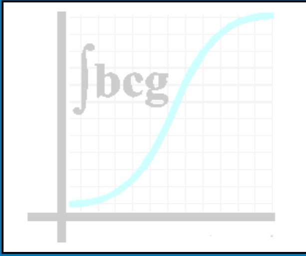

BCG Retirement News Roundup

October 2013, Volume 2, Issue 10

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Boomershine Consulting Group (BCG) has launched this monthly news roundup of highlighted significant articles from the retirement industry – for clients and friends. Retirement plan news has become increasingly pertinent for many audiences these days, including:

- Retirement Plan Sponsors – addressing both private and public sector issues
- Employers – dealing with complicated decision making for their plans
- Employees – educating the Boomer generation that is nearing retirement
- Industry Practitioners - helping to understand and resolve today's significant challenges

We review numerous industry news services daily and will include a collection of timely and significant articles each month concerning compliance, actuarial plan costs (including assumption debates), plan design change issues and benefit trends, as well as other related topics.

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Public Sector/Government Plans

NASRA Issue Brief: Public Pension Plan Investment Return Assumptions

http://www.nasra.org/files/Issue%20Briefs/NASRAInvReturnAssumptBrief.pdf

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Cities borrow to strengthen pension funds

Despite what finance experts say is a significant risk, cities across the nation continue to borrow money to bolster their employee retirement accounts.

Nashville was the latest to consider such a move, but Mayor Karl Dean's administration withdrew the proposal last week after intense criticism.

The city had considered borrowing $200 million to help reduce nearly $400 million of unfunded liability in its pension plan.

Earlier this year, Franklin, Tenn., agreed to issue $10 million in bonds to invest in the city's pension fund.

Elsewhere:

The Connecticut towns of Hamden and Stratford agreed this year to borrow up to $125 million and $220 million, respectively, to shore up pension plans.

Portsmouth, Va., this year borrowed nearly $170 million to help fund pension plans.

Fort Lauderdale issued $337 million in bonds last year to cover $400 million of unfunded liability in two separate retirement funds.

Oakland, the city believed to have issued the first pension obligation bond in 1985, again used them last year to pump more than $200 million into the city's retirement account for police and firefighters.

Critics say borrowing money to invest in pension funds is risky and point to cities where the deals have gone bad and helped contribute to major financial difficulties — including municipal bankruptcy.

Stockton, Calif., is among the most high-profile examples. The city borrowed money to shore up its retirement account, only to see significant investment losses.

Pension funds took a beating in the stock market during the Great Recession, and combined with increasing numbers of retirees — and in some cases, extra benefits given during boom years — have seen their unfunded liabilities grow.

That's the difference between how much money a pension fund has compared with its ability to meet current obligations and future promises to employees.

To reduce that gap, cities from coast to coast have borrowed. But issuing what are called pension obligation bonds carries significant risk, and finance experts warn cities not to enter into the deals lightly. The Chicago-based Government Finance Officers Association has cautioned cities on their use.

"It is a quick fix," said Jeffrey Esser, the association's executive director. "It is viewed as less painful than making the hard choices to fund a pension plan."

Those tough choices include raising taxes and cutting city services to pay more into retirement accounts.

Borrowing money to bolster a pension fund works like this: A city issues bonds, locks in a favorable interest rate, invests the proceeds with the rest of its retirement funds and banks on investment returns exceeding the financing costs.

Plans haven't always worked out. In a 2010 report, the Center for Retirement Research at Boston College found that after the recent financial crisis, most pension obligation bonds issued since 1992 were in the red.

The bonds, researchers found, could prove useful if a city were in a strong financial position and able to shoulder the risk without hurting its fiscal health.

But cities in the greatest fiscal stress turned out to be the ones most likely to issue the bonds, the researchers found.

In 2007, Stockton issued $125 million in bonds to help cover a pension shortfall. It invested them with the California Public Employees Retirement System, the nation's largest public pension fund.

But the system saw big losses during the recession, and the value of Stockton's investment dropped to less than $100 million.

Yet, the city was still on the hook to bondholders for the full amount, plus interest.

The deal and other bond obligations were significant factors in the city's decision to seek Chapter 9 bankruptcy protection.

