

# **Un- and Under-Funded Pension Liabilities for Private and Public Filings**

**Brian M. Resnick – Davis Polk & Wardwell LLP**  
**Laura S. Rosenberg – Fiduciary Counselors**  
**Daniel S. Lubell – Hughes Hubbard**  
**Gregory A. Charleston – Conway MacKenzie, Inc.**

# CDBV Part 3: Advanced Valuation Topics

## **Understanding Underfunded Pension Liabilities**

# Understanding Underfunded Pension Liabilities: Introduction

---

- 2 types of pension plans
  - Defined benefit plans
  - Defined contribution plans (401(k))
  
- Defined Benefit Pension Plans
  - Benefits determined under a formula
  - Formula includes factors like age, years of service, salary
  - Funded on a group basis using assumptions about long term interest rates, mortality, employee turnover, retirement age

# Understanding Underfunded Pension Liabilities: PBGC

---

- Regulate Title IV of ERISA, pension plan insurance program
  - By law, every plan must have insurance and PBGC is the only permitted insurer
- If a plan terminates and is underfunded, PBGC steps in, assumes plan and plan assets, and pays benefits to participants when they retire
- Funded from insurance premiums, recoveries from employers w/terminated plans, and assets of terminated plans

# Understanding Underfunded Pension Liabilities: Financial Implications – Income Statement

---

- Pension expense (income) is booked on the income statement, usually in COGS.
- Components of pension expense:
  - cost of benefits earned during year (called “normal cost”)
  - Plus interest expense on pension liability
  - Minus expected return on plan assets
  - Plus/minus amortization of deferred gains/losses, improvements in pension benefits

# Understanding Underfunded Pension Liabilities: Financial Implications - Cash

---

- Cash is king!
- No correlation between expense booked on I/S and required cash contributions
- Funding requirements determined by actuary

# Understanding Underfunded Pension Liabilities: Cash – Pension Funding

---

- Timing is important
  - assume a plan year beginning January 1, 2008
  - Quarterly payments due April 15, 2008, July 15, 2008, October 15, 2008, January 15, 2009
  - “catch-up” payment, usually the largest payment, due September 15, 2009

# Understanding Underfunded Pension Liabilities: Restrictions

---

- If plans not well funded, have restrictions:
  - If less than 80% funded, calculate liabilities differently (increases liability amount) and creates bigger pymts
  - And can't improve plan benefits
  - If less than 60% funded, accruals cease
- Some industries have special rules, such as auto manufacturers, auto parts manufacturers, commercial passenger airlines



# Understanding Underfunded Pension Liabilities: Balance Sheet

---

- Pension plans can be
  - Overfunded (assets > liabilities)
  - Fully funded (assets = liabilities)
  - Underfunded (assets < liabilities)
  
- Pension plans booked on B/S
  - Overfunded plan – intangible asset
  - Underfunded plan – intangible liability

# Understanding Underfunded Pension Liabilities: Funded Status

---

- Plan can be underfunded even if all payments made.  
Why?
  - Plan assets primarily invested in marketable securities such as equities and bonds
  - Interest rate used to discount the liabilities

# Understanding Underfunded Pension Liabilities: Funded Status – Yours, Mine, or His

---

- Funded status of a plan depends on the methodology used
- Different organizations have different methodologies
  - Financial statement purpose (FASB/SEC)
  - Termination basis (PBGC)
  - Funding (IRS)
  - Prudent Investor Rate (bankruptcy court)

# Understanding Underfunded Pension Liabilities: Funded Status

---

- FASB/SEC
  - Interest rate used should reflect current rates at which liabilities could be “settled”
  - SEC says this rate should not be higher than yield on portfolio of AA or higher bonds
- PBGC
  - Computes funded status on a termination basis; that is, how much money is needed today to pay for all benefits earned to date
  - Uses mandated retirement age, mortality, interest rate
  - Approximates public annuity markets

# Understanding Underfunded Pension Liabilities: Funded Status

---

- IRS
  - Determine minimum & maximum contribution amounts
- Prudent Investor Rate
  - A bankruptcy judge can decide on the interest rate to be used in present valuing pension liabilities

# Understanding Underfunded Pension Liabilities: Pension Assets

---

- Pension assets are held in separate trust, apart from other corporate assets
- Pension assets cannot be used for other corporate purposes
- Assets of one pension plan cannot be applied to another pension plan

# Understanding Underfunded Pension Liabilities: Pension Terminations

---

- 3 ways to terminate a pension plan
  - Standard
  - Distress
  - Involuntary

# Understanding Underfunded Pension Liabilities: Standard Termination

---

- Plan has sufficient assets to cover all benefits earned to date ("accrued benefits")
- Form of payment
  - Pay out benefits in an immediate lump sum and/or
  - Purchase annuities from financially strong insurance carrier
- Depending on interest rates, lump sums can be more or less expensive, so need to calculate both methods before deciding on course of action



# Understanding Underfunded Pension Liabilities: Distress Termination

---

- Plan is underfunded & company is facing financial distress (in or out of bankruptcy)
- Company petitions PBGC to terminate plan & assume responsibility for assets and benefit payments
- Participants do not earn additional benefits
- Participants may receive smaller benefit from PBGC than if plan had not been terminated as PBGC pro-rates the amount participants receive based on value of assets in plan

# Understanding Underfunded Pension Liabilities: Distress Termination

---

- Burden of proof on company to demonstrate:
  - Debtor is liquidating in bankruptcy (7 or 11)
  - “the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, [the debtor] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination”
  - Unless the plan is terminated, company will be unable to pay its debt when due and will be unable to continue in business, or
  - Cost of providing a pension plan has become unreasonably burdensome solely as a result of a decline in the company’s workforce

# Understanding Underfunded Pension Liabilities: Distress Termination

---

- Each controlled group member (each 80% or more owned subsidiary) must meet 1 of the criteria
  - Positive cash flows from one entity cannot be offset against losses from others to arrive at a net loss for the controlled group
  - Regardless of whether healthy entity had contact with pension plan or its employees participated in plan
- Each plan must meet 1 of the criteria (unless in bankruptcy)
  - A large underfunded plan may be terminated while a smaller plan may remain ongoing
  - Kaiser Aluminum (bankruptcy) decision requires all plans to be aggregated to determine distress test.

# Understanding Underfunded Pension Liabilities: Distress Termination – Reorg Criteria

---

- PBGC's actions
  - Will file brief & participate in hearing
  - Will adhere to (final) court's ruling
  - Believes bankruptcy court can only opine on distress termination motion with respect to debtors in that court's jurisdiction
  - Believes it has sole jurisdiction over non-bankrupt controlled group members

# Understanding Underfunded Pension Liabilities: Distress Termination Outside of Bankruptcy

---

- Company must demonstrate that if plan not terminated, it will not continue in business
- Since company probably in distress for non-pension reasons, need to demonstrate that pension is now an issue
- PBGC will review other creditors' concessions; wants everyone to "share pain"

# Understanding Underfunded Pension Liabilities: Distress Termination

---

- PBGC evaluates distress application like any creditor
  - Review 5 year projections
  - Focus on Free Cash Flow
  - Probe key assumptions – revenue growth, cap ex, margin improvements
  - May engage industry expert

# Understanding Underfunded Pension Liabilities: Involuntary Termination

---

- PBGC initiates termination action, regardless of company's wishes
- Why? – if it can demonstrate that a corporate action today will
  - Increase likelihood plan may terminate in future and
  - PBGC's recoveries in future will be lower than recoveries today

# Understanding Underfunded Pension Liabilities: Involuntary Termination

---

- When?
  - Changes to capital structure which impact PBGC's status vis-à-vis other creditors
    - Replacing unsecured debt with secured debt
    - Issuing debt to redeem equity
  - Paying extraordinary dividend to equity
  - Leveraged buyout
  - Transferring underfunded plan in spin-off/sale where new co is smaller & less credit-worthy
  - Imminent shutdown of a facility



# Understanding Underfunded Pension Liabilities: Exit Premium

---

- If a plan terminates in either a distress or involuntary termination, the plan sponsor must pay an “exit premium” to PBGC in the amount of \$1,250 per year per plan participant for three years.

