August 18, 2015

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

CC:PA:LPD:PR (REG-102648-15)
Room 5205
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: RIN 1212-AB29, RIN 1545-BM66, RIN 1545-BM73

Dear Ms. Alice C. Maroni and Mr. J. Mark Iwry:

On behalf of AARP, the largest non-profit organization representing our 38 million individuals age 50 and older and all older Americans, please accept these comments on the interim final rules issued by the Pension Benefit Guaranty Corporation (PBGC) and the Department of the Treasury (Department) establishing guidelines for implementing the Multiemployer Pension Reform Act of 2014 (MPRA).

At the outset, we note the unfortunate and unprecedented nature of this process. For over forty years, pension law has been clear -- pension promises are a legally earned benefit –if a worker in an employer-sponsored plan provides his/her labor over a working lifetime, then the employer will set aside sufficient funds to pay out earned pension income during retirement. The one exception is for an employer that goes out of business or declares bankruptcy. In these circumstances, Congress created the PBGC to provide a guaranteed level of benefits financed by premiums and terminated plan assets. In single employer plans, the plan must be terminated and the PBGC pays guaranteed benefits of up to approximately $60,000 a year under a priority system that protects retirees and workers closest to retirement age first.

MPRA applies to approximately 1,400 jointly sponsored union and employer plans, but departs from current law – and the single employer process -- by permitting the parties of a severely underfunded plan to reduce retiree pensions as the plan deems "equitable"

rather than increase contribution requirements. For the first time under pension law, a plan is permitted to reduce already earned and vested benefits -- with no requirement that the employer is ceasing operations or even no longer profitable. In fact, under MPRA, a plan with profitable participating employers could cut retiree pensions.

MPRA was passed with minimal Congressional consideration and almost no public opportunity to review the bill before it was passed. As we stated in our prior comments on MPRA guidance, the PBGC and the Department should make every effort to work with the severely underfunded multiemployer plans to find alternative solutions that do not impose painful cuts in the modest incomes of elderly retirees. These former workers did everything they were asked to do, and many have no alternative sources of income. The applicable unions, employers, and active workers have options other than cutting earned pensions and should be encouraged to make every effort to find reasonable sacrifices other than MPRA's unfair shift of the burden of saving the plan to the backs of retirees. The process is inherently an adversarial and conflicted one – the plan, union and employers are encouraged to cut the elderly retirees to spare themselves. The PBGC and the Department's rules must take the necessary steps to ensure fair due process as the agencies provide the only oversight to protect many retirees from sudden poverty.

AARP opposed the passage of MPRA and is working with all interested parties to prevent its damaging effects on retirees and their families.

With respect to the interim final regulations, we offer the following comments:

PBGC Partition Process -- There are a limited number of severely underfunded plans that are well known to the PBGC. PBGC should have an open and welcoming process so that plans and the PBGC have the flexibility to find mutually agreeable solutions. Plans need to feel free to contact the PBGC and vice versa.

As we stated in our previous comments, PBGC and troubled plans should always explore merging with stronger plans and merger should be a first resort consideration. PBGC should quickly issue updated merger procedure guidance.

The PBGC and troubled plans should also consider partition if the PBGC determines that the cost of a partition does not unduly impair its financial status and partition can help the participating employers meet their obligations and ensure workers and retirees receive promised retirement benefits.

AARP does not believe plans should have to apply for maximum benefit suspensions to be eligible for partition. If PBGC believes it has no flexibility on the level of retiree cuts, it should ask Congress to modify this element of MPRA. We agree that partition should not endanger PBGC's finances and are confident PBGC can protect its financial solvency.

PBGC's final rules also should consider requesting additional information for mergers and partitions. We suggest PBGC would need to know the amount each employer is contributing, as well as whether each employer is current or delinquent in making contributions, and if delinquent, by what amount. PBGC also should look back at least ten years, especially given that the economic crisis from 2008 through 2013 may not be an

accurate measure, and sufficient pre- and post-crisis data is needed to fairly evaluate a plan and its funding capabilities.

