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NATIONAL RETIREE LEGISLATIVE NETWORK

Defined Benefit Pension Plan Mergers

Protecting Vested Pension Benefits from Plan Asset Transfers

5/15/2021

Executive Summary

Unlike the shareholders of public companies, who willingly accept the risks of corporate financial performance, the tens of millions of employees and retirees who participate in defined benefit pension plans are supposed to be protected from the financial risks associated with business decisions such as corporate mergers and acquisitions. Earned benefits are protected by ERISA under rules intended to ensure that pension plan funding levels are sufficient to minimize the risk of a distress termination and the permanent loss of vested benefits that often occurs as a result.

Distress terminations are initiated by companies declaring bankruptcy or, in some cases, by the Pension Benefit Guarantee Corporation (PBGC) and require the approval of a federal court. If a company declaring bankruptcy remains in business, it must demonstrate it can no longer fund its pension plan as part of a successful restructuring. A key element in making a decision to approve a distress termination is the level of plan funding, calculated as the fair market value of plan assets minus projected liabilities. When assets fall substantially below the level needed to sustain the payment of benefits, a plan is at far greater risk of a distress termination. Many workers and retirees learn only *after* the PBGC takes over a plan that a distress termination can leave them with benefits that are permanently reduced by 30% or more.

This issue brief focuses on a looming new form of financial engineering: the merging of pension plans as part of a strategy to benefit the plan sponsor by combining plans with very different levels of plan assets and liabilities. Depending on the circumstances, merging pension plans can be beneficial to plan sponsors and harmless to participants, such as when companies merge two well-funded plans to reduce administrative costs. However, defined-benefit plan mergers can also be very damaging to the vested rights of plan participants.

For example, when a well-funded plan is merged with a very under-funded plan, retirees and other plan participants in the previously well-funded plan can be put at risk. In situations where the plan sponsor effectively uses the plan merger to transfer assets from the well-funded plan to fill a hole in the under-funded plan, whether to reduce the company's total minimum required contributions or for other reasons, this practice amounts to the equivalent of a "reversion" of plan assets that weakens the retirement security of the retirees and participants in the previously well-funded plan.

Because the agencies that regulate pension plans do not monitor or review intra-firm mergers, it is unknown how many plan mergers have had a detrimental impact on retiree income security. The PBGC not only lacks advance notice of intra-firm mergers, the agency has waived the requirement for post-event reporting of plan mergers despite the fact that Congress in ERISA Section 1343(c)(8) specified that *all* plan mergers are reportable events and that ERISA Section 414(l) explicitly mandates that the participants and beneficiaries in the higher-funded plan be held harmless if PBGC takes the merged plan over after a distress termination.

What is clear is that plan sponsors have both the ability and incentive to engineer plan mergers in ways that may reduce costs for the company, but increase the risk of permanent benefit losses for retirees. NRLN proposes the following changes:

- **<u>Advance Notice of Reportable Events</u>: All mergers of two or more qualified plans should be reportable events, as ERISA originally required, and included among the transactions that require an Advance Notice of Reportable Events to the PBGC.**

- **<u>Pre-Approval Process</u>: Plan mergers should be reviewed by the PBGC and IRS and challenged as appropriate.** Reasons for challenging or denying a plan merger should include: (i) if a plan merger has the effect of substantially reducing the plan sponsor's overall minimum funding requirement; or (ii) if the merged plan's Funding Target Attainment Percentage (FTAP) imposes substantial risk on participants in the higher-funded plan (e.g., the FTAP falls below 80%).

- **<u>A Plan Merger Should Not Reduce the Minimum Funding Contribution During PBGC's 5-Year Hold Harmless Protection Period</u>:** Although plan mergers can improve administrative efficiency, some are done to further reduce the company's minimum required contribution even more than permitted under the MAP-21 "funding relief" provisions adopted by Congress and extended again in 2021 to at least 2030. A plan merger that substantially reduces funding for its plans overall raises the risk of a distress termination and harms retirees.