# Understanding Underfunded Pension Liabilities: 430(k) Liens

---

- If company misses at least \$1M (cumulative) in pension funding to a plan, PBGC can (and does) file tax liens against all assets in controlled group
- PBGC retains secured position until missed payments are made
- PBGC stayed from filing 430(k) liens while company in bankruptcy against debtor entities; can file against non-debtors

# Understanding Underfunded Pension Liabilities: Pensions in Bankruptcies

---

- Companies are not required to fund their plans while in bankruptcy (except normal cost)
- If plan is to remain ongoing, company must make up all deficiencies in order to emerge from bankruptcy
- PBGC claims
  - Secured claim if previously perfected 430(k) liens
  - Priority claim for unpaid minimum funding pre-petition not subject to lien
  - Priority claim for unpaid minimum funding post-petition
  - Unsecured claim for underfunding (even if plan ongoing)

# Understanding Underfunded Pension Liabilities: PBGC's Claims in Bankruptcy

---

- If pension claims are expected to have significant impact on outcome of bankruptcy, pick appropriate venue
  - Some courts have rejected PBGC's priority claims
  - Other courts have rejected PBGC's termination basis methodology; recommend prudent investor rate
  - Not all courts have ruled on "Kaiser" methodology for terminating plans

# Understanding Underfunded Pension Liabilities: Joint & Several Liability

---

- All controlled group members responsible:
  - Funding the pension plan
  - Termination liability
- Rules are complex
- PBGC will examine how a transaction or proposed POR treatment will affect its claim
  - Assume subsidiary with little debt. Parent sells it at fair value and wants to put proceeds at holding company level which has significant amount of debt. Value of c.g. may remain same, but PBGC believes its claims have been compromised.

# Contact Information

---

- Laura Rosenberg  
Sr. Vice President, Finance  
(202) 558-5135  
[laura.rosenberg@fiduciarycounselors.com](mailto:laura.rosenberg@fiduciarycounselors.com)

# Recent Developments in Controlled Group Liability for Private Pensions

Daniel S. Lubell

Hughes  
Critical matters. Critical thinking.®  
Hubbard

# Controlled Group Liability

- All entities in the same “controlled group” with a company that sponsors (or is liable for contributions to) a pension plan subject to Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”) are jointly and severally liable for that company’s:
  - Required contributions to the pension plan;
  - Underfunded benefit liabilities upon plan termination; and
  - Unpaid PBGC premiums and plan termination premiums.

IRC § 412(b); ERISA §§ 302(b), 4062, 4068(a), 4007(e)(2); 29 U.S.C. §§ 1082(b), 1362, 1368, 1307(e)(2)



# Controlled Group Liability – cont'd.

- Similar joint and several liability rules apply to “withdrawal liability” arising when an employer either partially or completely stops contributing to a union-sponsored multiemployer plan.
- Controlled group liability rules do not apply to non-qualified pension plans (e.g., supplemental executive retirement plans).

# PBGC's Power to Enforce Plan Liabilities Against Controlled Group Members

- Controlled group liability is generally enforced by the Pension Benefit Guaranty Corporation ("PBGC"), the federal government corporation established under Title IV of ERISA to administer the federal pension plan insurance program for defined benefit plans (formula-based plans defined by the benefit payable upon retirement) as opposed to contribution plans (benefits defined by account balances).
- PBGC may, at its option, seek 100% of the joint and several obligation from any one or more of the controlled group members (but cannot collect more than 100% of the amounts owed). There is no ERISA provision for allocating controlled group liability among controlled group members. See PBGC v. Ouimet Corp., 711 F.2d 1085 , 1091 (1st Cir. 1983).

# PBGC's Power to Enforce Plan Liabilities Against Controlled Group Members – cont'd.

- PBGC can require controlled group members to make required contributions to a defined benefit plan and can assert a lien against any member of the controlled group for missed minimum required contributions in excess of \$1 million. (IRC § 430(k); ERISA §§ 302(k), 4068; 29 U.S.C. §§ 1083(k), 1368.) PBGC perfects its lien by filing notice in the same manner that a tax lien is filed.
- In the event of a plan termination (whether involuntarily by PBGC or as a result of a distressed termination by a plan administrator), PBGC can recover from the plan sponsor and members of its controlled group the amount by which the present value of the liabilities of the terminated plan exceed the fair market value of the plan's assets ("unfunded benefit liabilities" or "UBL"), (ERISA § 4062, 29 U.S.C. § 1362(a).)

# PBGC's Power to Enforce Plan Liabilities Against Controlled Group Members – cont'd.

- PBGC may also be able to recover plan termination premiums that are not paid by the plan sponsor (\$1,250 per plan participant per year for three years in connection with certain plan terminations in a Chapter 11 case). (ERISA § 4006(a)(7); 29 U.S.C. § 1306(a)(7).)
- PBGC can assert a lien after plan termination against any member of the controlled group not in bankruptcy for the lesser of the UBL or up to 30% of the collective net worth of all members of the controlled group. (ERISA § 4068; 29 U.S.C. § 1368.)
- In bankruptcies of controlled group members, PBGC will file its entire claim against each debtor controlled group member for underfunding, contributions and premiums even if such claims are contingent as of the bankruptcy filing.

# PBGC's Power to Enforce Plan Liabilities Against Controlled Group Members – cont'd.

- Due to the automatic stay under Section 362 of the Bankruptcy Code, controlled group members who are debtors are protected from paying prepetition minimum funding contributions and other prepetition claims. Debtors are also protected from PBGC's perfection and enforcement of liens for missed contributions and unfunded benefit liabilities. However, controlled group members not in bankruptcy do not receive such protections and remain liable for all PBGC claims and liens.
- In enforcing pension plan liabilities, courts regularly defer to PBGC's construction of ERISA. As the Supreme Court has noted, "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass." *Beck v. Pace Int'l Union*, 551 U.S. 96, 104 (2007) (quoting *Mead Corp v. Tilley*, 490 U.S. 714, 722, 725-26 (1989)).

# Defining the Controlled Group

- Under ERISA and the IRC, an entity is considered a member of a controlled group if it is (i) a “trade or business” and (ii) under “common control” with the employer, which generally means at least 80% common ownership. (See IRC §§ 414(b),(c),(m), 1563; ERISA § 4001(a)(14); 29 U.S.C. § 1301(a)(14).)
- A “parent-subsidary” control group exists if there are entities conducting “trades or businesses” connected through a “controlling interest” (generally 80% by vote or value of the entity’s stock in the case of a corporation, and 80% by capital or profits in the case of an entity treated as a partnership for tax purposes) with a common parent.



## Defining the Controlled Group – cont'd.

- A “brother-sister” control group exists where two or more traders or businesses are 80% commonly owned in specified minimums by the same five or fewer individuals, estates or trusts; and a combination of a brother-sister and parent subsidiary control group exists when there are at least three corporations and at least one of the corporations is the common parent in a parent-subsidiary controlled group and part of a brother-sister controlled group.
- The 80% determination may be direct or indirect and can be complicated because of the applicability of complex exclusion and constructive ownership rules.

# Private Equity Controlled Group Members

- Private equity firms holding 80% interests in multiple portfolio companies have traditionally taken the position that they do not engage in “trades” or “businesses” with respect to the portfolio companies for tax purposes generally and, therefore, for purposes of ERISA and IRC Section 414.
- This view was challenged when the PBGC Appeals Board in 2007 published a determination that the private equity investment firm involved in the Appeals Board opinion was engaged in a trade or business – versus mere investment activity – to be an ERISA controlled group member as it owned more than 80% of the stock of the bankrupt portfolio company. PBGC Appeals Board Decision, *Liability Within a Group of Companies*, 2007-09-26.



## Private Equity Controlled Group Members – cont'd.

- In 2010, the District Court in Board of Trustees, Sheet Metal Workers Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F. Supp. 2d 854 (E.D. Mich. 2010) refused to grant either party summary judgment as to whether a group of three private equity funds, which invested in a portfolio company, were liable as controlled group members for liability incurred by the portfolio company's withdrawal from a union-sponsored multiple employer plan. The court found evidence to create an issue of material fact that the private equity funds engaged in certain operations of the portfolio company and that the three private equity funds, none of which held an 80% interest, but each of which shared a general partner, could constitute a trade or business linked by common ownership to constitute one partnership or joint venture.

## Private Equity Controlled Group Members – cont'd.

- In Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund, 903 F. Supp. 2d 107 (D. Mass. 2012), the District Court for the District of Massachusetts ruled contrary to the Appeals Board Letter and the Palladium Equity Partners case. The court held that private equity funds sponsored by Sun Capital Partners Inc. (the “Sun Funds”) – which had no offices nor employees, neither manufactured nor sold any goods and did not report any income on their tax returns other than investment income – were not “trades” or “businesses.” Moreover, the court held that the two Sun Funds, which had different general partners but the same investment adviser investing in parallel in the bankrupt portfolio company, Scott Brass, Inc., did not create a controlled group with Scott Brass, even if the total investment of the two Sun Funds exceeded 80%. The investment was structured such that one Sun Fund owned only 70% and the other Sun Fund owned the remaining 30% of the investment vehicle, Sun Scott Brass, LLC.

