National Retiree Legislative Network

Washington D.C. Fly – In Legislative Agenda Priorities

September 15–17, 2009

PENSION ASSET PROTECTION and PENSION FUNDING RULES

Protection of Defined Pension Plan Assets:

Currently, corporations are allowed to take pension assets from defined pension plan trusts and use these funds to pay for corporate restructuring, specially they make lump sum payments of, typically, six(6) months or twelve (12) months pay to employees to agree to retire within a specific time widow or on a specific date.

Numerous cases have been exposed where companies have been paying pension payments to executives whose pensions exceed IRS defined pension payment limits from defined plan trust assets. The excess over the limit should be paid from operating expenses.

Investment firms, including hedge funds, have lobbied to persuade Congress to give them the power to buy and manage defined pension plan trust assets. The NRLN feels these investment firms are too risky to be trusted with pension funds.

The NRLN's proposed refinements to the Pension Protection Act of 2006 are vital to the continued protection of plan assets and PBGC viability, and to the generation of surplus assets that can be used to offset corporate health care costs or be available for Cost of Living Adjustments (COLA's).

Plan assets must:

- **Not be used to pay for corporate restructuring lump sum severance or buyouts.**
- **Not be used to pay for executive management non-qualified pensions or other deferred compensation.**
- **Not be at risk to be sold by plan sponsors or the PBGC to third party financial or other institutions.**

Pension Funding Rules

Current ERISA funding rules restrict funding of pension plans above the 100% during periods when sponsors can afford it. This restriction is partially responsible for the termination of pension plans and excessive PBGC liabilities. The inability of sponsors to fund during poor economic periods and the loss of plan values as equity markets fall have precipitated plan terminations.

- The NRLN proposes an increase in the maximum asset funding contribution limit from 100% to 120% so **companies can over-fund plans when profits and cash flow allow them to.** The new 120% limit would be consistent with the IRS Section 401a limitation for surplus asset retention.

Back Door Reversions:

Draining Pension Assets for Severance and Other Corporate Purposes Threatens Retirement Security

Executive Summary

The use of pension assets to make severance payments during a corporate restructuring is the largest and most widespread "back door reversion" by which some companies are seeking to circumvent the Congressional policy against reverting pension assets for corporate purposes. When pension funds were used to finance hostile takeovers and the mass layoffs that typically followed, in 1990 Congress stopped the practice by imposing a 50 percent excise tax on pension reversions. But today's "back door reversions" are more insidious. Although ERISA explicitly prohibits the use of qualified pension assets for "layoff benefits," companies can amend a plan at any time not merely to offer older workers enhanced early retirement benefits (by awarding extra years of service credit), but even to offer lump sum severance payments equal to a year's salary or more as part of a corporate restructuring.

The 2006 Pension Protection Act tightened up on this practice somewhat by requiring plan sponsors to pre-fund a plan amendment that increases benefit liabilities to the extent the plan's funding level would fall below 80 percent (after taking account of the new benefit liability). However, as the 2008 stock market meltdown demonstrated, a plan that is only 80 percent funded during a bull market could easily end up below 60 percent funded in a bear market – and in default with the PBGC if the plan sponsor declares bankruptcy. Moreover, any significant reduction below full funding not only leaves all plan participants insecure, it also reduces the ability of the plan to build a surplus that could be used to grant cost-of-living adjustments to longtime retirees, whose fixed monthly benefits erode with inflation, or to offset the cost of retiree health benefits through a Section 420 transfer.

The trend toward distressed companies using employee pension assets to pay severance costs – instead of relying on a restructuring reserve or other corporate assets – is not new to the current financial crisis. Lucent, United Airlines, AT&T, Verizon, Qwest, Federal Express, Delta and Delphi are among the other companies that have tapped pension assets to pay corporate restructuring costs. Some of these companies drained pension assets for severance payments as they spiraled downhill toward bankruptcy and an eventual taxpayer bailout courtesy of the PBGC. Other companies, left under-funded, cut other retiree benefits across the board. And some others, although their plans remained solvent, used up "surplus" assets that could have benefitted the vast majority of plan participants if used instead for cost-of-living adjustments or offset the cost of retiree health care benefits. In the current crisis, General Motors used pension assets to pay for billions in severance payments during 2008 – and ended up with such a dangerous degree of under-funding that in early 2009 the Treasury Department restricted the practice as a condition of the federal bailout loan package.

The most effective way for Congress to protect plan participants (and taxpayers) from unfunded liabilities from severance, layoff or any other benefit increase is simply to increase the target funding level threshold required for unfunded benefit increases and lump sum payouts from the 80 percent level, currently required under the PPA, to 120 percent. Severance or other benefit increases to selected individuals that are not funded should be paid out of the company's operating expenses, not from the pension trust. This would not limit the ability of plan sponsors to enhance benefits. What it does do is require companies to currently fund lump sum payouts or other benefit increases that would otherwise cause the plan to become under-funded or worsen its level of under-funding. Amendments increasing benefits that are collectively bargained or negotiated between a plan sponsor and bona fide union representatives, or in the context of a jointly-trusteed Taft-Hartley plan, should be exempted from this more restrictive funding level.