Pension bonds put "the burden of payoff onto the next generation," said Marcia Fritz, executive director of the California Foundation for Fiscal Responsibility, a group that has tried to rein in lavish pension plans through reforms in a state that has been at the forefront of the issue.

"All of that money is going to go into the stock market, and it is subject to the whims of the stock market," she said. "I thought these pension bonds had gone the way of the dinosaurs."

Duane W. Gang, USA TODAY 12:25 p.m. EDT October 17, 2013

North Miami Beach to sue pension board

North Miami Beach council members voted Tuesday to sue one of the city’s pension boards after the board refused to implement cuts to employee pension benefits.

The council recently decided to cut the rate at which employees accumulate pension benefits. For instance, non-uniformed employees will accumulate 2.5 percent of working salary per year of service, down from 3 percent. That means a worker who started now and stayed with the city for 20 years would get an annual pension benefit equal to 50 percent of working salary, down from 60 percent.

Benefits already accumulated would not be lost, however. So an employee who worked 10 years for the city before the change and 10 years after would retire on 55 percent of working pay.

The city anticipates savings of $736,000 the first year and $1 million per year after that.

The council also eliminated a rule requiring a two-thirds majority of workers to approve reductions to pension benefits.

City Attorney Darcee Siegel assured council members these steps were legal, but a majority of the pension board and their lawyer disagreed.

Pension board attorney Robert A. Sugarman told the board in a letter that the board should disregard the City Council’s instructions because the plan changes did not receive the required two-thirds vote of participating employees.

So earlier this month, trustees of the General Employees Retirement Board voted 3-2 not to implement the new plan.

The result is a stalemate.

“Basically a line has been drawn in the sand, and until the pension board are ordered to impose or implement that ordinance ... that you all approved, we’re at a standstill,” Siegel told the council on Tuesday.

The council unanimously agreed to sue the trustees for breaching their fiduciary duty and refusing to administer the pension plan as enacted by the city. The trustees include two City Council members selected by the mayor, two city employees chosen by the employees, and a fifth person chosen by the other four.

Councilwoman Barbara Kramer and Councilman Frantz Pierre are the two council members who sit on the pension board. They cast the two votes in favor of implementing the changes.

“This was not something I thought would occur. I felt really out of place, but at that point, I wasn’t doing what I normally do, which is the fiduciary duty of a trustee to watch over the pension plan and make sure its sound,” said Kramer.

Mayor George Vallejo was incredulous that the pension board, which was created by an ordinance of the City Council had three un-elected members take action that will cost the city extensive legal bills. Although Siegel is a city employee, the council agreed to hire outside lawyers to work on the lawsuit.

“Now we have to spend the city’s money to sue a board that refuses to enforce changes that have been duly passed on two readings, after two years of study and after a collective bargaining process, a special magistrate’s independent review,” Vallejo said. “The pension board says to the residents of this town, ‘too bad.’ ”

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Cullerton: Illinois pension debt not a 'crisis'

Illinois Senate President John Cullerton said Sunday that the state's massive public employee pension debt is not a "crisis," but instead an issue being pushed by business-backed groups seeking lower income taxes at the expense of retiree benefits.

"People really misunderstand the nature of this whole problem. Quite frankly, I don't think you can use the word 'crisis' to describe it at the state level," Cullerton said in an interview on WGN-AM radio.

"It's something we have to deal with, but it's not something that we're on the verge of bankruptcy on," Cullerton said.

The Chicago Democrat's remarks came as lawmakers prepare to return to Springfield on Tuesday for the fall session with the issue of Illinois' worst-in-the-nation $100 billion unfunded pension liability at the top of the agenda. Critics have contended the pension problem has created an unstable economic environment in Illinois, and the state's bond rating has been downgraded over the failure of government to deal with the issue.

A bipartisan House-Senate panel has been meeting since June in an attempt to come up with a plan to alter retirement benefits without running afoul of a state constitutional prohibition against diminishing or impairing pensions.

The group's work has centered on a plan that would replace the yearly automatic 3 percent compounded increase in pensions with a formula to provide an increase of half the rate of inflation. Cost-of-living increases also would be subjected to a freeze with the length dependent upon the age of the worker. In addition, the salary used to calculate a pension would be limited.

