Pension Plan De-risking: Fiduciary Protection of Retirees

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Talking Points:

Pension plan de-risking is when a defined benefit pension plan sponsor pays an insurance company to assume the monthly payments of pension benefits. Employees and retirees may be offered a one-time lump-sum payment in lieu of a monthly annuity benefit. Ever since General Motors and Verizon made headlines with their mega-billion-dollar annuitization deals in 2012, the movement for defined benefit plan sponsors to "de-risk" by transferring their pension obligations to commercial insurers has not let up.

The NRLN urges Congress to amend and extend DOL policy relating to the fiduciary standards under ERISA for selecting an annuity provider, as set forth in DOL Interpretive Bulletin 95-1, as follows:

- **Congress should require** that following a transfer of assets to settle liabilities for a subgroup of participants – whether by group annuity purchases or by lump sum buy-outs – **the on-going plan must be as well funded as it was prior to a transaction**.
- **If the entire plan is not terminated pursuant to ERISA Section 4041, after review and approval by PBGC, the plan has a fiduciary duty to continue to hold the annuity contracts as a plan asset,** so that retirees do not lose PBGC or other protections. The IRS should provide guidance that the distribution of a group annuity contract is a form of benefit distribution requiring consent.
- **Alternatively, the plan sponsor can choose to permanently transfer its liability for individual retirees to a qualified annuity provider, as if the plan were terminated, but only if it complies with both of the following two safe harbor requirements:**
  - **The plan seeks and obtains the affirmative consent of individual retirees**. Retirees who do not consent must have the option to remain participants.

The plan must purchase reinsurance from a separate and highly-rated insurer to guarantee the payment of benefits, in case of default. This should protect individual participants from the permanent loss of benefits that occurs to the extent the total value of their annuity exceeds state insurance guarantee funds, which can fall far short of PBGC maximum coverage levels and vary widely from state to state.

As part of either safe harbor, three additional protections should be required:

- the purchase of the annuity contract – and any reinsurance purchased to satisfy the safe harbor above – should be subject to DOL's safe annuity rule standards.
- the plan sponsor must send formal notification to plan participants 90 days prior to the transaction, with specific disclosures about the impact on participants.
- If the agencies do not act, Congress should at a minimum require plan sponsors to maintain back-up insurance, either from the PBGC or a highly-rated reinsurance carrier.

With respect to any lump sum buy-outs offered to participants, DOL should clarify fiduciary responsibilities to make complete and plain English disclosures concerning the financial trade-offs, including tax implications and the higher cost of purchasing an individual annuity contract.

For more information on this subject, contact Alyson Parker at 813-545-6792 or executivedirector@nrln.org

Pension Plan Risks in Mergers, Acquisitions and Spin-offs

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Talking Points

- Certain corporate transactions – particularly mergers, acquisition and/or spin-off of under-performing subsidiaries – increase the risk of a distress termination of a pension plan and lost benefits for retirees.
- Congress needs to update a number of ERISA provisions to ensure that both pension spin-offs and the merger of pension plans following merger and/or acquisition activity do not unnecessarily increase the risk of a distress termination and permanent pension losses for plan participants.
- The stakes are high for workers and retirees when an under-funded pension plan is terminated. Most retirees in single employer pension plans continue to receive their monthly benefit from the PBGC. However, when an under-funded pension plan terminates it can impose an ***immediate and permanent loss of income*** on beneficiaries.
- As globalization and the acquisition of American companies by foreign firms and investors becomes increasingly common, there is a particular concern about the PBGC's ability to deter plan terminations by, or recover assets from, foreign-owned or foreign-based plan sponsors and named fiduciaries.
- Unfortunately, the PBGC and other federal regulators lack the tools to protect retirees from unnecessary and severe terminations. ERISA's outdated and narrow protections create a number of gaps that harm retirees and worsen the PBGC's deficits.
- These tools are neither broad enough in scope nor flexible enough to deal with an under-funded plan. There are major gaps in the law that undermine efforts to prevent a pension plan from default.

The NRLN recommends six changes for legislation, regulatory reform and stepped-up enforcement:

1. **Congress should give regulators broader and more flexible authority under Section 4042(a) to negotiate or seek court approval for a more tailored remedy, short of plan termination**, to address spin-offs or other transactions that greatly increase the risk of future loss to the PBGC and participants.

2. Congress should further amend Section 4042(a) to authorize the PBGC to initiate proceedings to terminate a plan, or seek an alternative remedy short of plan termination, if a spin-off, controlled group break-up, takeover by a foreign entity or other corporate transaction transfers 20% or more of the plan's benefit liabilities without a commensurate and sufficient transfer of assets.

3. Congress needs to clarify that the PBGC has the authority to enforce a lien against all U.S.-based assets of the parent company of a foreign-owned plan sponsor even if those other assets or subsidiaries are not considered part of the controlled group sponsoring the plan.

4. The Department of Labor should revise its regulations to **clarify that fiduciaries under ERISA – especially contributing sponsors and "named fiduciaries" – must be subject to the jurisdiction of federal district courts for the enforcement of judgments for potential breaches of fiduciary duty**.

5. Congress should **add the proposed transfer or spin-off of pension assets or liabilities to a foreign controlled group or entity to the list of transactions requiring an Advance Notice of Reportable Events, triggering special scrutiny under the PBGC's Early Warning Program.**

6. Congress should require that intra-firm plan mergers are reportable events, as ERISA originally required, that require review and pre-approval of PBGC, particularly if any of the plans are in at-risk status, as NRLN proposes in a separate white paper on *Defined Benefit Pension Plan Mergers*.

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