce benefits (other than core benefits payable at normal retirement age) (E., F., below), and employers that contribute to such a plan must make additional contributions but are temporarily protected from unaffordable contribution increases resulting from funding deficiencies. (D, below).

B. Reorganization Triggers. A multiemployer plan is in reorganization as of the first day of a plan year (and remains in reorganization for at least 2 plan years) if the plan's actuary certifies, by a date no later than 2-1/2 months before the end of the prior plan year, that any one of the following tests is reasonably projected to be met:

- 1) Solvency/funded-ratio test: assets at market plus anticipated contributions equal less than 7 years' projected benefit payments plus administrative expenses and, as of the first day of the plan year, the plan's funded ratio is less than 65%, *or*
- 2) Short-term solvency test: assets at market plus anticipated contributions equal less than 5 years' projected benefit payments plus administrative expenses, *or*
- 3) Funding deficiency/funded-ratio test: plan is projected to have a minimum funding deficiency for any of the following 3 plan years (without regard to any applicable amortization extension under IRC section 412(e)) and, as of the first day of the plan year, the plan's funded ratio is less than 65%, *or*
- 4) Short-term funding deficiency test: plan is projected to have a minimum funding deficiency for either of the following 2 plan years (without regard to any applicable amortization extension under IRC section 412(e)), *or*

5) Contribution/funding deficiency test: As of the first day of the plan year--

- projected contributions for the year are less than the sum of the plan's normal cost for the year plus interest on the unfunded liabilities (regular minimum funding assumptions for assets and liabilities), *and*
- the present value of the benefits of retired and terminated-vested participants is greater than the present value of the benefits of active participants accrued by the date of the calculation, *and*
- the plan is projected to have a funding deficiency for any of the 3 following plan years (without regard to any applicable amortization extension under IRC section 412(e)).

Technical Note: The actuarial determinations must be reasonable projections as of the first day of the plan year for which the plan will be in reorganization, with the value of the plan's accrued liabilities based on the actuarial assumptions used for ongoing plan funding. The projections may be based on the valuation for the plan year immediately preceding the plan year for which the determination is being made, or, if that valuation has not been completed by the end of the 6th month of the plan year, a reasonable projection of the liabilities determined as of the valuation date for the plan year preceding that one. The projected value of assets shall be the market value of the assets as of the last day of the 6th month of the plan year preceding the year for which the determination is being made (based on the most reliable information available to the trustees as of the determination date), projected forward at the plan's assumed earnings rate.

C. Reorganization: General Requirements

- Notice would have to be given, by the end of the first month that the plan is first in reorganization, to the participants, contributing employers, unions, employer bargaining representatives and the PBGC, IRS and DOL that the plan is in reorganization, with a description of the possible consequences.
- Trustees must develop a rehabilitation plan as is discussed in greater detail in Subsection G that would take the plan out of reorganization within 10 plan years. The rehabilitation plan (including the schedules described in, G, below) would describe the combination of contribution increases, expense reductions (including possible mergers), funding relief measures and benefit reductions (including benefit reductions permitted because the plan is in reorganization) that would be adopted or proposed to the bargaining parties, to achieve this. The rehabilitation plan must be filed by 2-1/2 months before the end of the first plan year that the plan is in reorganization. If within 60 days of the due date for the rehabilitation plan the Trustees have not agreed upon a plan, then any Trustee may require the

plan to enter into an expedited dispute resolution procedure to determine the rehabilitation plan.

- If, under all of the circumstances, emergence from reorganization within that time frame is not reasonably possible, the rehabilitation plan would describe the alternatives considered, explain why emergence from reorganization is not feasible, and lay out steps to be taken to postpone insolvency or otherwise resolve the matter.
- A summary of the rehabilitation plan and each yearly update would have to be distributed to participants and employers with the annual multiemployer plan funding notice. The full document would be available to them upon request.