Cullerton said he could support the plan, estimated to save about $138 billion over 30 years, as a compromise. Cullerton had pushed his own plan, backed by unions, which would save a projected $57 billion, while House Speaker Michael Madigan authored another proposal estimated to save $163 billion.

Still, Cullerton said that under a 1996 law aimed at gradually boosting the amount of money put into the state's pension funds to eventually get them funded at 90 percent of their liability, payments to the retirement systems are already near their highest level and require only small annual future increases to stay on track. As a percentage of state general revenues, pension payments would continue to be about one-fifth of the state's general revenues through 2044, his office said.

But the Senate president also noted that the state's personal income tax rate is scheduled to fall from 5 percent to 3.75 percent, and the corporate rate is supposed to

drop to 5.25 percent from 7 percent in 2015. The loss of revenue is estimated at about $5.4 billion.

"These pension (proposals) we've talked about will save annually anywhere from $750 million to $1.5 billion. So you're still going to have real huge cuts that we'll have to make if we don't raise that income tax higher than what they're scheduled to go down to," he said.

"But the pension reform then is about tax reduction — not about the solvency of the pension fund or about diverting money to spend more money for education," he added.

Cullerton said the conference committee's pension framework represents savings equivalent to lowering the state income tax by 0.25 percent.

"That's really what it's about. Now, I wouldn't call that a crisis. I think people should put that in perspective," he said. "Keep in mind, it's not going bankrupt. The money that we save by lowering those benefits is going to be used to lower the tax rates."

Cullerton contended top business organizations were pushing the pension changes for the benefit of lower taxes and that the public was generally supportive because many people have been moved to 401(k)-style defined-contribution plans from the defined-benefit type of plans that state retirees receive.

The state Senate president said he was unsure whether Republicans, who have pushed for larger savings than what the conference committee has discussed, will support a final plan. Noting the panel contains a number of GOP lawmakers running for higher office next year, Cullerton accused them of "trying to out-Republican each other" in advance of the March primary.

He said if Senate Republican leader Christine Radogno of Lemont can get the support of a dozen Republicans for the conference committee framework, "I think (Democrats) can get 18 votes and pass a bill over to the House."

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VRS pension underfunding criticized

The funded status of state employee and teacher pension plans is the lowest since Edward T. Burton III first joined the Virginia Retirement System board of trustees in 1994 — and he's not happy about it.

Burton, an economics professor at the University of Virginia and a VRS trustee for 18 of the past 20 years, ripped state lawmakers Thursday for failing to fully fund state

employee and teacher pensions, and chided his fellow trustees for not sounding the alarm.

“Everyone likes to pretend these (public retirement) systems are in good shape when they’re not,” he said. “This system is not in good shape.”

Burton voted with the board Thursday to approve new contribution rates for state and teacher pensions in the next two-year state budget, which is expected to fund about 80 percent of what VRS and its actuary say is needed to pay long-term liabilities.

The funding pledge is part of a new Virginia law that requires the state to increase contributions to state and teacher pension plans to 100 percent of what VRS recommends by July 1, 2018. Under the statute, the state must increase funding in the next two years from 70 to 80 percent of the certified rates, and to 90 percent in the following biennium.

The requirement will cost the state an additional $320 million in the two-year budget that the General Assembly will adopt next year for state employee pensions and the state’s share of retirement for public teachers.

Local school divisions — and the governments that finance them — will pay an additional $244 million over two years if the legislature fulfills its promise to fund 80 percent of the required contribution to teacher pensions.

“It’s going to be a 24 percent increase for each locality each year for their teacher retirement costs,” said James J. Regimbal Jr., principal at Fiscal Analytics and adviser to local governments in Virginia.

The looming budget increases don’t surprise local government officials or state legislators, who say the higher contributions are necessary to correct chronic underfunding of the retirement system.

“I don’t think the numbers are way out of line with what we’ve been looking at,” said Chesterfield County Administrator James J.L. Stegmaier. “That doesn’t mean we’re happy about it, but they’re not out of line.”

Stegmaier has been among the critics of state lawmakers for deferring necessary contributions to employee pensions to balance the state budget.

“If you’re going to offer a benefit, you ought to pay for the benefit,” he said.