  NRLN proposes that for a period of five years following a plan merger, the plan sponsor's minimum annual funding contribution should be no less than what the company would have contributed if the plans had not merged. This change tracks and reinforces the PBGC's 5-year "hold harmless" protection. Pursuant to ERISA Section 414(l), if a merged plan is terminated, the PBGC applies its Priority Category allocation of benefits in a manner that ensures participants in the higher-funded plan (prior to the merger) do not lose vested benefits that would have been funded based upon the assets and funding level of the plan at the time of the merger. The PBGC limits this 'hold harmless' protection to a 5-year window following the plan merger.

- **<u>Scrutiny in Distress Terminations</u>: For a period of five years after a qualified plan merger, the PBGC should be required to oppose any proposed distress termination of the merged plan unless the plan sponsor can establish, to the satisfaction of the agency or a court in bankruptcy, that a distress termination would have been justified at the pre-merger funding level.**

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Introduction

Unlike the shareholders of public companies, who willingly accept the risks of corporate financial performance, tens of millions of employees and retirees who participate in defined benefit pension plans sponsored by those same companies are supposed to be protected from the financial risks associated with business decisions such as corporate mergers and acquisitions. Earned benefits are protected by ERISA under rules intended to ensure that pension plan funding levels are sufficient to minimize the risk of a distress termination and the permanent loss of vested benefits that often occurs as a result.

Distress terminations are initiated by companies declaring bankruptcy or, in some cases, by the Pension Benefit Guarantee Corporation (PBGC) with the approval of a federal court. If a company declaring bankruptcy remains in business, it must demonstrate it can no longer fund its pension plan as part of a successful restructuring. A key element in making a decision to approve a distress termination is the level of plan funding, calculated as the fair market value of plan assets minus projected liabilities. When assets fall substantially below the level needed to sustain the payment of benefits, a plan is at far greater risk of a distress termination.

Many workers and retirees learn only *after* the PBGC takes over a plan that a distress termination can leave them with benefits that are permanently reduced by 30% or more. A 2008 study by the PBGC showed that the proportion of participants in plans taken over by the PBGC who lose vested benefits had tripled since 1999 – to one in five – and that the share of vested benefits permanently lost has risen substantially to 28% on average per participant affected. The study has not been updated since.[1]

This issue brief focuses on a looming new form of financial engineering: the merging of pension plans as part of a strategy to benefit the plan sponsor by combining plans with very different levels of plan assets and liabilities. Depending on the circumstances, merging pension plans can be beneficial to plan sponsors and harmless to participants, such as when companies merge two well-funded plans to reduce administrative and reporting costs. However, defined-benefit plan mergers can also be very damaging to the vested rights of plan participants.

[1] "PBGC's Guarantee Limits: An Update," Pension Benefit Guarantee Corporation, September 2008, available at http://www.pbgc.gov/docs/guaranteelimits.pdf. The study found that 20% of participants in plans taken over by the PBGC permanently lost vested benefits. Benefits were reduced by 28% for those affected, compared with an average reduction of only 16% in the PBGC's 1999 study.

For example, when a well-funded plan is merged with a very under-funded plan, retirees and other plan participants in the previously well-funded plan can be put at risk. In situations where the plan sponsor effectively uses the plan merger to transfer assets from the well-funded plan to fill a hole in the under-funded plan, whether to reduce the company's total minimum required contributions or for other reasons, this practice amounts to the equivalent of a "reversion" of plan assets that weakens the retirement security of the retirees and participants in the previously well-funded plan.

Because the agencies that regulate pension plans do not monitor or review intra-firm mergers, it is unknown how many plan mergers have had a detrimental impact on retiree income security. PBGC not only lacks advance notice of intra-firm mergers, the agency has waived the requirement for post-event reporting of plan mergers despite the fact that Congress in ERISA Section 1343(c)(8) specified that *all* plan mergers are reportable events and that ERISA Section 414(l) explicitly mandates that the participants and beneficiaries in the higher-funded plan be held harmless if PBGC takes the merged plan over after a distress termination.

What is clear is that plan sponsors have both the ability and incentive to engineer plan mergers in ways that may reduce costs for the company, but increase the risk of permanent benefit losses for retirees.

