Major Issues to be Reconciled in Conference between the *Pension Security and Transparency Act of 2005* (S. 1783) and the *Pension Protection Act of 2005* (H. R. 2830)

Overall structure of the legislation

- While both bills contain much of what the Coalition needs to achieve multiemployer reform, the Senate bill structure is more workable, from a technical standpoint.
  - Example: The Senate bill contains more realistic timeframes and procedures for determining a troubled plan's status and developing/implementing the necessary corrective program.
- Thus, the Coalition supports using the Senate bill as the starting point.

Funding provisions

Critical-Status Plans Must Have The Ability To Reduce Non-Core Benefits

- The Conference Report must include the House provision that allows critical status plans to protect normal retirement benefits at normal retirement age by reducing unaffordable ancillary, non-core benefits and collecting temporary contribution surcharges from employers.

Excise Tax/Sanctions for Failure to Comply

- The Conference Report must combine elements of the House and Senate bills to ensure that the sanctions for troubled plans are directed only at plans and parties that fail to take the steps required by the new funding requirements.

- Both bills contain some sanctions that would inhibit the plan's recovery by punishing responsible plans and parties.
  - The excise tax in the Senate bill punishes all employers in a plan that fails to meet the benchmarks, regardless of the reason;
  - The House bill pushes plans into critical status (e.g., if actuary fails to certify).

- The Coalition suggests sanctions clearly targeted at parties who fail to comply with their obligations under the funding rules, without hurting responsible plans and parties:
  - Monetary sanctions are imposed on the plan trustees if they fail to adopt, update or carry out their duties under the funding improvement or rehabilitation plan.
  - Bargaining parties can sue to compel the trustees to adopt the required corrective program.
  - A "default" schedule of contributions and related benefit reductions is imposed if employers and unions fail to bargain the funding called for by the improvement/rehabilitation plan. An employer that does not comply must pay an excise tax on the unpaid contributions, in addition to other sanctions (e.g., liquidated damages) for the delinquency.

Trustees Should Not be Required to Consider Certain Employers' Interests in Developing Rehabilitation Plans

- The Senate bill's requirement that the impact on employers with fewer than 500 employees be taken into account would, for the first time, create an exception to the ERISA requirement that plan fiduciaries act solely in the interest of plan participants and beneficiaries. While the well-being of the industry that supports a multiemployer plan is an appropriate concern, a mandate that singles out the interests of any one class of employers over others could undermine the plan as a whole.

Amortization extensions

- While both bills increase the interest rate used by a plan that has an amortization extension to the plan funding rate, the House bill sets the interest rate at 150% of the federal mid-term rate, if that is higher than the plan rate.
  - The use of an interest rate higher than what the plan uses for funding penalizes a plan that requests an amortization extension, which is, for multiemployer plans, the counterpart to a funding waiver for single employer plans.

- The Conference Report should follow the Senate bill grandfather language, which would grandfather amortization extensions applied for before June 30, 2005, whenever they are granted, and modifications of such extensions. Since many extension applications filed years ago are still awaiting IRS action, shutting the door on extensions approved after that date would unfairly distinguish between similarly situated plans, based solely on the date the IRS decides to act on the amortization request.

Withdrawal liability provisions

The withdrawal liability provisions need to be carefully updated. Workable withdrawal liability rules are especially necessary when plans face funding problems, to make sure that some employers do not "work the system" to escape their obligations and leave the plan costs for payment by other employers. Accordingly:

- The Conference Report should follow the House bill and repeal ERISA section 4219(c)(1)(B), which arbitrarily cuts off an employer's withdrawal liability payments at 20 years (even if more is owed).

- The Conference Report should follow the House bill and repeal the special trucking industry rule, which has become outdated and harmful as the result of changes in the industry -- especially deregulation -- in the 25 years since MPPAA was passed.

- The Conference Report should follow the House bill, which prevents an employer from evading partial withdrawal liability by outsourcing operations to a non-signatory company.

- The Conference must reject any proposal that favors one group of small employer (by setting arbitrary limits on withdrawal liability) at the expense of the remaining small employers. Over 90% of all employers that contribute to multiemployer plans are small businesses who should not be saddled with additional liabilities that are redistributed to them as a result of such favorable treatment.

- The House bill has a provision that excuses certain employers from making interim liability payments if the plan's claim is based on a transaction to evade or avoid liability and is asserted either 2 or 5 years after the transaction, depending on the employer's size. A better approach, which protects both withdrawing employers and plans, would be to modify procedures for future transactions and require notice and the posting of a bond or letter of credit for the payments that otherwise would be required in these circumstances.

Disclosure provisions

- The Senate bill's effort to increase transparency for all interested parties could be stymied unless certain technical changes are made to ensure that the disclosure requirements are feasible and practical. Two major areas of concern:
  - The requesting party can require that the plan prepare a summary of financial reports prepared by investment professionals or other fiduciary. The plan should have the option of providing summaries (but not be required to do so).
  - Clarification is needed with respect to the extent to which a plan must provide communications from its actuaries, including "sensitivity testing".
    - Requiring disclosure of actuarial studies performed for planning purposes may discourage sophisticated projections and thorough advance analysis.
    - The Conference Report should confirm that an "actuarial report", which must be disclosed on request, refers to the actuary's valuation and supporting explanation (including certifications and projections of the plan's funding status based on current conditions) but not any commentary on options for benefit modifications and similar trustee considerations.

Effective Date

- The funding provisions of the House bill are effective for plan years beginning on or after January 1, 2006; the Senate bill is effective for plan years beginning on or after January 1, 2007

- Plans will need significant "lead time" to digest and implement the new requirements.

- The Coalition suggests the rules not take effect until January 1, 2007, and that the Conference report include the provisions in the Senate bill that "grandfather" responsible actions previously taken by trustees.