The last time the retirement plans were 100 percent funded was 2003, but deferred contributions and severe stock market losses in 2009 have eroded their status.

The state employee retirement plan was 65.1 percent funded June 30, when the latest snapshot of VRS assets and obligations was taken by its actuary, Cavanaugh Macdonald Consulting. The teacher plan was funded at 62.1 percent.

Both are funded at their lowest levels since 1994, when Burton joined the board. “That’s not good enough,” he said.

Chairwoman Diana F. Cantor defended VRS’ staff for clearly communicating the retirement system’s funding shortfalls to the public and legislators, who she said understand the seriousness of the problem.

“It’s not like they’re over there with a Pollyanna look at what’s going on over here,” Cantor said.

Burton said he did not fault VRS Director Robert P. Schultze or his staff, but he contended the board had not been aggressive enough in challenging lawmakers, especially when Gov. Bob McDonnell and the General Assembly deferred payment of $620 million to state employee and teacher pensions in 2011 and 2012 — an amount that exceeded $1 billion with deferred local contributions for teachers. “When the governor walked on the rates, we didn’t do anything,” Burton said.

The contribution rates approved Thursday would have been higher if VRS had not changed its assumptions last spring based on a four-year study of the system’s experience with employees — such as when they retire, how much they are paid, how long they live after retirement, and how often they are disabled.

The study’s findings slightly reduced pension rates and improved funding of retirement plans, but they had a big effect on the rate that local governments and political subdivisions will have to pay for disability coverage of employees hired on or after Jan. 1 under a newly adopted hybrid retirement plan.

The VRS board cut the previously advertised rate by one-third — from 0.91 to 0.60 percent of pay — and extended the deadline for localities to decide whether to join or opt out of the state plan. The board moved the deadline from Nov. 1 to Dec. 2.

The board also reduced the rate for teacher disability by about one-fourth, from 0.39 to 0.29 percent of pay.

School divisions and local political subdivisions, including authorities, have the option of joining other available plans with comparable benefits.

“It might make the VRS disability plan more attractive to localities,” said Mary Jo Fields, research director at the Virginia Municipal League, which is offering an alternative plan.

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Private Sector

All Eyes on 2018, and How to Avoid Excise Tax

October 8, 2013 (PLANSPONSOR.com) – Plan sponsors will definitely want to avoid an excise tax on high-cost health plans, and participants will need to start saving in health savings accounts (HSAs) for out-of-pocket health care costs.

Plan sponsors are already considering ways to avoid the 40% tax to be smacked onto plans exceeding limits set by the Patient Protection and Affordable Care Act (PPACA) in 2018. The excise tax will affect employer-sponsored coverage with limits of $10,200 for employee-only coverage and $27,500 for an employee and spouse or family coverage. The annual limit is subject to adjustments for health costs, age, gender and cost of living.

This is the so-called "Cadillac tax," Brad Kimler, executive vice president at Fidelity Benefits Consulting, told PLANSPONSOR. "No one wants to be the first guy to write a check for the excise tax—that would be a career-ending move," he said. Avoiding the excise tax promises to be a key driver for most major corporations in 2018 and is already giving private health exchanges traction, according to Kimler.

One way for plan sponsors to stay under the limit is make the population healthier. Expect more workplace-based wellness programs. Health plans will work with high-efficiency providers, such as centers of excellence and integrated delivery networks that keep costs down.

Perhaps easiest, Kimler said, is reducing the actual benefit, by providing high-deductible health plans, usually coupled with an HSA, which will carry lower premiums for participants. Plan sponsors will likely advise their plan participants to stow their savings on premiums in the HSA against future medical costs—but often this advice goes unheeded, Kimler said.

Unlike the less-popular flex spending account (FSA), HSAs can be rolled over year to year and owned by the participant (see "HSAs and FSAs Offer Different Benefits Strategies"). They share some characteristics of 529 college savings plans and are, in a sense, self-policing.

Participants need to save statements or summaries from providers and explanations of benefits (EOBs) from insurance companies. "They can pay themselves back from the account," Kimler explained. Receipts do not have to be accounted for year-to-year or used within a calendar year, as long as the coverage was in effect for the time of the claim. It amounts almost to a loophole within the device, he said.

