What's New With Withdrawal Liability?

Lawyers and Administrators Meeting
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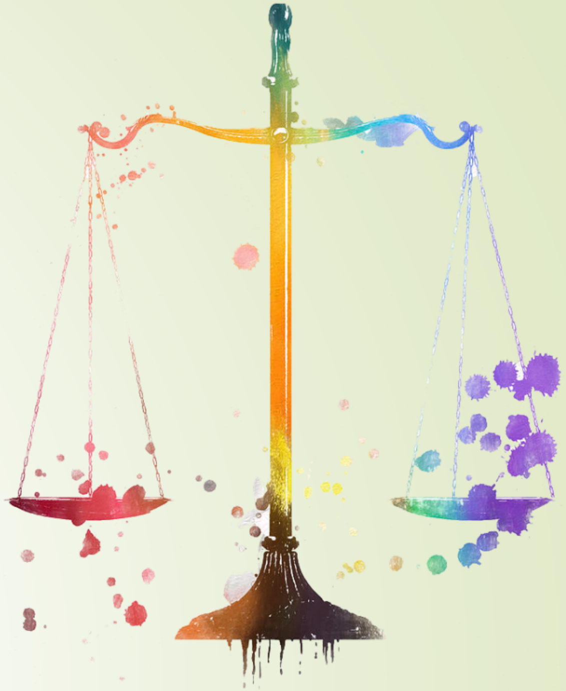


Litigation Topics

- *Discount Rate Challenges*
- *Binding Effect of Trust Amendments*

Discount Rate Litigation

- *New York Times*
- *Manhattan Ford*
- *Energy West*
- Every Other Withdrawal Liability Challenge Since the District Court's *New York Times* Decision

The New York Times Company v. Newspaper and Mail Deliverers'-Publishers' Pension Fund, Case Nos. 18-1140(L), 18-1408 (2nd Cir.)

- The Employer argued it is *per se* illegal to use a different discount rate for valuing liabilities for withdrawal liability purposes from the assumed earnings interest rate used for minimum funding purposes.
- The Arbitrator rejected the Employer's argument and upheld the Plan's use of the Segal Blend.
- The District Court also rejected the Employer's argument, but 1) determined that the Plan had not met its burden of demonstrating why a different rate was appropriate; and 2) the arbitrator had committed "clear error" by not so finding.

The New York Times Company v. Newspaper and Mail Deliverers'-Publishers' Pension Fund, Case Nos. 18-1140(L), 18-1408 (2nd. Cir.)

- On appeal, the Employer stuck to its original argument.
- Supporting the Employer are United Natural Foods, Inc., Metz Culinary Management, Inc., Joseph Abboud Manufacturing Co., US Foods, Inc., Waterford Hotel Group, LLC, General Dynamics Corporation (jointly), and Ruprecht Company.
- Supporting the Plan are Segal, the PBGC, and the NCCMP.
- The case is fully briefed, oral argument is set for May 22, 2019.

Manhattan Ford Lincoln, Inc. v. Auto Workers Local 259 Pension Fund, 331 F.Supp. 3d 365 (D.N.J. 2018)

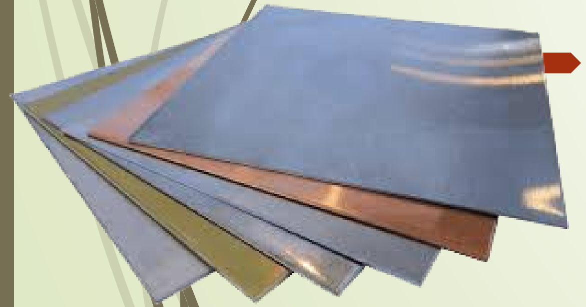
- The Employer used the same argument as in *New York Times*.
- The Arbitrator rejected the argument and upheld the use of the Segal Blend.
- In reviewing the award, the district court:
  - Agreed with the arbitrator that the law does not require the discount rates for minimum funding purposes and for withdrawal liability be the same; and
  - Found that the Employer failed to meet its burden to prove that use of the Segal Blend was unreasonable.
- The Employer appealed but withdrew the appeal.

UMWA 1974 Pension Plan v. Energy West Mining Co., C.A. Nos. 1:18-cv-1905-RJL, 1:18-cv-2085-RJL (D.D.C.)