## Private Equity Controlled Group Members – cont'd.

- On appeal, the First Circuit reversed, rejecting the argument that a private equity fund could not engage in a “trade or business” and thus could not be part of an ERISA controlled group. Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund, 724 F.3d 129 (1st Cir. 2013). The First Circuit performed a fact-specific analysis to determine that at least one of the Sun Funds was engaged in a trade or a business, rather than acting as a passive investor.
- Merely investing in portfolio companies for the principal purpose of making a profit is not enough to be a trade or business. The First Circuit held, however, that at least one of the Sun Funds satisfied an “investment plus” standard, similar to the standard set out in the Appeals Board opinion and Palladium Equity Partners case, to constitute a trade or business. In applying the “investment plus” standard, the court engaged in a fact-intensive analysis, examining the Sun Funds’ partnership agreements, offering memoranda and other agreements, focusing on the management and operational activities engaged in by the Sun Funds. In support of its holding that Sun Fund IV was a trade or business, the First Circuit found:

## Private Equity Controlled Group Members – cont'd.

- The purpose of the Sun Funds was to manage and supervise their investments giving the general partner “exclusive and wide-ranging” management authority. Id. At 142.
- The Sun Funds sought portfolio companies in need of extensive intervention in their management and operations, provided such intervention and sold them in two to five years for a profit. Id.
- The principals of the Sun Funds’ general partners took controlling interests in the companies in order to involve themselves in company management “encompass[ing] even small details, including signing of all checks for its new portfolio companies and the holding of frequent meetings with senior staff to discuss operations, competition, new products and personnel.” Id. At 143.



## Private Equity Controlled Group Members – cont'd.

- Sun Fund IV received a direct benefit from its active involvement in management that “an ordinary passive investor would not derive.” Id. As a result of management fees paid to its general partner, Sun Fund IV received “an offset against the management fees it otherwise would have paid its general partner for managing the investment.” Id.
- The First Circuit rejected the Sun Funds reliance on Supreme Court tax precedents (Whipple v. Commissioner, 373 U.S. 193 (1963) and Higgins v. Commissioner, 312 U.S. 212 (1941)), finding that the Sun Funds direct and indirect involvement in management and operations distinguished it from those cases. The Court also rejected the Sun Funds argument that they did not engage in management activities because a separate management entity undertook these activities. Relying on Delaware law, the Court found the general partner of the Funds’ acted as the agent of the Funds in providing these management services to Scott Brass.

## Private Equity Controlled Group Members – cont'd.

- The First Circuit remanded the case to determine whether Sun Fund III (the 30% owner) constituted a trade or business and whether the 70%-30% ownership split between the two Sun Funds prevented either fund from having the 80% “common control” element for purposes of being part of Scott Brass’ ERISA controlled group. The court concluded, however, that a provision of ERISA allowing transactions to be disregarded where a primary purpose is to “evade or avoid” liability did not apply to this case.
- The First Circuit denied a petition for rehearing. A petition for a writ of certiorari to the Supreme Court was denied on March 3, 2014.

# Foreign Controlled Group Members

- Foreign entities that meet the requirements of IRC § 1563(a) can be members of controlled groups under ERISA. (See ERISA § 4001(a)(14) referring to IRC §§ 414(b) and (c), which specifically refers to section IRC § 1563(a).)
- Both PBGC and the United States Department of Labor (the “DOL”) have taken the position that foreign entities are included in the definition of controlled groups. (PBGC Op. Ltr. 97-1 (May 5, 1997); DOL Adv. Op. No. 85-28A (1985) and Op. Nr. 87-03A n.5 (1987).)

## Foreign Controlled Group Members – cont'd.

- Courts have assumed foreign entities may be controlled group members in addressing selected matters. See, e.g., PBGC v. Satralloy, Inc., 1992 U.S. Dist. LEXIS 22829 (S.D. Ohio July 16, 1992) (PBGC can assert a lien against a foreign controlled group member if it can establish minimum contacts needed for jurisdiction); Central States, Southeast & Southwest Areas Pension Fund v. Xth Transport, Inc., No. C-2-90-0630, 1996 U.S. Dist. LEXIS 7610 (N.D. Ill. May 30, 1996) (a foreign controlled group member may be liable for withdrawal liability for a multiemployer plan if such foreign entity is subject to personal jurisdiction in the U.S.).
- In GCIU-Employer Retirement Fund v. Goldfarb Corp., 565 F.3d 1018 (7th Cir. 2009), the Seventh Circuit dismissed a multiemployer pension fund's claim for withdrawal liability against a Canadian (former) parent of the U.S. contributing employer, holding that neither the parent's majority ownership of the contributing employer's stock nor the employer's withdrawal from the plan at a time the parent held its ownership interest were sufficient contacts to establish specific personal jurisdiction over the foreign parent.



## Foreign Controlled Group Members – cont'd.

- In PBGC v. Asahi Tec. Corp., No. 10-1936, 2013 WL 5503191 (D.D.C. Oct. 4, 2013), the District Court for the District of Columbia granted PBGC summary judgment that (i) it had specific personal jurisdiction over Asahi Tec, and (ii) Asahi Tec was liable for the unfunded benefit liabilities and termination premiums of Asahi Tec's bankrupt U.S. subsidiary, Metaldyne Corporation. Asahi Tec had moved to dismiss PBGC's claims for lack of personal jurisdiction because it purported to have no offices, operations or assets in the U.S. and had no involvement in the termination of Metaldyne's pension plan. On March 14, 2012, the Court denied Asahi Tec's motion because PBGC had "made a prima facie showing that the defendant purposefully directed activity towards the United States in connection with the acquisition of Metaldyne and the attendant assumption of controlled group pension liability, and that the claims in the complaint arise directly out of that specific conduct." PBGC v. Asahi Tec Corp., 839 F. Supp. 2d 118, 120 (D.D.C. 2012).

## Foreign Controlled Group Members – cont'd.

- In granting PBGC summary judgment on Asahi Tec's lack of personal jurisdiction defense, the District Court held that it had specific personal jurisdiction over Asahi Tec for PBGC to enforce controlled group liability because Asahi Tec purposely directed its activities at the U.S. when it acquired Metaldyne with the knowledge of the underfunded pension plan. It further held that Asahi Tec was aware that it could be liable for the plan's liabilities, factoring the underfunded pension liabilities in valuing Metaldyne at time of the acquisition, when PBGC's contingent claims arose. Having found that it had specific jurisdiction over Asahi Tec, the court then determined that Asahi Tec held the requisite stock ownership of Metaldyne to impose controlled group liability for its pension liabilities.

# Controlled Group Member Transactions

- PBGC may seek to obtain protections prior to a transaction involving a plan sponsor that could adversely affect a pension plan and ultimately cause PBGC to involuntarily terminate the plan. See ERISA § 4042, 29 U.S.C. § 1342 (authorizing PBGC, at its discretion, to “involuntarily” terminate a plan upon making one of four statutory findings, including (i) the plan has not met minimum funding standards, and (ii) PBGC’s possible long run loss with respect to the plan may increase unreasonably if the plan is not terminated.)

## Controlled Group Member Transactions – cont'd.

- Among the transaction that PBGC is likely to pay close attention to under its Early Warning Program are break-up of a controlled group; leverage buyouts; and transfers of significantly underfunded pension liabilities in connection with the sale of a business. Using the threat of seeking an involuntary termination, which would trigger controlled group liability for the plan's underfunded benefit liabilities, PBGC may negotiate with controlled group members to obtain protections for the pension plan in connection with such transactions. These could include cash contributions to the plan, letters of credit, security interest in assets and guarantees from the stronger members of a controlled group if a member is leaving the group.
- In PBGC v. Saint Gobain Corp. Benefits Committee, No. 13-2069, 2013 WL 5525693 (E.D. Pa. Oct. 4, 2013), PBGC sought a U.S. District Court's approval to terminate an underfunded pension plan maintained by Saint-Gobain Containers, Inc. (SGC US), over the objections of the plan's sponsor and the plan's administrator. PBGC asserted that its possible long-run loss would increase if the pension plan were not terminated because SGC US's investment-grade French parent corporation had agreed to a \$1.7 billion sale of SGC US to a unit of Ardagh Group, a below-investment-grade company.

## Controlled Group Member Transactions – cont'd.

- The issue before the court initially was not whether the creditworthiness of the purchaser justified an involuntary termination so as to establish controlled group liability against the French parent and other members of SGC US's controlled group, but the standard of review the court would apply as to PBGC's determination to proceed with an involuntary plan termination (arbitrary and capricious as an action of a federal agency or *de novo* review). The Court determined that ERISA required *de novo* review.
- On April 16, 2014, PBGC announced that it had reached a settlement that will allow SGC US to continue as the sponsor of the plan following the sale of SGC US to the Ardagh Group unit. The settlement is the result of an agreement by the former French parent of SGC US to make \$207.5 million in additional contributions to the plan, bringing the plan's funding ratio to 80% from 63%.