The Recent CenturyLink Plan Mergers Demonstrate a Need for Added Protections

Since there is only very limited after-the-fact disclosure that a company has merged two or more of its pension plans, not even regulators at the PBGC, IRS and Department of Labor have data on how the manipulation of plan mergers may have diminished plan funding levels or left retirees and other participants at greater risk of permanently losing vested benefits following a distress termination that occurs years later.

Some plan mergers can reduce overall funding even when both plans are relatively well-funded. For example, Chrysler-Fiat recently combined two U.S. management pension plans that were well-funded (above 90%) based on the Funding Target Attainment Percentage (FTAP) calculated using the liability discount rates that apply pursuant to the "funding relief" originally enacted by Congress in 2012 (MAP-21 Act) and recently extended through at least 2020.[2] Because one of the two plans had a large credit balance at the time of the merger, it is likely that the company was able to reduce its annual minimum funding contribution to the merged plan to a level significantly below what it would have contributed had the plans not merged. In other words, even companies with plans that are funded at similar levels can use a plan merger to further reduce the company's minimum required contribution even more than permitted under the MAP-21 "funding relief" provisions. A plan merger that substantially reduces funding for its overall pension funding in this manner raises the risk of a distress termination that can negatively impact retirees.

[2] *See* Conference Report to Accompany the Moving Ahead for Progress in the 21st Century Act (Map-21) Act (H.R. 4348), Public Law 112-141 (enacted July 6, 2012), Section 40211(A)(2)(D). The funding "stabilization" provisions in the Map-21 Act allow plan sponsors to use higher interest rates in valuing their liabilities, based on a 25-year average of interest rates rather than market rates. This substantially lowers projected liabilities and, in turn, lowers the employer's minimum required contributions. Congress once again extended this "funding relief" until 2030 in the American Rescue Plan Act that President Joe Biden signed into law on March 11, 2021.

A more striking and worrisome example is the declining regional telecom operator, CenturyLink.[3] At CenturyLink, the combination of three pension plans – two inherited from acquired companies – has effectively transferred 81,000 former Qwest plan participants from a very well-funded plan into a combined plan with a substantially higher risk of distress termination should the plan sponsor declare bankruptcy. CenturyLink (CTL) merged its Embarq Retirement Pension Plan and Qwest Pension Plan into the CenturyLink Retirement Plan, relabeling the three merged plans as the CenturyLink Combined Pension Plan as of December 31, 2014.[4]

According to CTL's 2016 Annual Funding Notice (for plan year 2015), merging the plans had fourpotentially troubling impacts.

First, and most importantly, the merger made a much larger pool of assets available to pay liabilities for all three plans, but it substantially increased the funding risk for Qwest plan participants. In plan years 2013 and 2014, the Qwest plan reported a funding level of 91% and 89%, respectively (using non-adjusted market discount rates).[5] However, the Embarq and CenturyLink Plans were funded at only 76.3% and 73.4%, respectively, in 2014 when the plans were merged. The combined plan was reported at 84.1% (for plan year 2014) and 87.4% (for plan year 2015). Relative to the much better funded Qwest plan, combining the three plans increased total plan assets by 53% but drove liabilities up 66%. The combined plan continued to hover barely above the 80%funding threshold, never recovering the more than 90% level of the Qwest plan. For example, in 2018 CTL made an additional voluntary contribution of $400 million to lift the overall funding ratio to 84.3%.[6]

Second, combining the plans allowed the company to substantially reduce its overall minimum required contribution by at least $100 million, leaving all participants worse off, particularly the retirees in the higher-funded Qwest Plan. For plan year 2014, the minimum required contribution for the Embarq and CenturyLink Plans was just under $110 million (using the adjusted MAP-21 liability discount rates) and nearly $287 million (using unadjusted PPA market rates). The Qwest Plan's minimum contribution was $0 (adjusted) and $220 million (unadjusted). However, on the day after the plans merged (Jan. 1, 2015), the CTL Combined Plan's minimum required contribution – for all three plans – was $0 (adjusted). Clearly the plan merger was used to engineer a "funding holiday."