Retiree Representative -- The rules are largely silent on the role of the retiree representative despite the fact that this might be the most important person in the process for vulnerable workers and retirees. The rules should expand the retiree representative role, with clear functions and duties, and ensure that this person is a daily source of help for the affected workers and retirees. The rules should require that the representative be someone who is fully qualified and available when needed to advocate for the retirees. The retirees should have an opportunity to designate their representative and only if there is no retiree candidate should a trustee -- whose interests are often adverse to the retirees -- be permitted to designate a representative.

The rules should further elaborate the contact person(s) at the PBGC and Department who will be available to assist and respond to any concerns raised by the retiree representative. There should be clear processes for who provides information to the retiree representative and where and when the representative should report on his or her efforts to the PBGC and the plan. In order to monitor the effectiveness of the MPRA process, the retiree representative should submit a periodic report to the retirees and the Department and the Department should consider the reports before approving a plan application for retiree cuts. The retiree representative also should assist in drafting and approve the vote ballot. The representative should be notified of any missing participants and beneficiaries and assist in trying to locate them. As this is a largely new and untested position, the Departments should regularly check in with all retiree representatives and ensure that they understand their roles and are successfully carrying them out. The representative should serve as long as needed and his/her tenure should not be a plan decision.

If workers and retirees have questions or believe there have been mistakes in their benefit information or calculations, to whom should they turn? The Department and PBGC need to have clear rules and processes to ensure that the retiree representative, PBGC participant advocate, PBGC, and Department are fully available to assist workers and retirees. Workers and retirees should know who is available to assist them and where to find that person.

We understand the Department has engaged Kenneth Feinberg to assist the Department. The Department needs to make his duties and contact information fully available to every affected worker, retiree and beneficiary. Participants and beneficiaries should have easy access to all sources of help and their contact information at all reasonable times.

Actuarial Assumptions/Reasonable Measures/Equitable Distribution of Cuts -- The interim final rules largely deferred to the assumptions of the plan sponsor and plan actuary. While we strongly disagree with the Department's decision, we offer two additional qualifications. First, the Department should monitor the variances between plan actuarial and other assumptions to look for patterns of standardization and outlier assumptions between plans and industries. The Department should question and ask for modifications of any assumptions that deviate from recommended or typical actuarial

practices. Second, the Department should require that plans provide information on profitable employers contributing to the plan. The Department should not permit plans with many financially profitable employers to escape their pension promises simply because they did not make sufficient contributions to the plan. The Department needs to request adequate information to understand the prior and current funded state of the plan, but also the financial ability of the contributing employers to fund their promises.

The Department requires plans to provide the plan's actuarial assumptions and also to assume that results could be 1% and 2% worse than assumed. The Department also should require plans to assume results could be 1% and 2% better than expected. In any case in which the plan is not far from solvency (the Department proposes a 5% variance standard), the Department or the PBGC should work with the plan to determine if the plan could continue alone or merge with another plan without invoking benefit suspensions under MPRA.

The interim rules also propose to largely defer to the plans to demonstrate that the plan took all reasonable measures to avoid insolvency. As we stated earlier, the Department must assume that this is an adversarial process and the plan is not acting on behalf of retirees. MPRA specifically included a strong role for the Treasury Department in order to make sure plans are not manipulating their underfunded status to protect the active workers and the plan. The proposed rules are far too deferential to the plans. Treasury has an obligation to ensure fair due process for the retirees.

The Department must have some benchmarks to prevent fraud or gaming. There are industry standards and averages for payroll and defined benefit pension contributions. If employers are contributing above the average for defined benefit pensions that should be credited. But, if employers are contributing below the average for their industry and the employer is profitable, it should not be claimed that they have taken all reasonable measures to avoid benefit reductions. Plans with below industry average contributions should be required to take reasonable measures to increase contributions before they are permitted to reduce retiree pensions. Plans with above industry average contributions should be considered for partition first.