D. Funding Requirements for Plans in Reorganization

- Thirty days after the plan provides the contributing employer with notice of its reorganization status, there will be automatic employer contribution surcharges as follows:
 - The first year, the surcharge is 5% of the contribution rate required by the collective bargaining agreement.
 - The second year and thereafter while the plan is in reorganization, the surcharge is 10% of the contribution rate required by the collective bargaining agreement.
 - The surcharge will terminate upon the execution of a new collective bargaining agreement which adopts a schedule of benefits published by the trustees pursuant to the rehabilitation plan.
- The plan shall have a statutory cause of action to collect surcharges.
- Surcharge contributions may not be the basis for benefit accruals.
- Normal funding standard account continues to run during reorganization except there will be no excise taxes or additional contributions if a funding deficiency occurs while a plan is in reorganization.

E. Benefit Restrictions for Plans in Reorganization

- Effective as of the first day of the plan year that the plan is in reorganization, the plan shall not pay the following to people retiring on or after that date: lump sums, partial lump sums, social security level-income payments or other 417(e) benefits, except for \$5,000 small-benefit cashouts.

- The IRC section 412(e) restrictions on benefit increases apply.

F. Benefit Reductions for Plans in Reorganization

- In General: Core benefits payable at normal retirement age will be protected as provided under current law. However, the anti-cutback rules will be revised to permit limited modifications of certain protected benefits, as follows:
- The otherwise-prohibited benefit reductions that would be allowed while a plan is in reorganization would be limited to:
 - 1) “benefits, rights and features” (e.g., post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, early retirement benefits and the like),
 - 2) retirement-type subsidies (including, e.g., unreduced QJSA), early retirement benefits and payment options other than the 50% joint-and-survivor benefit and single-life annuity, and
 - 3) as provided under current law, benefit increases that would not be eligible for PBGC’s guarantee on the first day of reorganization because they were adopted or, if later, took effect less than 60 months before that.
- Except as provided above, the accrued benefit at normal retirement age could not be reduced under the plan reorganization rules.
- Except for rescission of recent benefit increases, the reorganization rules would not authorize reduction in protected benefits of participants who were in pay status one year before the first day of the year the plan enters reorganization. .
- Benefit reductions made under the special authority of plan reorganization would be reflected in the minimum funding standard account but not in withdrawal liability calculations; surcharges would not be reflected in the employers withdrawal liability allocations.

G. Procedures for Benefit Modification

- By 2-1/2 months before the end of the plan year in which a plan goes into reorganization, the Trustees must provide to the negotiating parties a sliding schedule of benefit modifications and contribution increases that would meet the rehabilitation plan. At a minimum, the Trustees must provide the parties with the following schedules:
 - 1) A schedule of the benefit cutbacks and other measures required to bring the plan out of reorganization if there are no further increases in contributions to the plan. If the plan cannot emerge from reorganization without contribution

increases, then the Trustees shall provide a schedule showing the amount of contribution increase necessary to bring the plan out of reorganization assuming all benefits are cut back to the extent permitted by law, provided that future accrual rates are not reduced below an accrual rate equivalent to a) 1% of the contributions made with the respect to the participant's work or, b) if the current accrual rate on the effective date is less than 1% then no less than the current accrual rate.

- In the event the parties do not adopt a schedule approved by the trustees then the trustees shall impose this schedule as the default schedule except that the mandatory surcharges described at Subsection D above shall remain in effect.
 - If the employer refuses to comply with the default schedule then at the discretion of the Trustees that employer's participation in the plan may be terminated in which case the employer will be deemed to have withdrawn or if applicable, partially withdrawn.
- 2) Upon the request of the bargaining parties the trustees shall provide a schedule of the contribution increases and other measures required to bring the plan out of reorganization assuming there are no cutbacks in protected benefits, *and*
 - 3) The trustees may, in their discretion prepare and provide the bargaining parties with any additional schedules that they deem appropriate for the parties' consideration.
 - 4) The schedules required in this Subsection shall in the discretion of the trustees be updated periodically to reflect the experience of the plan, but not less than once every three years. A schedule that has been adopted by the bargaining parties through the collective bargaining process shall remain in effect for the duration of the collective bargaining agreement.
- For active participants, the Trustees' decision to implement a benefit cutback would be driven by the contribution obligation negotiated by the parties, i.e., the impact on each group will depend on what they negotiate. The Trustees shall include an allowance for funding other participants' benefits in the schedules provided to the bargaining parties, and shall reduce their benefits to the extent permitted hereunder and deemed appropriate based on the plan's overall funding status and prospects in light of the results of the parties' negotiations.