Third, while substantially reducing its overall required minimum contribution, the plan merger also allowed CenturyLink to evade the negative consequences that the Pension Protection Act imposes on plans deemed to be "at risk" when their funded level falls below 80%.[7] Because the plan merger

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[3] CenturyLink, unlike former Bell operating companies AT&T and Verizon, has no wireless business to augment a shrinking wireline business. It announced in September 2016 that it is laying off another 3,400 workers, or 8% of its workforce. See Scott Moritz, "CenturyLink Looking to Cut 8% of Workforce or About 3,400," *BloombergTechnology* (Sept. 16, 2016), available at https://goo.gl/vXFGc2.

[4] *See* CenturyLink Combined Pension Plan, 2015 Annual Funding Notice, April 2015 (available on request).

[5] *See* CenturyLink Combined Pension Plan, 2016 Annual Funding Notice, April 2016, at pp. 3-4 (available on request from NRLN). CTL reported a considerably higher Funding Target Attainment Percentage based on the higher 25-year average discount rates enacted by Congress in MAP-21: 105% for 2013 and nearly 110% for 2014.

[6] Rob Kozlowaki, "CenturyLink Phones in Additional $400 Million Pension Contribution," *Pensions and Investments* (Aug. 9, 2018).

[7] Under federal law, a pension plan is deemed "at risk" when its funding level (FTAP) falls below 80% of liabilities. If a plan is at-risk, the plan sponsor must contribute substantially more money the following year than if it is not at-risk. PBGC variable-rate premiums rise substantially and the plan is subject to restrictions on lump sum payouts and on plan amendments that increase plan liabilities.

effectively used Qwest Plan assets to paper over under-funding in the Embarq and CenturyLink Plans (funded at 76% and 73% respectively), those two plans were no longer considered at-risk and CTL was no longer required to make accelerated minimum funding contributions, or subject to restrictions on lump sum payments, or required to report additional financial and other information to the PBGC. Thanks to the financial alchemy of the plan merger, CTL can contribute substantially less per participant overall and avoid the possibility of the 4% penalty it might have paid if its other two plans remained at-risk for more than two out of four consecutive plan years.

Finally, in addition, engineering an effective transfer of assets from the Qwest Plan to the other two plans opened the door for further abuse. Immediately after using Qwest Plan assets to paper over the at-risk status of the Embarq and CenturyLink Plans – and ending restrictions on lump sum payouts – in May 2015 CTL used the new Combined Plan assets to "de-risk" the two under-funded plans by offering lump sum buy-outs to vested participants not already in pay status. Although these lump sums were funded disproportionately with Qwest Plan assets, they were offered only to Embarq and CTL Plan participants. The number of vested participants dropped 11,000 (33%) between year-end 2014 and 2015. And the fair market value of the Combined Plan's assets dropped by $1.5 billion (12%). Although it is impossible to tell from the 2016 AFN how much of this $1.5 billion is attributable to lump sum buyouts, from the perspective of the Qwest Plan retirees, they are now at greater risk in a combined plan that is less well-funded and which has a minimum required contribution (for plan year 2015) that is more than $1 billion less due to the liability discount rate "smoothing" enacted by Congress and exploited even further by CTL using a plan merger.

Entirely different issues can arise in the context of corporate mergers and spin-offs. In 2015, Nokia was in the process of acquiring Alcatel-Lucent (ALU) during a period when ALU retirees were deciding whether or not to accept a lump sum pension buyout offer. Although the U.S. Treasury Department determined in 2015 that ERISA prohibits voluntary lump sum offers to retirees already in pay status, ALU had communicated its lump sum offer prior to the effective date of the Treasury's ruling. Alcatel-Lucent retirees were expected to make this decision without any disclosure concerning whether the new combined company's U.S. pension plans could or might be merged.

Current law gives companies an additional incentivize to merge pension plans with very disparate funding levels in situations where this reduces PBGC premiums. Fully-funded plans pay only a flat rate premium based on headcount, but underfunded plans (such as the Embarq and CenturyLink plans) pay an additional variable rate premium based on the total unfunded liability for the plan (capped by participant).[8]

ERISA 404(l) Shows Congress Intended to Protect Participants in the Higher-Funded Plan

Congress enacted ERISA Section 1058 and Internal Revenue Code Section 414(l) to protect the vested benefits of participants when plans merge, consolidate or transfer assets:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the

[8] *See* Findley USI, "Three Compelling Reasons to Consider Pension Plan Mergers," August 2019, available at https://findley.com/2019/08/three-compelling-reasons-to-consider-pension-plan-mergers/.

> benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).[9]

PBGC regulations implemented this protection by establishing a "special schedule of benefits" that gives participants in the higher-funded plan priority in the allocation of plan assets after a distress termination, such that those participants end up no worse off post-merger in terms of the portion of vested benefits guaranteed by PBGC. This rule ensures that if the merged plan is subject to a distress termination – and taken over by PBGC – that the participants of the higher-funded plan do not receive lower benefits than they would have if their pre-merger plan had terminated with the level of assets it had at the time the plans merged.

While this ERISA protection is very important, contrary to the plain language of the statute (which is not time-limited) the PBGC limits its applicability to situations where the combined plan is terminated within five (5) years of a plan merger. The regulation explicitly requires plan sponsors to maintain records relevant to enforcing Section 414(l) for only five years, which is important since the merger of plans controlled by the same company (or "controlled group") is not a reportable event.

Needed Changes to Regulations or Statutes Governing Plan Mergers

1. **Plan Mergers Should be Reportable Events with Advance Notice**

Section 4043 of ERISA requires that plan sponsors notify PBGC of the occurrence of certain events that may signal problems with a pension plan or business. As part of its Early Warning Program, the PBGC monitors notifications of a wide range of "reportable events," the most potentially significant of which (e.g., pension liability transfers, liquidations, bankruptcy, loan defaults, or change in contributing plan sponsor) require companies to file notification of the transaction with the PBGC at least 30 days in advance of the closing date.

When Congress enacted ERISA, it required that *all* plan mergers are reportable events. Section 1343(c)(8), which remains current law, states that reportable events include:

> **(8)** when a plan merges, consolidates, or transfers its assets under section 1058 of this title, or when an alternative method of compliance is prescribed by the Secretary of Labor under section 1030 of this title.[10]

Unfortunately, the Department of Labor used its discretion to limit the disclosure, thereby blinding the agencies to the sort of situations (such as at CenturyLink) that Congress anticipated. Although transfers of benefit liabilities by a plan is a reportable event under ERISA, the PBGC regulations limit the reporting requirement to "a transfer of benefit liabilities" to another plan or person "that are not members of the transferor plan's controlled group" (see 29 C.F.R. §4043.32). In other words, DOL regulations do not include intra-plan mergers as "reportable events" despite the fact that ERISA Section 414(l) clearly demonstrates that Congress both recognized that participants in the higher-funded plan can be at risk of losing vested benefits and intended to hold those participants harmless if the plan later terminated.

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[9] 29 U.S. Code § 1058, which is substantially identical to 26 U.S. Code § 414(l)(1). *See also* C.F.R. 414(l)-1(a)(2)(ii).

[10] 29 U.S. Code §1343(c)(8). This is current law.

The NRLN believes that the PBGC should monitoring intra-plan mergers as part of its Early Warning System. As the CenturyLink example above confirms, there are situations where an intra-plan merger can pose a risk to plan participants and to the pension insurance system that are equal to or greater than the risk of most pension spin-offs or transfers to other firms, which are reportable events that also require advance notice. As the PBGC itself has recognized as it has steadily broadened its Early Warning System in recent years, without timely disclosure of transactions that can place the plan or subsets of participants at great risk:

> Without such timely information, PBGC typically learns that a plan is in danger only when most opportunities for protecting participants and the pension insurance system may have been lost.[11]

Accordingly, NRLN recommends that <u>all mergers of two or more qualified plans should be reportable events, as ERISA originally required, and included among the transactions that require an Advance Notice of Reportable Events</u> to the PBGC under 29 C.F.R. § 4043, Subpart C. This can be accomplished on a regulatory basis by the Department of Labor, or by Congress amending ERISA Section 1343(b)(3) to add plan mergers (as defined in Section 1343(c)(8)) to the list of events requiring at least 30 days advance notice. In addition, Section 1343(b)(4) should be amended to make clear that the PBGC cannot waive this reporting requirement with respect to plan mergers.