Disability Benefits -- We applaud the Department's sensitive efforts to try to fully protect vulnerable disabled retirees. We raise one additional disability circumstance, not addressed in the rules. We understand some retirees may first have become eligible for Social Security Disability Income (SSDI) or possibly even workers' compensation before transitioning to their plan's disability, early or normal retirement benefits. We urge the Department to also protect these disabled retirees and ensure that if a plan encouraged or permitted injured workers to first receive government sponsored disability benefits before or coordinated with plan benefits, these disabled retirees will not be penalized because of their plan structure and usage of these earned disability benefits.

Participant Notices -- While we believe that the Department and plans should use model notices whenever available, we believe the proposed models should be improved in several ways. The proposed models, while technically accurate, are long with few subheadings or highlighting. The Department should add bolded subheadings for key

topics and highlight important information. The Department should test the models with actual retirees.

Participants and beneficiaries should always be timely informed -- both by the plan and retiree representative -- on plan, PBGC or Treasury decisions. The plan and PBGC should maintain up-to-date information in a highlighted place on their website and send written notices as needed to ensure participants and beneficiaries are timely and accurately informed of the status of any potential changes to their plan. All communications should have email and telephone contacts. Participants and beneficiaries should not be denied key information and generally should not be charged for information important to their retirement benefits. All notices should be filed with the Department and put on the Department's website in a prominent and easy to find place with other relevant plan information.

Participant Voting -- The interim final rules largely adopted the plan interpretation of who can vote on retiree pension cuts. The statute says "a majority of all participants and beneficiaries of the plan". The plans want to ensure that non-voting participants and beneficiaries are effectively counted as votes in support of retiree cuts. The Department created a small compromise by providing a pro-rata rule, non-voters are counted proportionately to those who voted. While better than the plan preference, we believe the Department could and should interpret the statute to count votes solely based on those who actually voted. The Department also should prohibit plans from counting participants and beneficiaries positively for whom the plan has no address or an unverified address. Given our concern with the Department's rules on electronic distribution of information (below), we believe there is a high likelihood that some retirees will never see the information about the cuts or voting, and thus we strongly believe the burden should be on the plan to demonstrate that it successfully notified all participants and beneficiaries and the plan should in no way be rewarded because it failed to find or notify a participant.

As recommended earlier, the retiree representative should both participate in drafting and approving the voting ballot.

Electronic Disclosure -- The Department largely punts to its existing rules on electronic disclosure and authorizes plans to interpret these rules on the method of information delivery. Given the extremely sensitive nature of this information and the plan's strong disincentive to notify retirees about benefit cuts, it is troubling for the Department to abdicate a strong role in ensuring that important information is timely, clearly, and successfully delivered to all workers, retirees, and their family members. The Department should strengthen the rule to require at least three attempts to find a participant, plans should report all non-located participants and beneficiaries to the retiree representative and the Department, and plans should provide information in the format the retiree requests. Plans also should be required to notify the Department how they notified participants and beneficiaries and how they determined the delivery method preferred by the participants and beneficiaries.

Ongoing Oversight -- Given the deep financial pain that the proposed cuts are likely to cause, the Department, and the retiree representative if one is appointed, should maintain a strong ongoing role to ensure that the process and implementation is as fair as possible. AARP urges the Department to modify the final rules so that the plan, whose

interests are adverse to the retirees, cannot terminate the retiree representative. The Department should make the determination, on a plan by plan basis, whether the representative's assistance is still needed by the retirees.

Government Websites -- Recognizing the adversarial nature of the MPRA, it requires significant plan and process information be posted on the PBGC and Department websites. Recent attempts to access information have not found easily displayed MPRA information or documents. The PBGC and the Department should create special main page sections on their respective websites where all MPRA documents will be timely and prominently displayed and searchable. (For example, see the separate government websites for information on the Affordable Care Act or the Department of Labor's Fiduciary rule).

We are not commenting on the Department's rules for benefit improvements for the simple and straightforward reason that it should be clear – given the hardship such cuts will cause to those who stand to lose already earned benefits with little recourse -- that any benefit or funding improvements should first go to any retirees whose benefits are cut.

Thank you in advance for your consideration of these comments.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs