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Soft Landing Strategies for Troubled Multiemployer Pension Plans: How Cooperation, Compromise, and Flexibility Can Save Them

BY GEORGE M. KRAW

As more Taft-Hartley multiemployer plans struggle with funding problems, the multiemployer community and its regulators must develop solutions that permit financially troubled plans to protect participants and maintain retirement benefits. Current strategies for many troubled plans include delaying recognition of investment losses, keeping investment assumption rates at optimistic levels, and investing in ''alternative'' investment programs that don't suffer the daily ups and downs of publicly traded securities.

Those strategies can make financial statements and actuarial reports appear healthier, but neither they nor the traditional fixes of increasing contributions and reducing future accruals will satisfy the long-term funding needs of many troubled plans.[1] The best way to fulfill those funding needs is by permitting plans to develop strategies for survival while they still have substantial assets and manageable benefit obligations—and before insolvency and regulators are at their doors. This means permitting plans to restructure early, in ways that provide a fair distribution of limited retirement assets.

Even if existing constraints on plan restructuring were loosened by regulatory changes, questions about how to restructure plans in an equitable manner would remain difficult to answer. Many past funding problems have been dumped on current sponsors and participants to sort out and clean up. The interests of active participants, whose pay packages include a large benefit contribution for a meager benefit accrual, are different from those of a retiree in pay status whose pension is what guarantees him dignity in retirement. What are necessary are protocols that allow plans, sponsors, participants, and regulators to work through the funding problems.

Paris Club Successes

The challenges are similar to those faced by financially troubled national governments that must restructure their financial obligations because they cannot afford to pay them as they come due. For those debtor nations, cooperation and compromise reached through the auspices of private nongovernmental organizations like the Paris Club provide the best means for resolving their financial problems and have achieved successes during the past half century.[2] Those successes depend on achieving voluntary agreement. The Paris Club has no legal authority over the parties. A similar approach could be developed for multiemployer plans by doing the following:

- providing procedures and venues for plan stakeholders to determine the extent of a plan's distress;
- granting plans regulatory relief to allow restructuring in appropriate circumstances; and
- fostering collaborative policies among stakeholders to protect the jobs of active participants, the benefits of current and future retirees, and the continuation of multiemployer plans.

[1] The Pension Benefit Guaranty Corporation's 2011 Annual Report, at page 10, bluntly states that many multiemployer plans ''are substantially underfunded'' and that ''for some, the traditional remedies of increasing funding or reducing future benefit accruals won't be enough.'' The report later notes that the PBGC ''cannot step in until plans are already insolvent, by which time other remedies are no longer possible.''

[2] A detailed description of the Paris Club's procedures and history can be found on its English language website at *http://www.clubdeparis.org/en/*.

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Bringing stakeholders together is the first step in the Paris Club approach. Multiemployer plan stakeholders are the sponsors, participants, and government agencies that regulate and insure the plans. Resolving plan problems is best achieved by the stakeholders.[3] Currently, an intricate series of laws and regulations govern plan operations. Although such prescriptions work for well-funded plans, each troubled plan is unhappy in its own way, and the problems of each are best addressed on a case-by-case basis. It is the same approach adopted by the Paris Club to deal with insolvent or illiquid developing countries that cannot pay their international debts.

A Paris Club strategy would recognize that the problems of individual plans in a poor economy can be made worse by the multiemployer structure. Multiemployer plans are designed to cushion the shock of individual employer failures by spreading retirement obligations across entire industries. When those industries are at risk or the national economy is in a sustained period of low growth, individual plan problems are magnified and difficult to quarantine. Strong plans are at risk of contagion from weaker ones. Continued high unemployment rates result in lower contribution levels and skew plan participation demographics towards older, more expensive active participants. Younger workers are laid off and new workers are not hired. Meanwhile, investments that fail to achieve the expected 6 percent to 8 percent annual return weaken the plans financially.

Few Tools for Troubled Plans

Troubled plans have few effective tools for dealing with the current economic difficulties. Vested benefits cannot be restructured except in limited circumstances, even if plans are deeply indebted and lack enough current participants to meet required debt reductions. Recent legislative actions that allow plans to write off investment losses over longer periods of time to improve current financial reports do not increase plans' real assets on hand.

Unless additional revenue sources are found, troubled plans eventually will run out of money to pay benefits at promised levels.[4] Current laws compel additional contributions, benefit cuts, or both, to significantly underfunded plans. But those mandates will not keep plans safe in industries in which plan sponsors do not enjoy dominant economic positions and cannot set prices. The laws leave plan sponsors at risk of losing market share to competitors that provide fewer or no retirement benefits.