The NRLN has outlined these specific statutory language changes in a separate document.[12]

2. <u>Plan Mergers Should be Reviewed and Challenged as Appropriate by PBGC and IRS</u>

In addition to requiring advance notice of plan mergers as a 'reportable event,' Congress should provide the PBGC and/or IRS with the explicit authority to review and challenge plan mergers that unreasonably increase the funding risk to a group of participants or which result in a substantial reduction in the plan sponsor's funding obligations. Plan mergers should not be approved if the funding level disparity allows a plan sponsor to avoid or substantially reduce the ERISA minimum funding requirement compared to what it would have been if the plans were not combined.

Plans with very divergent FTAPs should not be merged, particularly where the lower-funded plan is at-risk and the assets of the higher-funded plan are being used to substitute for additional plan sponsor contributions. As described above, CenturyLink did not add funds to the Qwest plan during plan year 2014 and disclosed in the 2015 Annual Funding Notice that the funding shortfall of the Qwest plan worsened from $721 million to $1,032 million in 2014, a 43% increase.

ERISA generally deters transfers of plan assets even when a plan is in surplus. Congress clearly intended to protect participants from plan asset reversions and from the plan sponsor's self-interest in using plan assets in ways that do not primarily benefit the participants of that particular plan. For example, while Section 420(h) allows plan sponsors to transfer surplus pension assets to offset the cost of retiree health

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[11] PBGC, "Proposed Rule: Reportable Events and Certain Other Notification Requirements," 74 Federal Register 61,248 (Nov. 23, 2009), available at http://www.setonresourcecenter.com/register/2009/nov/23/E9-28056.pdf. "PBGC believes that many of the automatic waivers and extensions in the existing reportable events regulation are depriving it of early warnings that would enable it to mitigate distress situations." *Ibid*, at p. 61251.

[12] NRLN, *Defined Benefit Pension Plan Mergers: Proposed Legislative Amendments to Enhance Protections for Retirees and other Participants*, Fact Sheet (April 2021). Available on request.

benefits *for participants of that plan*, ERISA does not allow the transfer of plan assets to pay for the health care costs of active employees or other operating costs.

Similarly, combining two or more plans should not increase the risk of a distress termination, and the consequent loss of vested benefits, for a substantial number of the retirees and other participants in the previously well-funded plan that ends up under-funded as a result of the combination. While the plan merger may help the company reduce its current minimum contributions, this maneuver imposes added risks on retirees and should be deemed a violation of ERISA's anti-reversion provisions.

Accordingly, NRLN recommends that all plan mergers be reviewed by the PBGC and IRS and challenged or disapproved as appropriate. The reasons for challenging or denying a plan merger should include:

(i) if a plan merger that has the effect of substantially reducing the plan sponsor's overall minimum funding requirement; or

(ii) if the merged plan's Funding Target Attainment Percentage (FTAP) imposes substantial risk on participants in the higher-funded plan (e.g., the FTAP falls below 80%).

NRLN recommends that Congress amend ERISA Section 430 (**26 U.S. Code § 430**) – which defines the "Minimum funding standards for single-employer defined benefit pension plans" – by adding a new subclause (7) to subsection § 430(i), which provides special rules for plans deemed at-risk:

(i) SPECIAL RULES FOR AT-RISK PLANS

. . .

(7) Plan Mergers

A plan in at-risk status that is subject to section 414(l) of this title may not merge or consolidate with, or transfer its assets or liabilities to, any other plan without the approval in writing of the Pension Benefit Guarantee Corporation following a review to ensure the proposed merger or transfer of assets or liabilities does not –

(A) **substantially reduce the plan sponsor's overall minimum funding requirement for the current or subsequent plan year, or**

(B) **cause the combined plan to be at-risk as defined in clause (4) of this subsection.**

The NRLN has outlined this specific statutory language change in a separate document.[13]

3. **A Plan Merger Should Not Reduce the Minimum Funding Contribution During PBGC's 5-Year Hold Harmless Protection Period**

Although plan mergers can improve administrative efficiency, some are done to further reduce the company's minimum required contribution even more than permitted under the MAP-21 "funding relief" provisions adopted by Congress and extended through at least 2030. As explained above, the plan mergers at CenturyLink are a recent and egregious example. A plan merger that substantially reduces funding for its plans overall raises the risk of a distress termination and harms retirees. By exploiting this loophole to reduce its minimum funding requirement, a plan sponsor – particularly at a declining

[13] NRLN, *Defined Benefit Pension Plan Mergers: Proposed Legislative Amendments to Enhance Protections for Retirees and other Participants*, Fact Sheet (April 2021). Available on request.

company such as CenturyLink – imposes added risk on the PBGC insurance system, and therefore on taxpayers, by making a distress termination both more likely and, ultimately, more costly.