This year, as plan sponsors survey the benefits landscape, Kimler said, it will sink in that health insurance costs rise because of sprouting reinsurance costs and fees. “What is the long-term glide path of our benefit plans?” is a question for corporations and benefits professionals. “How do we measure, over time, the variability and risk for different people in the work force?” Kimler said. Historically, everyone was in a fairly homogenous medical benefit plan with similar deductibles and co-pays.

But companies cannot stay under that excise tax limit by reducing the amount of subsidy they give. “They can only do it by reducing the value of the benefit they provide,” Kimler said. “So when you reduce the value of the benefit, you increase the deductibles and the-out-of-pocket exposures. The net result is that you’re going to have a population that is going to be richer or poorer, depending on their health status.”

“People don’t understand the risk of the out-of-pocket,” said Sunit Patel, senior vice president at Fidelity Benefits Consulting. “The burden isn’t going to be just on the premium but on out-of-pocket expenses, which can change a lot from year to year.”

The average person’s shaky financial literacy is a common topic, Kimler said, “but health care literacy is even worse. What’s a deductible? An out-of-pocket limit? Most consumers of health care have no idea what these terms mean, and they will become more important as companies migrate to the exchanges. Even companies that are just staying in over time will be forced to bring down their total premium value.”

Even with the lower premiums that go along with a high-deductible plan, Kimler said, participants need to save that money. “As exposures increase, there is going to be more variability for people,” he said.

“When consumers look at different price points in plans, they may not understand the deductible and the out-of-pocket,” Patel said. Differences in premiums are not necessarily driven by differences in quality of networks but by some of the insurance providers in health insurance being new, with their first chance to gain market share. “Just because you see a price point that is really high or really low, you shouldn’t think it necessarily equates with the quality of the benefit,” he said.

As costs in health care rise, plan sponsors will feel squeezed as they work harder to avoid hitting that cost threshold for providing a plan. “The floor is rising to meet the ceiling,” Kimler said, “and sometime between 2018 and 2022, employers will hit that mark.”

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Poll: Half of older workers delay retirement plans

CHICAGO (AP) — A new poll shows about half of working people 50 and older plan to retire at a later date than they previously expected.

The survey released Monday by the Associated Press-NORC Center for Public Affairs Research shows older Americans are embracing a revised vision of retirement.

They're not just working longer but continuing to work even after retiring from their primary career. More than 80 percent of those workers say it's at least somewhat likely they will do some work for pay even after retirement.

Workers 50 and older plan to retire at about 66, nearly three years later than their expectation when they were 40.

Finances, health and the need for employer benefits are most likely to play a role in retirement timing.

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Stealth Bill Would Allow Cuts to Current Pensions

UPDATE: Congress is holding hearings today on changing ERISA to allow cuts to the pensions of those already retired. In a surprise turnaround, the Teamsters union has come out against the cuts. Problems in the Teamsters' huge Central States Pension Fund were a big impetus for the proposed changes described below.

Congress is taking up a little-publicized proposal that would leave some pensioners high and dry.

Current law says pension plans can't cut the pensions of those already retired. But some multi-employer plans are in big trouble, so their unions and employers are uniting to lobby for the right to slash members' benefits.

"Until now," said Karen Ferguson of the Pension Rights Center, "it was unheard of that benefits of a multi-employer retiree would be cut, except in the very rare instance that their pension plan runs out of money." Multi-employer plans are more likely to be healthy than single-employer plans, precisely because they aren't dependent on one company.

But a coordinating committee for multi-employer plans, a group that includes both unions and employers, is pushing for what it calls a “solution” for “deeply troubled plans”: the right to preemptively cut promised benefits for everyone in their plans, including those already retired.

Multi-employer pension plans represent 10 million workers in construction, mines, grocery, hotels, health care, and Teamster employers. The plans had worked well for 40 years, and 60 percent are still in good shape. But others could run out of money in 15 to 20 years, hit by employer pull-outs, stock market reverses, deregulation, globalization, deunionization, and low interest rates.

The Teamsters’ Central States Fund, with members in 24 states from the South to the Midwest, is the poster child for an ailing plan. Deregulation of trucking brought hundreds of non-union companies into the industry and drove most union firms out, thus reducing contributions into the fund and to Teamster plans in other regions.