IV. Insolvency

- A. As under current law, the plan administrator would have to perform a PBGC-prescribed solvency valuation for the first year the plan is in reorganization and at least every 3 plan years thereafter. If, as a result of one of these valuations, the plan is expected to become insolvent by the end of the 5th following plan year, annual insolvency valuations must be performed.

- B. If the current market value of available plan assets (without regard to expected contributions and earnings) is equal to no more than 5 years of projected benefit payments, accrued benefits may be reduced to the level necessary to postpone insolvency by another 3 years, but in no event below the PBGC-guaranteed level. Any such reductions in accrued benefits must be matched by proportional reductions in the rate of future accruals.
- C. In the year a plan becomes insolvent, accrued benefits must be reduced to the level supportable by the plan's available plan assets, but not below the PBGC-guaranteed level.
- D. These requirements would run parallel to the plan reorganization rules and whatever rehabilitation measures the Trustees take pursuant to those provisions.

V. Definitions

- A. For purposes of IRC Sections 412(e), 412(f), 412(o), the plan reorganization rules and the comparable ERISA sections plus section 204(h), "plan amendment", in the case of a multiemployer plan, means an amendment to the plan or related documents adopted by the Board of Trustees.
- B. For purposes of the new provisions of the Code and ERISA added by this legislation, unless otherwise specified,
 - 1) except with respect to the rules in I.A., "actuarial accrued liability" and "normal cost" are determined based on the unit credit actuarial funding method,
 - 2) the value of plan liabilities is determined using the actuarial assumptions described in IRC section 412(b) that have been or are expected to be used for the plan year for which the determination is being made, and
 - 3) A plan's "funded ratio" is the ratio of the market value of its assets to the actuarial value of its actuarial accrued liability.

VI. Withdrawal Liability Reforms

- A. Strengthen and clarify withdrawal liability rules for all plans
 - Repeal ERISA section 4225, which reduces or subordinates withdrawal liability claims under various circumstances involving employer liquidations.
 - Repeal ERISA section 4219(c)(1)(B) which arbitrarily limits an employer's withdrawal liability payments to twenty years of payments.

- ERISA section 4205 should be amended to make clear that an employer who performs work formerly covered by a pension plan incurs partial withdrawal regardless of whether the employer uses employees of a third party to perform the work.
- B. Repeal the special trucking-industry rule.
- C. Rationalize withdrawal liability rules for construction plans, by extending to them the following rules applicable to other plans.
- Ability of trustees to adopt a “5-year free look”
 - Ability to amend the withdrawal-liability allocation rules to re-start presumptive-rule pools when plan as a whole is fully funded, to eliminate old remnants of individual employer’s liability.

VII. Miscellaneous Other Issues

- A. *Heinz* fix, modeled after Alaska Teamsters fix – trustees would be allowed to adopt stricter benefit-suspension rules applicable to people who retire after adoption of the stricter rule – retroactive to 1/1/1976.
- B. *Sheet Metal* fix: multiemployer plans can rescind benefit increases for retirees adopted after the date of retirement.

VIII. Effective dates

Unless otherwise specified, the effective date would be the first day of the first plan year beginning after enactment. New sections I.A and II.B – tougher standards for benefit increases – would not apply to previously negotiated benefit increases which restore benefits lost due to benefit cuts adopted between 2000 and the date of enactment, if, in connection with (and at the time of) the benefit reductions, the plan document, trust agreement or related documents promised to restore lost benefits if contributions were increased. Section II.D. – adoption of shortfall funding method – would be effective as of the 2003 plan year (retroactive filing of Schedule B permitted).