NRLN proposes that for a period of five years following a plan merger, the plan sponsor's minimum annual funding contribution should be no less than what the company would have contributed if the plans had not merged. This change tracks and reinforces the PBGC's 5-year "hold harmless" protection. Pursuant to ERISA Section 414(l), if a merged plan is terminated, the PBGC applies its Priority Category allocation of benefits in a manner that ensures participants in the higher-funded plan (prior to the merger) do not lose vested benefits that would have been funded based upon the assets and funding level of the plan at the time of the merger. The PBGC limits this 'hold harmless' protection to a 5-year window following the plan merger.

To accomplish this, **Congress should amend ERISA Section 430** (26 U.S. Code § 430) – which defines the "Minimum funding standards for single-employer defined benefit pension plans" – by adding two new subclauses to subsection § 430(c)(7)(F)(iv). The amendment would require that a plan's minimum required contribution "**shall not be reduced due to the merger of plans as compared to what each plan would have been required to pay, including by the application of credit balances," during "the five-year period following the effective date of the merger of two or more qualified single employer plans."**

The NRLN has outlined these specific statutory language changes in a separate document.[14]

4. Plan Mergers Should Not Make Approval of a Distress Termination More Likely

The CenturyLink scenario described above demonstrates how the merger of two plans with very disparate funding levels could lead to a distress termination of *both plans* in bankruptcy even when the well-funded plan may have been able to emerge from a restricting. As a simplified example, consider a situation where a plan that is 100% funded on a termination basis merges with a plan (perhaps recently acquired via merger) that is 60% funded – and the resulting combined plan is 75% funded on a termination basis. If the plan sponsor later declares bankruptcy and asks the court in bankruptcy to terminate the combined plan, the outcome for the participants of the higher-funded plan could be much worse than if the plans had remained separate (and only the under-funded plan terminated and was taken over by PBGC).

As noted above, ERISA Section 414(l) clearly demonstrates that Congress recognized that participants in the higher-funded plan can be at risk of losing vested benefits and that Congress intended to hold those participants harmless if the plan later terminated. At a minimum, the PBGC should oppose the distress termination of a combined plan in bankruptcy court if it would have opposed the distress termination of the higher-funded plan pre-merger.

NRLN proposes that for a period of five years after a qualified plan merger, the PBGC should be required to oppose any proposed distress termination of the merged plan unless the plan sponsor can establish, to the satisfaction of the agency or a court in bankruptcy, that a distress termination would have been justified at the pre-merger funding level.

[14] NRLN, *Defined Benefit Pension Plan Mergers: Proposed Legislative Amendments to Enhance Protections for Retirees and other Participants*, Fact Sheet (April 2021). Available on request.

Congress should amend ERISA Section 4041 (29 U.S. Code § 1341) – which governs the termination of single-employer plans – by adding a new subsection (iv) to § 4041(c)(B) that requires the PBGC to "oppose non-essential distress terminations" if "the plan comprises two or more plans merged within five years of the proposed termination date and the corporation determines that a distress termination would not have been necessary for one or more of the merged plans at its pre-merger funding level."

The NRLN has outlined this specific statutory language change in a separate document.[15]

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* Available on Request: (1) *Defined Benefit Pension Plan Mergers: Proposed Legislative Amendments to Enhance Protections for Retirees and other Participants*, Fact Sheet (Oct. 2016); (2) *Century Link Combined Pension Plan Annual Funding Notice*, April, 2015; (3) Century Link, AFN Risk Analysis; (4) *Century Link Combined Pension Plan Annual Funding Notice*, April 2016.

[15] *Ibid.*