The Paris Club's approach to highly indebted countries is therefore a useful model for dealing with the problems of highly indebted multiemployer plans. For the past half century, the Paris Club has operated as an informal organization, without legal basis, relying on consensus, social pressure, and political influence to achieve its goals. Its activities are based on five key principles. Decisions are made on a case-by-case basis to address each debtor country's unique circumstances. Actions can be taken only by agreement of creditors. The Paris Club negotiates debt restructuring only with debtor countries that need relief, are committed to implementing necessary financial reforms, and have successfully implemented reforms under an International Monetary Fund program.

All in Together

All members of the Paris Club agree to act as a group in their dealings with a given debtor country and to be sensitive to the effects their claims may have on the other members. A debtor country that enters into an agreement with the Paris Club is expected not to give more favorable terms to creditors who are not in the group.

The key elements in the success of the Paris Club approach are clear and accurate information about the debtor and the individualized solutions for debtor countries. Multiemployer plan restructuring should seek similar ends and not hide problems under longer write-off periods or aggressive investment assumptions that create volatility.

The restructuring should also clarify the exact causes of investment distress. Although a plan must report annually, even those filings may not adequately distinguish among causes of plan distress. Plan demographics and the financial future of plan sponsors are especially important factors. A plan in a dying industry in which the number of active participants is or soon will be a small percentage of total plan participants is in an entirely different situation from that of a plan in which the problems arise chiefly from aggressive investment assumptions or extraordinary losses from the 2008-2009 market crash.

Ability to Restructure

The solutions to such problems should reflect the different circumstances in which they arise.

To make revisions and compromises work, the participating parties will need the power to restructure the plans.[5] Current regulatory schemes do not provide an effective means for individualized plan restructuring. Such a strategy will require changes to the Employee Retirement Income Security Act and the tax code.

[3] In the Paris Club approach, the role of the regulators should be defined by the regulators themselves. The Pension Benefit Guaranty Corporation, for example, may wish to have an active role in individual restructuring to protect the agency's financial interests. Such an approach would require legislation to permit greater flexibility in the PBGC insurance program.

[4] The PBGC has provided financial assistance to about 70 plans during its lifetime and is currently providing assistance to about 40 plans. The agency estimates the current underfunding in the multiemployer pension plan insurance program at $21 billion. The underfunding amount is what the corporation estimates is necessary to make future benefit payments to participants in troubled plans at the reduced PBGC guaranty.

[5] In an earlier article I proposed a series of reforms that would allow plans that obtained union approval to cut vested benefits. The article also called for the creation of special bankruptcy procedures for plans that would allow modification of the withdrawal liability rules on a case-by-case basis; and revision of investment assumption rates. See George M. Kraw, Four Reforms to Save Multiemployer Plans, BNA Pension & Benefits Daily, Nov. 17, 2010 (220 PBD, 11/17/10; 37 BPR 2564, 11/23/10). For a critique of these proposals see Paul Secunda, The Forgotten Employee Benefit Crisis, Cornell Journal of Law and Public Policy, *Vol. 21, No. 1, pages 77-106, 2011,* http://www.lawschool.cornell.edu/research/JLPP/upload/Secunda-final.pdf, at pages 88-95.

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Troubled plans require flexibility for determining what benefits should be restructured on a case-by-case, plan-by-plan basis. Some plans may decide that no changes should be made. Others may view capping maximum benefit levels as the best way to preserve the plan. Still others may wish to modify the normal retirement age or the amount of subsidies a plan provides for early retirement. Such changes in all circumstances should require the approval of all sponsoring unions.

Inflexible Rules

Similarly, well-intentioned but now problematic rules relating to withdrawal liability, which make it difficult for plans to obtain new employers and employee units; and investment assumption rates, which generally cannot be lowered without plans recognizing immediate losses for future benefit obligations, should be made more flexible for troubled plans. These issues should be left to plan sponsors to work out, with consultation from their regulators.

Such arrangements could also be made subject to a judicial review process that permits objections to be heard before any changes are implemented, and provides legal protections once agreement is reached.

Fully funded plans and less volatile investments should be the final aim of any plan restructuring. In the current economic environment, that is an impossible goal for some plans. The worst approach would be to wait for a crisis to create consensus for change. Allowing plans now in distress to create solutions that address their specific circumstances will save the largest number of plans and benefit the greatest number of participants.