- The Employer argued that Plan's use of PBGC termination rates was improper, and that an intermediate rate based on corporate bonds should be used.
- The Arbitrator found that the Employer failed to meet its burden to show that use of the PBGC rates was unreasonable or did not represent the actuary's best estimate of Plan experience.
- The decision is under review by the USDC for DC.

Trust Amendments – *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Four-C-Aire*, No. 17-2295 (4th Cir.)

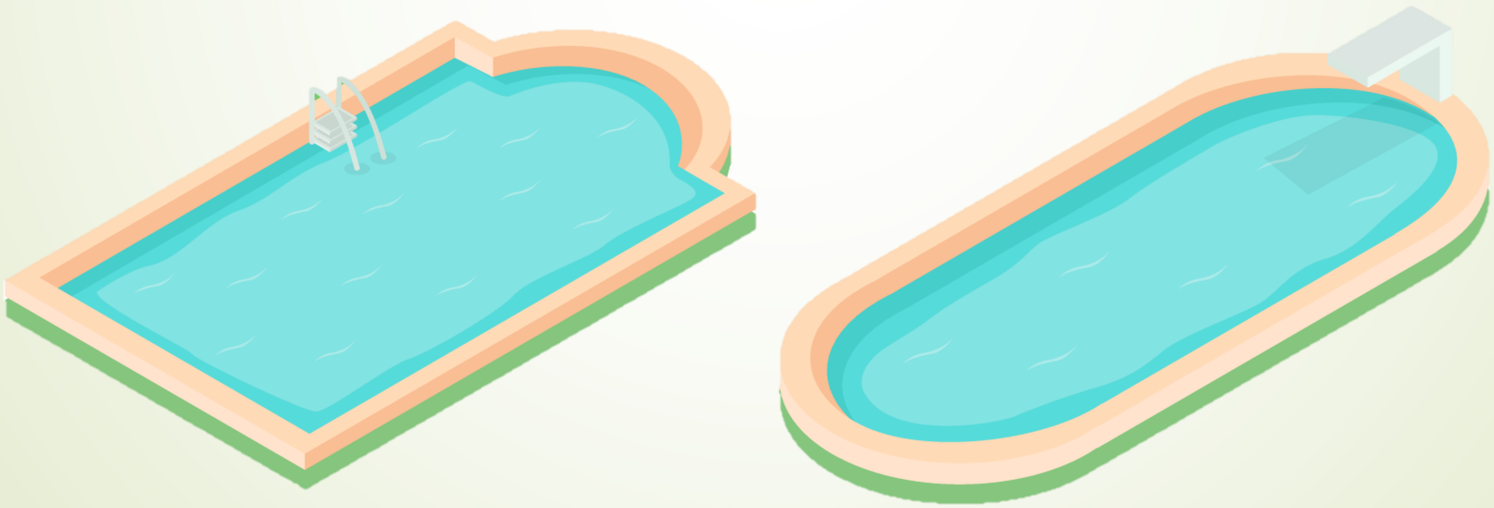
- Employer signed a "me-too" agreement adopting the terms of the Area Agreement.
- The Area Agreement obligated the employer to contribute to the Plan, and bound it to the Trust Agreement and any amendments.
- The Trustees amended the Trust to impose Exit Contributions on employers withdrawing but who did not have to pay withdrawal liability because of the *de minimis* exception.
- Following withdrawal, the Plan sued for the Exit Contribution.



SMWNPF v. Four-C-Aire, No. 17-2295 (4th Cir.)

- In district court, the Employer moved to dismiss because the Exit Contribution applies post-expiration, which is barred by *M&G Polymers v. Tackett,* 135 S. Ct. 926 (2015).
- The district court agreed and dismissed, but also concluded that:
  - The Employer could not be bound to a provision of a Trust Agreement to which it had not agreed.
  - The Plan failed to plead that the amendment had been properly adopted.
- The appeal has been fully briefed and argued.