# “Evade or Avoid” Controlled Group Transactions

- If a principal purpose of a business transaction was to evade liability under Title IV of ERISA, and the pension plan terminates within five years after the transaction, the transaction can be ignored for purposes of assessing controlled group liability. ERISA § 4069, 29 U.S.C. § \_\_\_\_.
- On June 14, 2012, PBGC filed an objection in the bankruptcy proceedings of RG Steel related to a DIP financing motion that sought approval of certain releases in favor of RG Steel’s 75% owner, the Renco Group, which would impair or prejudice PBGC’s statutory rights against Renco. In its objection, PBGC noted a sales transaction in which Renco sold a 25% interest in RG Steel to private equity firm Cerberus Capital Management, LP a few months before RG Steel’s bankruptcy filing. PBGC contended that Renco had designed the transaction for the purpose of evading or avoiding its controlled group liability for RG Steel’s pension plan, which had estimated \$87.2 million in unfunded benefit liabilities as of August 31, 2012 .

## “Evade or Avoid” Controlled Group Transactions – cont’d.

- On January 28, 2013, PBGC sued Renco and certain affiliates in the District Court for the Southern District of New York, 1:13-cv-00621-RJS, alleging that they were jointly and severally liable for RG Steel’s unfunded benefit liabilities even though they did not meet the 80% “common control” standard as of the plan termination date. PBGC invoked the “evade or avoid” powers under ERISA § 4069.
- PBGC alleged that prior to the 25% ownership sale to Cerberus, Renco falsely stated to PBGC that there was no agreements imminent to break up its controlled group. PBGC alleged that Renco’s misrepresentations were intended to, and did, prevent it from exercising its involuntary termination rights to lock in Renco’s controlled group liability. PBGC further alleged that the intent to evade liability is demonstrated by the structure of the transaction, which was in certain respects devoid of economic value. The Renco lawsuit remains pending.





# Unfunded and Underfunded Pension Liabilities

*June 6, 2014*

CONWAYMACKENZIE



## ***Table of Contents***

---

Public Pension Plan Overview	<b>3</b>
US Public Pension Funds	<b>5</b>
Focus State–Puerto Rico	<b>10</b>
Focus State–Illinois	<b>14</b>
Select Government Pension Experience	<b>18</b>



# Public Pension Plan Overview

CONWAYMACKENZIE

# GASB 67 and 68 — Revised Financial and Accounting Disclosure Standards For Public Pension Plans

## Overview

- Government Accounting Standards Board (GASB), which governs the public pension plans, has approved new accounting and reporting standards to bring better disclosures
  - Under the new standards GASB 67 (effective from June 15, 2013) and 68 (effective from June 15, 2014) replaces GASB 25 and 27 disclosure rules, respectively
- The revision seeks to rationalize three major aspects of public pension plans reporting – funding method (which determines plans liability & expense), discount rate, methods used to amortize unfunded liability changes
- Drawbacks of the earlier rules include,
  - Basic information on total assets, liabilities, funded levels and annual contributions made were often not reported
  - For individual plans, difficulty in finding financial statements and actuarial reports to understand current status
- **Impact of the revisions in standards**
  - Funded levels of public pension plans are expected to further deteriorate after the revision is implemented, which in turn might also impact the government's credit rating
  - Ensure higher comparability between reporting entities with standardization of the accounting process, to bring it more in-line with the private sector pension accounting rules
  - Greater transparency in group pension plans as participating employers will report their proportionate share of pension costs

Source: Plan Consultant, GASB's New Rules on Uniformity and Disclosures

## Revisions requirements under the new GASB standards

### Net Pension Liability (NPL)

- For defined pension plans, required to report NPL as a balance sheet item for the sponsors
  - NPL to be calculated as the total pension liabilities (calculated using uniform funding method) less market value of assets
- Annual change in the NPL to be reported as the primary pension expense

### Discount Rate

- As per the new rules, disclosures to now include documentation on how the discount rate was determined along with the assumed asset allocation and the long-term expected real rate of return for each major asset class
- Further, asset smoothing to be prohibited for accounting purposes but allowed for funding purposes, which will lead to different discount rates of liabilities for accounting and funding calculations

### Recognizing unfunded Liability Changes

- Change in value of unfunded pension liabilities from plan revision, which impacts the pension expense, to be recognized immediately

### Determining a plan's funding requirement

- No change in the method of determining the plan's funding requirement

### Other requirements

- Multi-employer plans to record their respective proportionate share of plan liabilities and expenses
- Overall, the details of information to be now included in notes to financial statements has increased





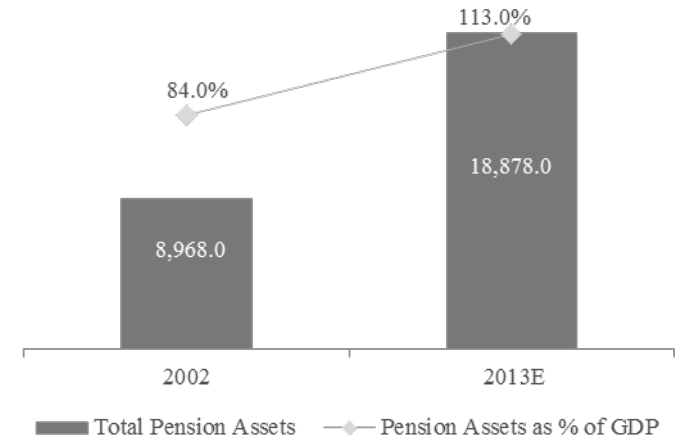
# US Public Pension Funds

CONWAYMACKENZIE

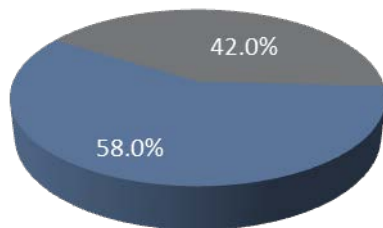
# Domestic equity market is the preferred investment choice for pension plans in the US

- Globally, US is the largest pension market in terms of pension assets
  - Pension assets increased 12% y-o-y to reach \$18.9 trillion in 2013
- Post the financial crises, 2013 experienced the maximum returns for US pension funds investments in the equity markets
  - Domestic equities has seen the highest asset allocation in the past ten years
- Notable shift by employers from defined benefit plans to defined contribution plans in an effort to reduce the mounting pension obligation burden
  - In 2009, defined benefit plans accounted for 45% of the pension assets vis-à-vis 42% in 2013

**US Pension Plan Assets**  
(\$ billion, %, 2002, 2013E)

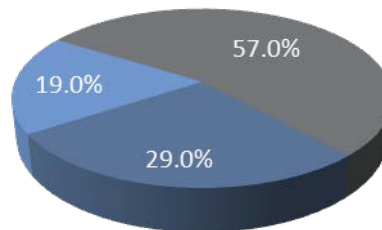


**US Pension Assets–By Type**  
(%, 2013E)



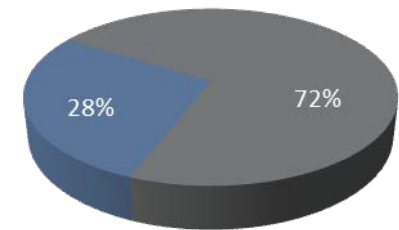
■ Defined Benefit ■ Defined Contribution

**US Pension Assets–By Investments**  
(%, 2013E)



■ Equities ■ Bonds ■ Other

**US Pension Assets–By Sector**  
(%, 2013E)



■ Private Sector ■ Public Sector

# Large pension obligations coupled with widening pension funding gap may force some states to file for bankruptcy

## Vallejo, Chicago, Cincinnati, Providence, Taylor, Woonsocket – What's common across these cities??? The possibility of filing for bankruptcy

- Prime reason being high debt burden of which pension obligations form a large chunk
- Escalating pension costs, in the aftermath of the financial crises led the US public pension plans to become drastically underfunded over the past few years
  - However, there is a significant variation in the health of the pension plans across US with some states being extremely strong on pension system (Wisconsin emerged as the strongest state with 99.8% funding ratio), while others facing large funding shortfalls
- The underfunded public pension liabilities gap is estimated in the range of \$730 billion to \$4.4 trillion
- Several municipalities are being reviewed by rating agencies such as Moody's for a possible credit downgrade, based on anticipation that new GASB rules might further deteriorate the pension liabilities situation
  - Detroit Bankruptcy filing raises concerns that other financially distressed cities and states (e.g. Illinois, California, Mississippi, Connecticut, Alaska) may follow suit