The union failed to organize the non-union companies and even let the largest contributor, UPS, pull 45,000 workers out of Central States in 2007 in exchange for a big one-time payment. There are now 62,000 active workers in the fund and 211,000 retirees.

Central States is one of the architects of the proposal that Congress may take up before the end of the year.

THE RIGHT TO SLASH NOW

Under the 2006 Pension Protection Act, which is up for renewal next March, if a plan goes bust, the Pension Benefit Guaranty Corporation (PBGC), a government agency, takes over paying out benefits—though these are cut to the bone.

The top amount the PBGC will guarantee currently for a multi-employer fund member is $12,870 a year, for someone who’s worked 30 years (much less for others). This is true even if the union had negotiated a decent pension of, say, $36,000 a year.

Both the Teamsters and employers such as UPS are saying that, to forestall that scenario for troubled funds later, benefits should be cut now.

Ferguson counters, “If the economy turns around in 10 or 15 years and the plans become healthy again, those who got their benefits cut now will be dead, literally.”

She argues that if the pension fund can’t be saved and will have to turn to the PBGC eventually anyway, then it’s a lot better to keep paying full benefits and spend down the assets, rather than cutting preemptively and subjecting thousand of retirees to poverty in their last years.

The proposal on its way to Congress would give plan trustees the authority to cut pensions now to 110 percent of the PBGC-guaranteed figure, or $14,157 a year for the best-off.

A ROSY VIEW

It's ironic that the premiums and guarantee levels originally set up for the PBGC assumed that multi-employer pension plans would always remain in good shape. Employers in such plans pay premiums to the PBGC of just $12 per year per worker, while those in single-employer plans pay $42. If a single employer goes bust, the maximum its workers can get from the PBGC is $27,500, more than twice the level for those in multi-employer plans.

Ferguson said the proposal has been heavily lobbied for and has support from both parties in both houses of Congress. The Teamsters for a Democratic Union (TDU) caucus, the Machinists, and some other unions are opposing it, along with the AARP.

Sandy Pope represents Teamsters at dozens of small shops in New York—precisely the workers who would be hurt by the changes. She's angry that her international is going for preemptive concessions. "When we bargain, we ask for $2 when we hope for $1," Pope said. "Here they're leading with what should be a last resort."

TDU member Dave Scheidt, who worked at Roadway, wants the government to step in, but not this way. He noted, "In 1980 our government put deregulation of trucking in place and that's what brought this about."

Pope thinks the government should increase premiums and fund the PBGC adequately.

Of course, those with defined-benefit pensions from any source are a minority now. "With all the baby boomers with crappy 401(k)s," Pope said, "people have their heads in the sand about what the economy is going to look like 10 years from now. Giving people their pensions now would help."

October 22, 2013 / Jane Slaughter

Social Security's Real Retirement Age Is 70

IB#13-15

The brief's key findings are:

- Due to increases in Social Security's Delayed Retirement Credit, the effective retirement age is now 70, with monthly benefits reduced for earlier claiming.

- Benefit levels at 70 appear appropriate given that rising deductions for Medicare and greater benefit taxation have reduced Social Security's net replacement rates.
- The shift to 70 should be feasible for many workers given increases in lifespans, health, and education.
- But vulnerable workers forced to claim early will have low benefits and will be particularly harmed by any further cuts.
- Policymakers need to inform those who can work that 70 is the new retirement age and devise ways to protect those who cannot work

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A long history of reaction

The U.S. government was never visionary, moving slowly to answer pension problems with legislation and regulation

The history of U.S. pension legislation over the last four decades is largely one of playing catch-up.

"Congress typically waits until there is some crisis," said Phyllis Borzi, assistant secretary for the Employee Benefits Security Administration at the Department of Labor. "One of the beauties of the marketplace is that things change. The problem with government is that we tend to be more reactive than visionary, and Congress is 18 times more like that than anybody."

Just ask the 11,000 employees of the Studebaker-Packard Corp., which in 1963 reneged on its defined benefit pension promises, leaving more than half with little or no retirement benefit. The lack of protection for private-sector workers shocked Congress into action, but it took more than a decade to come up with the solution, which came in the form of the Employee Retirement Income Security Act of 1974. The watershed law signed Sept. 4, less than a year after the first issue of Pensions & Investments, laid the ground rules for defined benefit plan sponsors on participation, funding, vesting, reporting, fiduciary duties and financial disclosure. The law also created a safety net for workers — the Pension Benefit Guaranty Corp.