Two-Pool Withdrawal Liability Arrangements



Two-Pool Withdrawal Liability Arrangements

General Information

- What is a two-pool withdrawal liability arrangement?
  - Alternative method for allocating unfunded vested benefits ("UVBs") and possibly alternative terms and conditions (e.g. payment amount and duration)
  - Employers are separated into different UVB pools (old employer pool and new employer pool)
  - Could provide current employers the option of move from the old employer pool to the new employer pool (this is referred to as "jumping")
    - Includes payment of frozen old employer pool withdrawal liability and possible relief from other liability and contribution requirements

Two-Pool Withdrawal Liability Arrangements
Advantages

- What are some advantages of a two-pool withdrawal liability arrangement?
  - May attract new employers
    - Significantly reduces a new employer's exposure to legacy unfunded liability
    - Alternative plan design could reduce chance of UVBs developing in the future
  - Incentivize current employers to maintain participation
  - Address long-term solvency issues by maximizing plan income

Two-Pool Withdrawal Liability Arrangements

Typical Candidates

- What plans are *typical* candidates for a two-pool arrangement?
  - Larger plans (process can be complex, time consuming, expensive)
  - Critical (and declining) plans
  - Plans <u>not</u> in the building and construction industry
  - Plans with potential new employers or current employers with financial resources to “jump”

Two-Pool Withdrawal Liability Arrangements

Considerations

All Two-Pool Withdrawal Liability Arrangements	Allow "Jumping"

• UVB allocation method
• Benefit design
• Funding policy
• Investment policy
	• <u>Old Employer Pool Settlement</u>
	  • Withdrawal liability amount
	  • Payment amount
	  • Payment duration
	  • Required duration of participation in new employer pool
	  • Concession on future contribution rate increases
	  • Contingent on minimum amount of adoption by old employers

Two-Pool Withdrawal Liability Arrangements

Request for PBGC Review

- A two-pool withdrawal liability method requires approval from the PBGC for an alternative UVB allocation method
  - A plan may – but is not required to – request that the PBGC review alternative terms and conditions for the satisfaction of withdrawal liability
  - Regardless, the PBGC will consider alternative terms and conditions when it evaluates the alternative UVB allocation method
- PBGC welcomes informal consultations with trustees and their advisors in advance of a request for review

Two-Pool Withdrawal Liability Arrangements

Request for PBGC Review

No Jumping

- Alternative UVB allocation method only
- PBGC is regularly approving these types of methods
- Less complexity results in a quicker PBGC review

With Jumping

- Alternative UVB allocation method
- Alternative terms and conditions
- PBGC is placing additional scrutiny on these methods
- Application and approval process is more extensive, expensive, and lengthy

Two-Pool Withdrawal Liability Arrangements

Alternative UVB Allocation Method
Approval Process

- Prior to submitting a request for review to the PBGC:
  - Trustees must adopt the alternative UVB allocation method
  - Employers and employee organizations must be notified of the change
- Request for review must include information described in 29 C.F.R. § 4211.22
  - It may be helpful to include:
    - Reasons why the Trustees are seeking the change in UVB allocation method
    - The Plan actuary's expectations on how the alternative method could help the plan
    - A copy of the plan's most recent actuarial valuation report
    - If applicable, a copy of the plan's funding improvement plan or rehabilitation plan

Two-Pool Withdrawal Liability Arrangements

Alternative UVB Allocation Method
Approval Process

- PBGC must determine that the method does not significantly increase the risk of loss to plan participants and beneficiaries or to the PBGC itself
- Items to consider:
  - Must allocate total plan UVBs
    - What about potential surplus position in new employer pool?
    - Collapsing pools
  - Controlled groups
  - Mass withdrawal liability