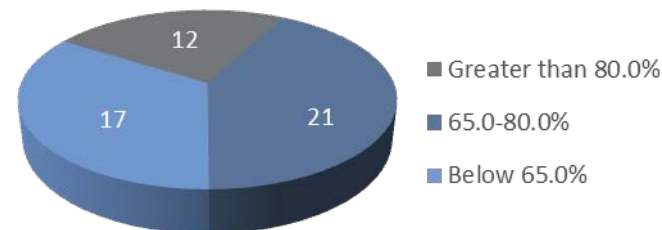
### Case Study: Detroit City

- Facing financial turmoil, Detroit city filed for bankruptcy under Chapter 9 in July 2013 on the back of mounting debt burden (estimated at \$18 billion)
  - Unfunded pension liability has been estimated in the range of \$3.5-\$8.0 billion
- In a ruling in December 2013, a decision was provided that Detroit can impose cuts to its municipal pension plans
  - A landmark ruling, it paves way for cities and municipalities to use the bankruptcy route to force reductions in their pension liabilities

Source: Standard & Poor's, A Bumpy Road Lies Ahead for US Public Pension Funded Levels

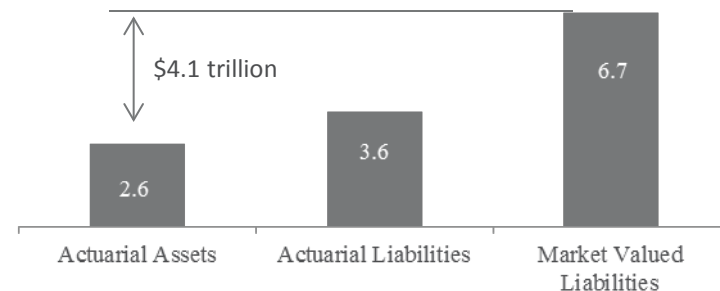
© 2014 Conway MacKenzie, Inc.

No<sup>1</sup>. of States with Funded Ratio (2012)



Note: 1) 50 States are Considered for the above-mentioned statistic  
Source: Morningstar, The State of State Pension Plans 2013

Pension Funding Gap (\$ Trillion)



Source: Business Insider, Pensions Are Still Making Ludicrous Assumptions About Future Returns

# Puerto Rico and Illinois have the worst funded ratio and credit rating in the US

- As per the Morningstar study report on 50 US states, collectively the state plans are 72.6% funded and the UAAL per capita is ~\$2,600
- The US territory of Puerto Rico had the worst funded ratio of 11.2%<sup>1</sup> with a general obligation (GO) rating\* of 'BBB-' and 'Negative' Outlook
  - Amongst the states, Illinois remained the worst funded at 40.4%
- As state's pension funded level continued to decline, albeit at a slower pace due to better investment returns in 2013, governments across are implementing reforms to tackle the spiraling pension costs

Top 10 States with funded ratio

Rank	State	Funded Ratio (2012)	UAAL PC (2012)	GO Rating*
1	Wisconsin <sup>1</sup>	99.9%	18	AA/Stable
2	Washington <sup>1</sup>	98.1%	160	AA+/Stable
3	North Carolina <sup>1</sup>	93.9%	415	AAA/Stable
4	South Dakota	92.6%	795	AA+/Stable
5	Tennessee <sup>1</sup>	92.1%	415	AA+/Stable
6	New York <sup>1</sup>	90.5%	814	AA/Positive
7	Delaware	88.3%	1,150	AAA/Stable
8	Florida	86.4%	1,089	AAA/Stable
9	Idaho	84.4%	1,378	AA+/Stable
10	Oregon <sup>1</sup>	82.0%	2,932	AA+/Stable

5 States with biggest drop in funded ratio (2007–12)

Rank	State	Decline	Funded Ratio (2012)	Funded Ratio (2007)
1	Vermont	22.6%	70.2%	92.8%
2	Oregon	22.6%	82.0%	104.6%
3	Illinois	22.2%	40.4%	62.6%
4	North Dakota	21.8%	63.5%	85.3%
5	Kentucky	21.0%	46.8%	67.8%

Source: Bloomberg, *Biggest Five Year Decline In Pension Funding States*

Bottom 10 States with funded ratio

Rank	State	Funded Ratio (2012)	UAAL PC (2012)	GO Rating*
1	Illinois	40.4%	7,421	A-/Negative
2	Kentucky	46.8%	4,983	AA-/Negative
3	Connecticut	49.1%	6,922	AA/Stable
4	Louisiana	55.5%	4,161	AA/Stable
5	New Hampshire	56.2%	3,470	AA/Stable
6	Kansas	56.4%	3,650	AA+/Stable
7	Mississippi	58.0%	4,983	AA/Stable
8	Rhode Island	58.2%	4,280	AA/Stable
9	Indiana	58.4%	2,415	AAA/Stable
10	Hawaii	59.2%	6,329	AA/Stable

Note: 1) Data available for 2011

Sources: Morningstar, *The State Of State Pension Plans 2013*; \*Standard & Poor's, *A Bumpy Road Lies Ahead For US Public Pension Funded Levels*

# Ten Municipalities Under 65% Funded

Municipality with funded ratio*			
Rank	Municipality	Total Liability	Funded Ratio
1	Charleston, W. VA.	\$0.337 Billion	19%
2	Omaha, NE	\$1.508 Billion	45%
3	Chicago, IL	\$26.724 Billion	47%
4	New Orleans, LA	\$1.937 Billion	56%
5	Wilmington, DE	\$0.364 Billion	59%
6	Honolulu, HI	\$3.264 Billion	61%
7	Jackson, MS	\$0.489 Billion	61%
8	Manchester, NH	\$0.422 Billion	61%
8	Boston, MA	\$2.543 Billion	62%
9	Jacksonville, FL	\$4.438 Billion	64%
10	Louisville, KY	\$1.233 Billion	64%

Source: PEW Charitable Trust 2013 Research Study. – based on 2010 fiscal year

- The City of Chicago, Cook County, and the State of Illinois all have alarmingly underfunded pension plans.
- Voters in Cincinnati recently defeated a ballot initiative that would have overhauled the pension systems and turned them into 401k plans.
- Many these large cities including Detroit and Chicago are working on pension reform plans.





# Focus State-Puerto Rico

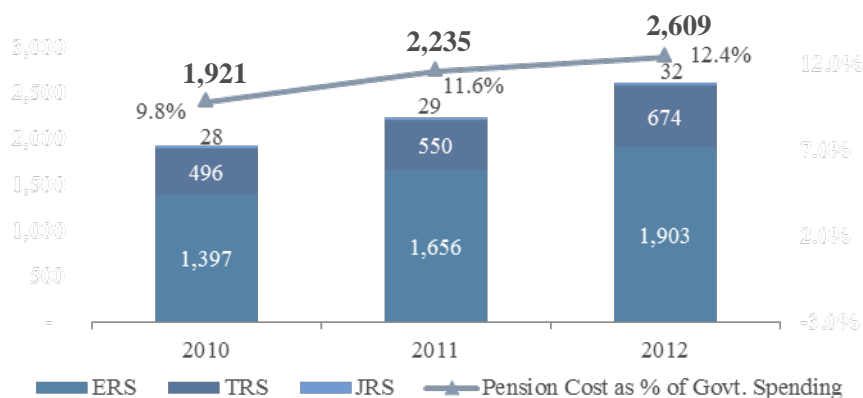
CONWAYMACKENZIE

# Puerto Rico remains highly underfunded with adverse macro-economic indicators

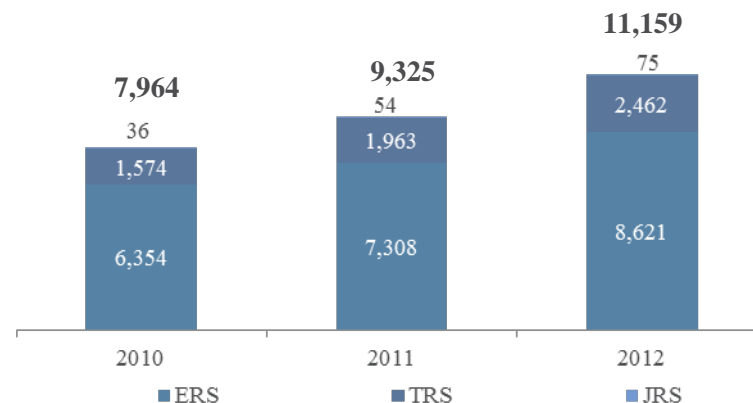
## Key Trends

- Puerto Rico has been trapped in recession since 2006 and is characterized by high unemployment rate (14% in 2013), low labor force participation rate (41.2% in 2013) and decreasing population, which demands structural and macro-economic reforms
- Poor macro-economic fundamentals coupled with high debt (accounting for c.65-70% of GDP in 2013), budgetary imbalances and persistent pension underfunding forced the credit rating agencies (S&P and Moody) to downgrade Puerto Rico debt rating to junk status in February 2014
- Huge unfunded actuarial liabilities are likely to deplete the net assets of ERS<sup>1</sup>, JRS<sup>1</sup> and TRS<sup>1</sup> pension plans by 2015, 2019 and 2021, respectively, if no immediate action is taken to curtail them
- Low funded ratio, which has reached 8.4% in 2012 and is well below the 2007 level (24.8%), along with large unfunded actuarial liabilities forced the Puerto Rico government to announce pension reforms in April 2013
- Currently, the state is highly underfunded, especially the State's biggest defined pension plan ERS with liability of c.\$26 billion at the end of 2012; the state reports pension liabilities as per GASB disclosures