Then there were the employees of Enron Corp., who were urged to keep adding company stock in their defined contribution plans. In 2001, asset values crashed as Enron executives sold their shares while the company slid into bankruptcy. That helped to raise awareness of the issue of company stock in retirement plans and led to several rounds of defined contribution reforms, but it was too late for Enron workers.

Massive industry upheaval in the airline and steel industries in the early 21st century also shook up what had been until then a rather sleepy PBGC, transforming an agency handling 73 defined benefit plan terminations in 2000 into one facing 186 terminations in 2002, all of which led to a whopping $23.3 billion deficit by 2004.

Another case of delayed reaction came in 1986, when Congress added a financial distress test for employers seeking to terminate their plans. "It's clear that Congress was trying to create a financial safety net, but from the beginning the program was not structured correctly," said Ms. Borzi of EBSA. "Congress struggled in the '70s, '80s, '90s and even today over how to structure a system that does not encourage gaming and dumping." Disagreement over how employers calculated their funding levels, plus bipartisan concern over the PBGC deficits that could have hurt taxpayers created the climate for the next big pension legislation, the Pension Protection Act of 2006.

The PPA provisions for shorter, seven-year amortization periods for measuring liabilities and more conservative interest rates for calculating them pleased accountants, CEOs and politicians pushing mark-to-mark accounting, but proved to be a tipping point for defined benefit plan sponsors, which started freezing or closing plans at an unprecedented rate, or at least seriously considering it. "It was the difference between a snapshot and a motion picture, which did contribute to a lot of additional volatility that caused concern to balance sheets," said Drexel University law professor Norman Stein. With short amortization periods and new discount rates, "the legislation suffered from a kind of schizophrenia" that has since spilled over to the public sector, he said.

"It really put a lot more plans at risk," said Diane Oakley, executive director of the National Institute on Retirement Security, Washington. As a congressional policy aide during the PPA debate, she said many people worried that the law was going too far and would drive more sponsors to terminate their defined benefit plans and send more plans to the PBGC. "The idea was to get more money into the plans, but the business response was to close the plans," said a committee policy aide with the Senate Health, Education, Labor and Pensions Committee who asked not to be identified.

Cross-purposes

The 2008 recession brought its own reminder of how market forces and legislative action can work at cross-purposes. "The law of unintended consequences is alive and well, especially when talking about government," said Dallas Salisbury, president and CEO of the Employee Benefit Research Institute, also of Washington. He noted that the PPA was mainly about protecting the PBGC. "All of the things that it so dramatically influenced on the defined benefit side could almost be described as accidental."

The PPA was better for defined contribution plans. It codified earlier tax changes that encouraged automatic enrollment in 401(k) plans and made it easier for 401(k) sponsors to offer investment advice to participants. "What we saw in automatic enrollment is what I think is the perfect model for the role of government. They provided

some legal reassurance to encourage this behavior," said Edward Ferrigno, vice president for Washington affairs for the Plan Sponsor Council of America.

While ERISA and PPA were massive efforts, there were lots of smaller legislative changes over the last 40 years that often came through the tax-writing committees, beginning with the Revenue Act of 1978, where Section 401(k) established qualified deferred compensation plans, and clarification regulations in 1981. "Some of the pieces that really changed things were not big things at the time," said Alicia Munnell, director of the Center for Retirement Research at Boston College.

Another tax bill in 1984 added non-discrimination testing of 401(k) plans, but it was the Tax Reform Act of 1986, which established faster vesting schedules, raised contribution limits, and further tightened non-discrimination testing that "set the groundwork for the explosion of defined contribution," said Mr. Salisbury of EBRI.

While the tax code was used to prevent abuse of employees' retirement assets by employers, many see the history of pension legislation as a story about lawmakers' search for tax revenue, which could be increased by reducing some tax exemptions for retirement contributions or benefits. "Every time they wanted to raise money, they whacked the retirement system," said David Wray, past president of PSCA.