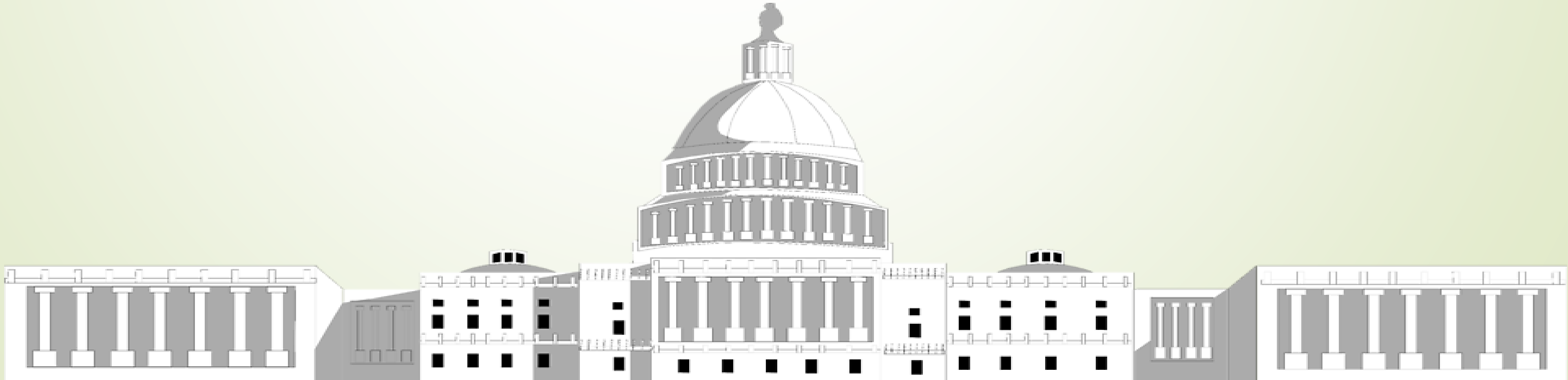
Two-Pool Withdrawal Liability Arrangements

Alternative Terms and Conditions

- A plan may use alternative terms and conditions to satisfy withdrawal liability without PBGC approval
- Alternative rules must be otherwise consistent with ERISA and PBGC regulations
  - While the PBGC has not issued regulations on this topic, they released a Policy Statement on April 4, 2018
  - Rules must be applied uniformly to each employer, but special provisions may be made to reflect the creditworthiness of an employer [Section 4214 of ERISA]

Two-Pool Withdrawal Liability Arrangements
Implementation

- What are some implementation issues to be aware of?
  - Assets and liabilities associated with the old employer pool and new employer pool will need to be tracked separately
    - Employer contributions from “old” vs. “new” employers
    - Benefit payments associated with service with “old” vs. “new” employers
  - Potential alternative benefit design under the new pool



Two-Pool Withdrawal Liability Arrangements

Helpful Source Material

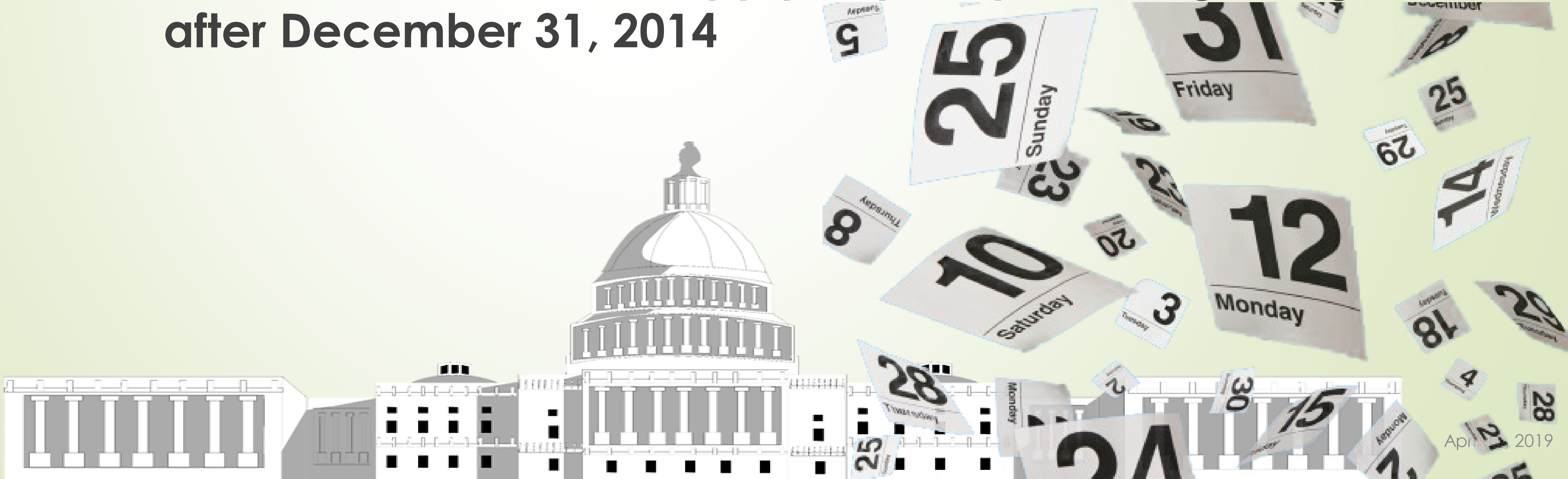
Reference	Summary
Section 4211(c)(5) of ERISA	Section of ERISA that provides PBGC the authority to approve alternative UVB allocation methods
Sections 4219(c)(7) and 4224 of ERISA	Sections of ERISA that allow a plan to adopt rules providing for other terms and conditions for the satisfaction of withdrawal liability
29 C.F.R. §§ 4211.21 – 4211.23	PBGC regulation that provides guidance on applying for alternative UVB allocation methods
82 FR 1376-1380	PBGC Request for Information: Two Pool Withdrawal Liability
83 FR 14524-14527	PBGC Policy Statement: Requests to Review Multiemployer Plan Alternative Terms and Conditions To Satisfy Withdrawal Liability