**Annual Pension Cost—By Type**  
(\$ million, %, FY2010–2012)



**Net Pension Obligations—By Type**  
(\$ million, FY2010–2012)



Note: 1) ERS: Employee Retirement System; JRS: Judiciary Retirement System; TRS: Teachers' Retirement System

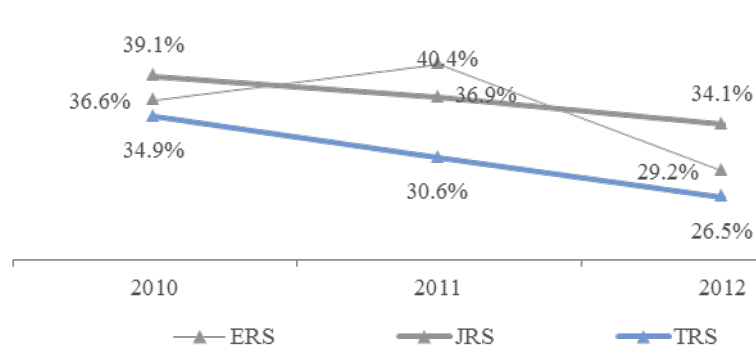
Source: Puerto Rico Commonwealth Annual Financial Report (2010-2012); Government Development Bank of Puerto Rico

# Increasing unfunded actuarial liabilities and declining funded ratio is a cause of concern

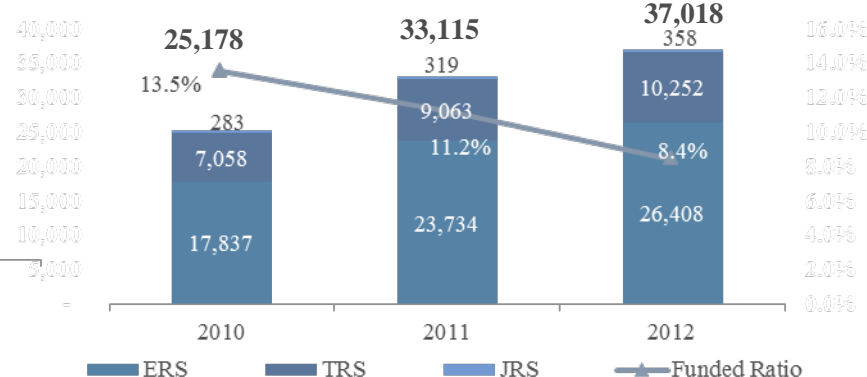
Overview of Employee Retirement Systems (As of June 30, 2012, \$ million)

	Actuarial Assets	Actuarial Accrued Liability	Unfunded Actuarial Liability	Funded Ratio	Single Vs Multiple Employer	Coverage
ERS	1,238	27,646	26,408	4.5%	Multiple	State Employees not covered under any other plan
JRS	58	416	358	14.1%	Single	Active and Retired Judges
TRS	2,099	12,351	10,252	17.0%	Single	Teachers coming under Department of Education
<b>Total</b>	<b>3,395</b>	<b>40,413</b>	<b>37,018</b>	<b>8.4%</b>		

Statutory Contribution as Percentage of Required Contribution—By Type (% , FY2010–2012)



Unfunded Actuarial Liabilities and Funded Ratio (\$ million, %, FY2010–2012)



Source: Puerto Rico Commonwealth Annual Financial Report (2010-2012) ; Government Development Bank of Puerto Rico

# Pension reforms are expected to lower statutory annual contributions and reduce the future pension liability

- Increasing net pension obligations (up 19.7% y-o-y), annual pension cost (up 16.7% y-o-y) and unfunded actuarial liabilities (up 11.8% y-o-y) in 2012 forced the government to undertake pension reforms in April 2013
- Following the are the key take aways of **ERS reforms**:
  - Retirement age for Act No. 447 participants raised from 58 to 61, current system 2000 participants raised from 60 to 65 and for new employees it is increased to 67 (with the exception of police officers, firefighters and custody officers whose retirement age remains 58)
  - Contribution of public employees increased from 8.275% to 10%
  - Survivor benefits will be modified and disability benefits will be substituted by mandatory disability insurance policy
  - Christmas bonus reduced from \$600 to \$200 and summer bonus is eliminated
  - Defined benefit plan is terminated with effect from June 30, 2013 and new employees will now be entitled to receive benefits only under defined contribution plan
- Pension reforms undertaken for TRS (enactment of Act 160-2013) are expected to eliminate \$560 million of future annual pay-as-you-go contributions, which will result in present value reduction in system pension benefits of c.\$3.7 billion
  - In April 2014, Supreme Court overhauled TRS reforms stating that the law diminishes the contractual rights of the petitioners in terms of their retirement plan; however it allowed the law to be applied to new teachers joining the system after the date of enactment of law
- The accuracy of actuarial assumptions also play an important role in defining the future liability to the government

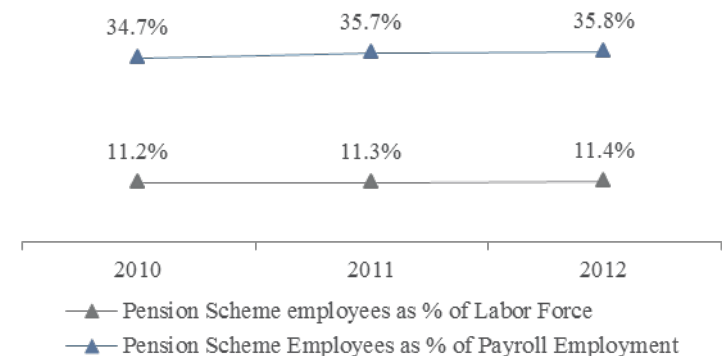
Note: 1) It is calculated as general wage inflation, plus service-based merit increase

Source: Puerto Rico Commonwealth Annual Financial Report (2010-2012); Government Development Bank of Puerto Rico

© 2014 Conway MacKenzie, Inc.

Actuarial Assumptions (30 <sup>th</sup> June 2012)	ERS	JRS	TRS
Investment rate of return	6.4%	6.6%	6.4%
Inflation	2.5%	2.5%	2.5%
Projected Payroll Growth	2.5%	NA	NA
Projected Salary Increases p.a	3.0%	3.0%	3.5% <sup>1</sup>
<b>Membership</b>			
Retirees and Beneficiaries currently receiving benefits	117,861	404	37,243
Current Participating Employees	134,566	374	42,707
Total	252,427	778	79,950

**Pension Scheme Employees—By Labor Force and Payroll Employment (% , FY2010–2012)**







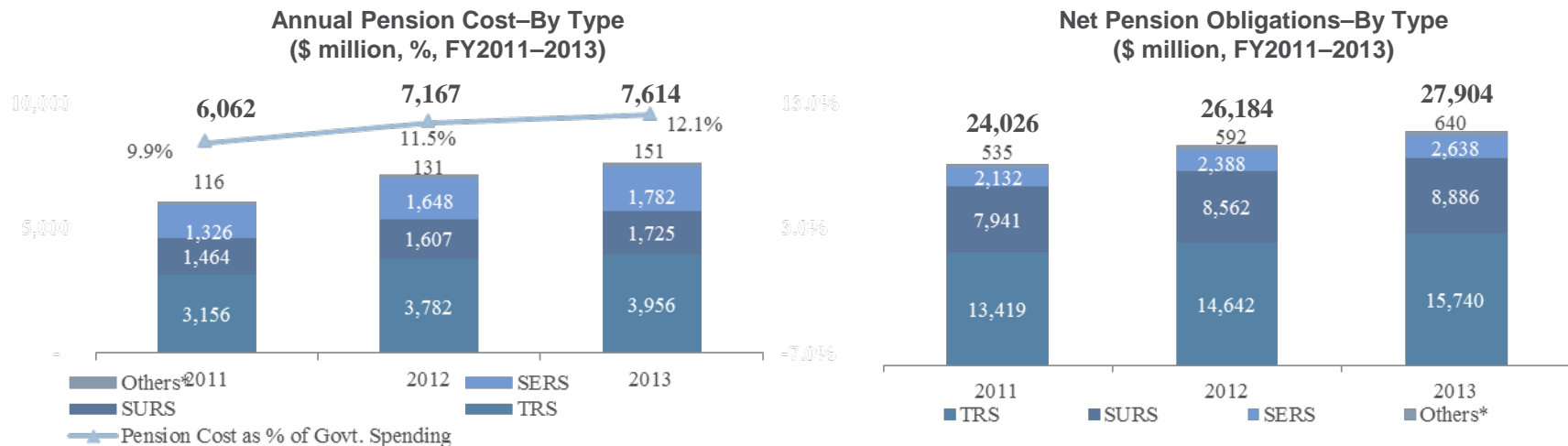
# Focus State-Illinois

CONWAYMACKENZIE

# Illinois has one of the lowest funded ratio in US which has accumulated huge unfunded actuarial liabilities

## Key Trends

- Illinois ranks 3<sup>rd</sup> in top 5 states in the US, which have witnessed the biggest drop in their funded ratios during 2007–2012, with a decline of 22.2% to reach 40.4% in 2012; however buoyed by strong investment returns, the ratio remained largely flat in 2013
- The persistent faulty actuarial assumptions and expectations has played a pivotal role in increasing the unfunded actuarial liabilities to more than \$100 billion level in 2013, which has garnered a negative outlook from majority of credit rating agencies
- During 2011–2013, the state witnessed an upward trend in its pension cost (grew by CAGR 12.1%), net pension obligations (up by CAGR 7.8%) and unfunded actuarial liabilities (grew by CAGR 10.1%), which has led to an increase in debt levels to the point where it may be forced to file for bankruptcy
- To curtail the increasing unfunded liabilities, the Illinois government announced certain reforms through enactment of Public Act 98-0599 which caps the pensionable earnings of tier1 employees, reduces the automatic annual increase to post-retirement benefits and undertake other such steps to reduce the future pension obligations



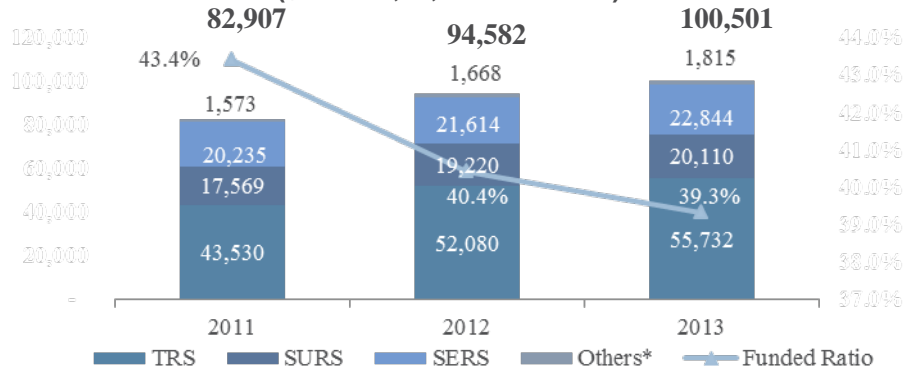
Source: State of Illinois Comprehensive Annual Financial Report (2011–2013); Annual Financial Report of GARS, JRS, SERS, TRS, SURS (FY2011–2013)

# Declining funded ratio and increasing actuarial liabilities led to increase in statutory contributions to pension funds

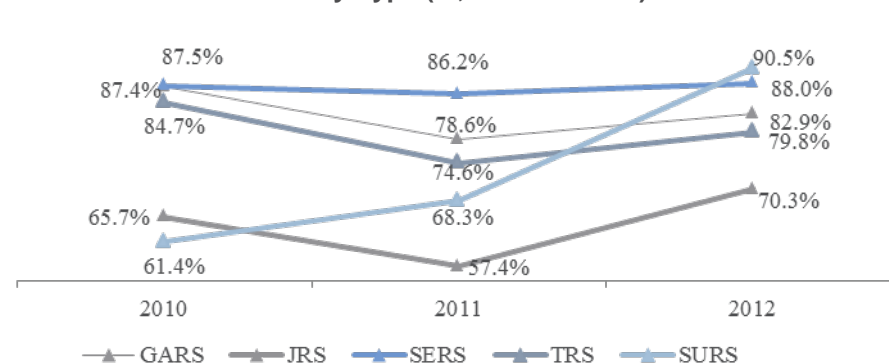
## Overview of Employee Retirement Systems (As of June 30, 2013, \$ million)

	Actuarial Assets	Actuarial Accrued Liability	Unfunded Actuarial Liability	Funded Ratio	Single Vs Multiple Employer	Coverage
GARS <sup>1</sup>	52	320	268	16.2%	Single	All members of General Assembly
JRS <sup>1</sup>	610	2,157	1,547	28.3%	Single	Active and Retired Judges
SERS <sup>1</sup>	11,877	34,721	22,844	34.2%	Multiple	All State Employees not covered under any other plan
TRS <sup>1</sup>	38,155	93,887	55,732	40.6%	Multiple	Teachers of Public Schools excluding Chicago
SURS <sup>1</sup>	14,263	34,373	20,110	41.5%	Multiple	Faculty and Staff of State Universities
<b>Total</b>	<b>64,957</b>	<b>165,458</b>	<b>100,501</b>	<b>39.3%</b>		

Unfunded Actuarial Liabilities and Funded Ratio  
(\$ million, %, FY2011–2013)



Statutory Contribution as Percentage of Required Contribution—By Type (%, FY2011–2013)



Note: \* Others include GARS and JRS pension funds 1) GARS: General Assembly Retirement System; JRS: Judge Retirement System; TRS: Teachers Retirement System; SURS: State Universities Retirement System

Source: State of Illinois Comprehensive Annual Financial Report (2011–2013); Annual Financial Report of GARS, JRS, SERS, TRS, SURS (FY2011–2013)

# Pension reforms intent to stabilize the systems' finances in long-term through reduced pension payments and debt

- Accumulating unfunded actuarial liabilities, downgrade of debt rating by credit agencies and fear of bankruptcy forced the government to pass the pension reforms (Public Act 98-0599) in December 2013
- Following are the key points from the **reforms**:
  - Reduction of automatic annual increase under post-retirement benefits (earlier there used to be annual 3% compounded increase regardless of expected inflation)
  - Capping pensionable earnings of Tier1 employees
  - Delaying the retirement age by almost up to 5 years for members under the age of 46
  - Changes made to the effective rate of interest, and a reduction of employee contributions for Tier1 employees by one percentage point
- The objective of the reforms is to eliminate the unfunded actuarial liabilities by 2045 and is not only expected to save \$160 million in pension payments but also reduce the pension debt by \$100 billion over the next 30 years
- However, several lawsuits has been filed to challenge the constitutionality of the above act by retired teachers, retired state workers and coalition of public employee unions for violating the pension protection clause of the state constitution

Actuarial Assumptions (30 <sup>th</sup> June 2013)	GARS	JRS	SERS	TRS	SURS
Investment rate of return	7.0%	7.0%	7.8%	8.0%	7.8%
Inflation	3.0%	3.0%	3.0%	3.3%	2.8%
Projected Salary Increases p.a	3.5%	3.8%	4.0%-8.9%	5.0%-10.2%	2.8%
<b>Membership (30<sup>th</sup> June 2013)</b>					
Total Membership	246	984	85,529	389,800	202,354
Active Members	160	962	61,545	160,692	70,556

Source: State of Illinois Comprehensive Annual Financial Report (2011–2013); Journal Star–Illionis pension reform lawsuits to be merged (March 2014)





# Select Government Pension Experience

CONWAYMACKENZIE



**City of Detroit** - Conway MacKenzie is charged with leading a task force of restructuring professionals to analyze the City's pension liabilities in order to: (a) understand the nature and scope of the of the City's obligations under its defined benefit pension plans; (b) identify factors impacting the funded status of the defined benefit pension plans; (c) evaluate future potential contribution requirements by the City to the defined benefit pension plans; and (d) analyze the City's options for modifications thereto. As part of the City's Chapter 9 process, Conway MacKenzie serves in a lead role negotiating with active unions and retired employees, including the Official Committee of Retired Employees, to address existing accrued benefits and establish programs for prospectively earned benefits for general City employees as well as Police & Fire workers.



**Commonwealth of Puerto Rico** - Conway MacKenzie was engaged by the Government Development Bank of Puerto Rico (the "GDB") to conduct a review and forensic accounting investigation of the Employees Retirement System of the Government of the Commonwealth of Puerto Rico. Tasks performed included reviewing historical decisions, transactions and other actions taken by the Board of Trustees of the Employees Retirement System and the Board of Directors of the GDB, and evaluating the deterioration in the funding ratio and other key indicators of the Employees Retirement System during the period of June 2004 to December 2008. In addition, financial projections, budgets, strategic plans and other information were reviewed to assess the current financial situation of the Employees Retirement System, including analysis and validation of key assumptions.