Implications of PBGC Proposed "Methods for Computing Withdrawal Liability, MPRA of 2014"

- Applicability dates
- Actuarially-determined contribution increases
- Proxy group method

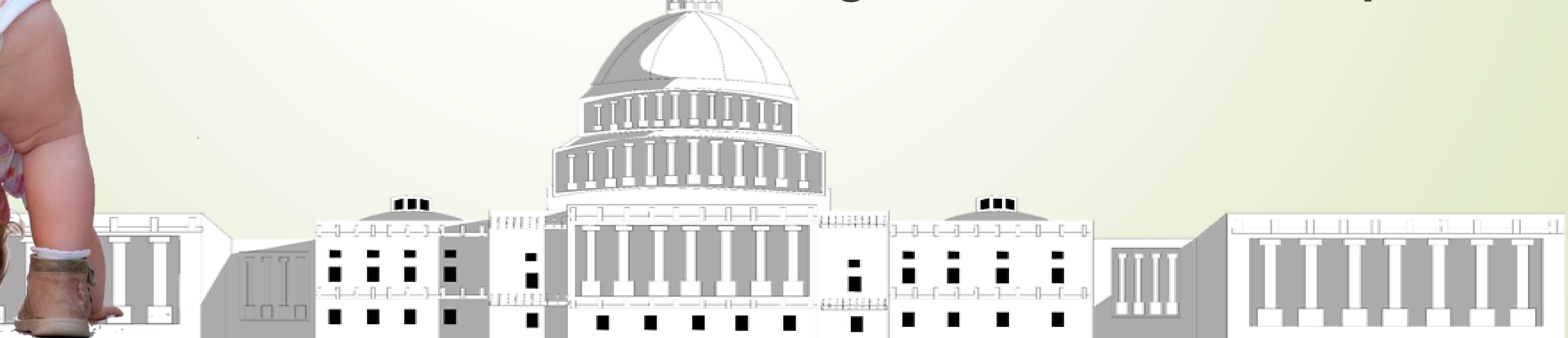
Applicability Dates

- Changes relating to simplified methods apply to employer withdrawals after effective date of final regulation
- Changes related to MPRA benefit suspensions and contribution increases apply to plan years beginning after December 31, 2014



Applicability Date Concerns

- Mid-plan year implementation possible dependent on effective date of final regulation
- Retroactive application
  - Many plans have adopted calculations methods in the absence of comprehensive guidance
  - Highly problematic when employers have withdrawn since 2014
  - Additional administrative, legal, and actuarial expenses

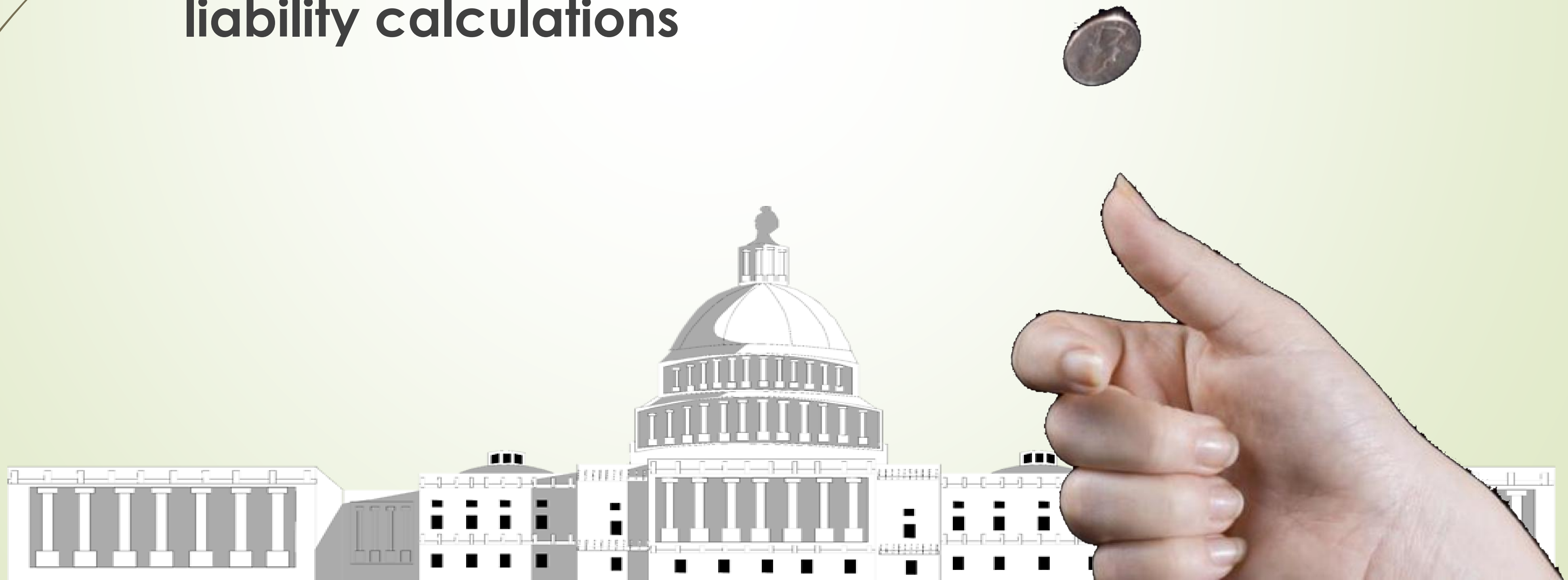



Other Retroactivity Concerns

- Clarification of Technical Update 10-3
  - Basic, reallocation, and affected benefit pools are aggregated before reflecting de minimis reduction and 20-year payment cap

Actuarially-determined Contribution Increases

- The proposed regulation requires certain actuarially-determined contribution increases recognized for future benefit accrual purposes to be included in withdrawal liability calculations



Actuarially-determined Contribution Increase Concerns

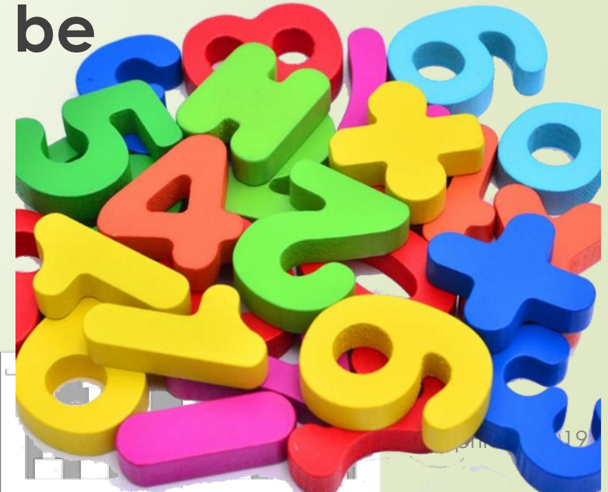
- Administrative complexity and additional actuarial expense for employer-by-employer calculations
- Percent-of-contribution benefit formulas with benefits earned on the entire contribution
- Supplemental non-benefit bearing contribution increases

Proxy Method

- Recognizes frequent occurrence of multiple contribution schedules under a FIP or RP
- Recognizes administrative burden of accounting for each employer
- The proxy method allows grouping of employers with similar history of total contribution increases and disregarded contribution increases

Proxy Method Concerns

- Definition of proxy groups
  - A single employer may have bargaining groups in different contribution schedules
  - Potentially large variations within a single contribution schedule
- Data required to determine "adjusted contributions" (that is, contributions that would have been made excluding contribution increases that must be disregarded)



Questions and Discussion