**Gregory A. Charleston**

Senior Managing Director, Atlanta

[GCharleston@ConwayMacKenzie.com](mailto:GCharleston@ConwayMacKenzie.com)

[770.628.0800](tel:770.628.0800)

Greg Charleston, Senior Managing Director, leads Conway MacKenzie's Atlanta office and also leads the firm's Healthcare Advisory Services Group. Mr. Charleston's healthcare experience has involved hospital, home care, diagnostic imaging, medical equipment, and other healthcare service organizations. Mr. Charleston also has extensive experience in various other industries, including transportation, aviation, publishing, government, distribution, construction and automotive. He has served as Chief Restructuring Officer (CRO) and as interim CEO and CFO on several engagements.



**Daniel S. Lubell**

Dan Lubell is a partner in the Corporate Reorganization Group of Hughes Hubbard & Reed LLP. Mr. Lubell advises in every major aspect of bankruptcy and financial restructuring, including asset sales, plan negotiations and complex bankruptcy court litigation. His practice includes representation of trustees, debtors, creditors and investors in Chapter 11 cases, out-of-court restructurings and other proceedings. He has extensive experience in bankruptcy matters involving pensions, cross-border cases and chapter 5 litigation.

Mr. Lubell's significant recent matters include representation of the Trustee of Lehman Brothers Inc. and the Trustee of MF Global Inc. in proceedings under the Securities Investor Protection Act; PricewaterhouseCoopers Inc. as Canadian Receiver of Fletcher Leisure Group in Chapter 15 and as the Canadian Receiver in the Georges Marciano Chapter 11; and Union Bank in the pre-packaged Homer City Chapter 11 and matters related to the Edison Mission Chapter 11. Mr. Lubell is lead outside counsel for the Pension Benefit Guaranty Corporation in litigation against Asahi Tec Corp. and with respect to claims against the Estate of Victor Posner and related entities. He also recently served as U.S. counsel for committees of retirees and pensioners in several Canadian cross-border cases including Smurfit Stone Containers Canada, Inc., Hollinger Canadian Publishing Holdings and Shaw Canada Inc.

Mr. Lubell received a B.A. *cum laude* from U.C.L.A. and a J.D. *magna cum laude* from Boston University School of Law, where he was an editor of the Law Review.





## Brian M. Resnick

### PARTNER

212 450 4213 tel  
brian.resnick@davispolk.com

Mr. Resnick is a partner in Davis Polk's Insolvency and Restructuring Group. He has substantial experience in a broad range of corporate restructurings and bankruptcies, representing debtors, creditors, banks, hedge funds, asset acquirers and other strategic parties in connection with pre-packaged and traditional bankruptcies, out-of-court workouts, DIP and exit financings, bankruptcy litigation, Section 363 sales and restructurings of monoline insurance companies. Mr. Resnick also advises financial institutions and other clients in structuring complex derivatives and securities transactions, and evaluating credit risks inherent in such transactions.

#### Bar Admissions

- State of New York
- U.S. District Court, E.D. New York
- U.S. District Court, S.D. New York

#### Education

- B.M., Percussion Performance, The Juilliard School, 1997
- M.M., Percussion Performance, The Juilliard School, 1999
- J.D., Columbia Law School, 2003
  - Harlan Fiske Stone Scholar
  - Member, Columbia Business Law Review

#### Of Note

- Editorial Board Member, American Bankruptcy Institute Journal
- Contributing Author, Collier on Bankruptcy
- Profiled in the Wall Street Journal's Bankruptcy Beat blog on July 26, 2011 ("Bankruptcy Beat Snapshot: Brian Resnick") and Daily Bankruptcy Review on July 28, 2011
- Featured as July 22, 2011, "Mover of the Week" in Daily Bankruptcy Review Small Cap's article entitled "From Broadway to Bankruptcy, Resnick Thrives in Two Careers"

#### NOTABLE REPRESENTATIONS

- Patriot Coal and James River Coal in connection with their respective Chapter 11 cases
- Joint administrators and liquidators of Lehman Brothers International (Europe) and its U.K. Lehman affiliates, including in connection with the tens of billions of dollars of claims that such companies have against Lehman's U.S. entities
- Bank of America as administrative agent for senior lenders in connection with the multi-billion dollar debt restructuring of Foxwoods Casinos, and the chapter 11 cases of Refco Inc. and its affiliates
- Citigroup as administrative agent and lead arranger of \$950 million debtor-in-possession financing facility for Eastman Kodak Company, and \$1.1 billion debtor-in-possession financing facility and \$3.5 billion exit facility for Federal Mogul Corporation
- J.P. Morgan as administrative agent under the \$4.5 billion debtor-in-possession financing for Delphi Corporation, including in connection with the unprecedented credit bidding of the DIP facility claims in exchange for a substantial portion of Delphi's businesses
- J.P. Morgan as administrative agent for pre-petition lenders in connection with several traditional (Coach America) and prepackaged (McLeodUSA, Citation Corporation) bankruptcy cases
- Alliance Tire Group (co-owned by Warburg Pincus) in connection with its acquisition of the U.S. operations of GPX International Tire Corporation pursuant to Section 363 of the Bankruptcy Code
- Twenty-three financial institution counterparties with credit default swap and financial guarantee exposure to monoline insurer Syncora Guarantee Inc. in connection with a comprehensive restructuring of credit default swap and financial guarantee obligations aggregating over \$160 billion
- Federal Reserve Bank of New York with respect to their more than \$150 billion in multiple financings for American International Group (AIG)
- Delta Air Lines and its affiliates as debtors in connection with their Chapter 11 cases

#### RECOGNITION

- Named one of *Super Lawyer's* Rising Stars of 2013
- Named one of *Law360's* Rising Stars of 2013 – Bankruptcy
- Up & Coming, New York: Bankruptcy/Restructuring – *Chambers USA 2012-2013*
- "Outstanding Young Restructuring Lawyer" – *Turnarounds & Workouts 2012*



**Laura Rosenberg, CFA, CIRA, CDBV**  
**Senior Vice President, Finance**

---

Phone (202) 558-5135 ■ Email [laura.rosenberg@fiduciarycounselors.com](mailto:laura.rosenberg@fiduciarycounselors.com)

Ms. Rosenberg is Senior Vice President, Finance of Fiduciary Counselors Inc. She has more than twenty-five years of experience in corporate finance, valuations, and pensions, with a concentration in corporate restructurings, workout, and bankruptcies.

Ms. Rosenberg has served as a senior executive of Fiduciary Counselors Inc. since 2004. She is a member of the company's Investment Committee and has served as the lead consultant on numerous client engagements including those related to company stock funds, prohibited transaction exemptions, performing and nonperforming real estate investments, and mergers & acquisitions of closely held companies. She also leads the firm's valuation practice.

Ms. Rosenberg is a consultant on behalf of clients with defined benefit pension plans. She assists companies, creditors committees, and other applicable parties with pension plan terminations, pension funding issues, and potential Pension Benefit Guaranty Corporation (PBGC) intervention in corporate transactions and bankruptcies. Ms. Rosenberg serves as an expert witness with respect to these issues.

With her extensive background in the distressed arena, Ms. Rosenberg serves as the firm's appointee on creditors and equity committees.

Ms. Rosenberg joined Fiduciary Counselors in 2004 from the PBGC, where she served for twelve years. She was a manager in the Corporate Finance & Negotiations Department, where she was responsible for valuation, credit analysis and negotiations with major corporate pension plan sponsors in a wide range of industry sectors including aviation, automotive and steel.

Ms. Rosenberg was a principal architect of the PBGC's Early Warning Program and successfully negotiated the restructuring of over \$18 billion of pension debt in more than 100 transactions with major corporations both in and out of bankruptcy. She led PBGC's negotiations to settle claims in numerous bankruptcies including TWA, United Airlines, US Airways, LTV Steel, Bethlehem Steel and Kaiser Aluminum, where the pension claim was often the largest creditor in the proceeding. Additionally, Ms. Rosenberg led PBGC's involvement in the Northwest Airlines prohibited transaction exemption and minimum funding waiver request. She also served as PBGC's appointee on creditors committees and as an expert witness in a key litigation case.

Prior to serving at PBGC, Ms. Rosenberg was the Capital Markets Manager and Cash Manager at MCI Communications Corporation, where she analyzed investment bankers' capital structure proposals and managed the pension asset managers and pension asset allocations.

Ms. Rosenberg received her B.S. degree in Finance from the University of Maryland, her M.B.A. in Finance from The George Washington University and a Certificate in Government Affairs from Georgetown University. She is a Chartered Financial Analyst (CFA), a Certified Insolvency and Restructuring Advisor (CIRA), and holds a Certification in Distressed Business Valuation (CDBV). Ms. Rosenberg teaches courses on pensions and valuations. She also serves on a peer review board for valuations. She is a frequent author and speaker on financial and pension matters and is widely quoted as an expert in these subjects.