Ms. Munnell agreed. "ERISA was trying to do a lot of good things, but it had a lot of demands," she said.

Over the years, several other pieces of legislation were aimed at preventing abuses, including a 1980 multiemployer pension plan law that created withdrawal liability to discourage employers from leaving their fellow sponsors holding the bag. The 1984 Retirement Equity Act helped protect women by mandating spousal consent for workers to waive survivor benefits, among other things. It also created a coalition of pension advocates, said Mr. Stein of Drexel University. "There was a political element to that that has carried forward to this day."

Timely fixes

The difficulty of getting additional and timely fixes has shifted a lot of responsibilities for filling in the broad strokes of ERISA to regulators, including those at the Labor Department and the Internal Revenue Service, where some efforts have been more successful than others.

"Congress is good at big concepts and not the fine detail," said Bradford Campbell, a partner in the Washington law office of Drinker Biddle & Reath LLP, who served as a top official in the Employee Benefits Security Administration during the implementation of PPA. "The one downside is that Congress has more checks and balances. Unless the regulatory agency is making process mistakes, they have a great deal of regulatory latitude. If it's in good faith, it works well."

Right after the passage of ERISA “it was chaos,” said Ms. Borzi, who was a key House pension aide from 1977 to 1995. A concerted effort by officials from the DOL, IRS and the Securities and Exchange Commission during the Carter administration to give plan sponsors and providers a single set of operating parameters helped.

“You have this delicate balance of providing some benefits while at the same time making sure they aren't ripping off the participants or the taxpayers,” said Karen Ferguson, director of the Pension Rights Center, an advocacy group in Washington. “Regardless of politics, the agencies try to continue that balance.”

Employers have also gotten more proactive about regulation in the last 20 years, said Aliya Wong, executive director of retirement policy for the U.S. Chamber of Commerce in Washington. “I think as employers are seeing more money going into the plans, they want to see it being spent wisely, and are trying to prevent more burden,” she said. “A great example of that is (developing rules for) electronic delivery, where employers said "make it workable,'” Ms. Wong added.

One “deregulation” regulation that had a big impact on retirement plan investing came in 1979, with the “prudent man” rule, which opened up investment options by removing the fear of investment risk-taking that had existed in the absence of clear direction on the issue. The rule, which said that a fiduciary must act with the “care, skill, prudence and diligence” of any prudent man in a similar capacity, led to what became known as the “prudent investor” rule for assets that may be too risky for large allocations but beneficial for a diversified portfolio. Many credit the rules with increasing private equity investment by both corporate and public pension funds.

Less successful was the way agencies handled exemptions to prohibited transactions rules. While they “generally worked well,” said Scott Macey, president and CEO of The ERISA Industry Council in Washington, “they should recognize a little more flexibility. The rules have encouraged too much litigation” in cases where sponsors did not mimic specific examples that had already been sanctioned.

“The nature of government regulation for better or worse is that even when it is intended to create flexibility, it doesn't because it is read literally by the lawyers. The Catch-22 is it ends up stifling innovation,” said EBRI's Mr. Salisbury.

Another ERISA provision, 404(c), which allows participants to direct their defined contribution investments, “really changed the dynamic,” said Ms. Borzi, particularly as demographics changed and defined benefit plans saw increased volatility. She sees that provision as creating an opening for defined contribution plan service providers and consultants to get much more involved, but worries that DC plan participants will need more help with financial literacy.

Time to rethink

The changing landscape from defined benefit to defined contribution “has required companies to rethink and the government to rethink its job,” said PBGC Director Joshua Gotbaum. ”Our job is to encourage defined benefit plans. Part of our job, as the economics of the world changes, is to ask what companies can afford. We understand why companies have had to change their retirement programs, but we encourage them to do so in a way that preserves retirement security,” he said. “We regulated DB plans more intensely than we did DC plans. I think that differential is a continuing incentive for companies to not offer DB.”

As defined benefit plans continue their downward trend, leaving a gap so far unfilled by DC plans, the discussion is now shifting to ways to tackle lifetime income instead of lump-sum distributions, which Mr. Gotbaum said “are like cigarettes. They're not illegal and many people like them, (but) they are bad for you. They are the opposite of retirement security.”

David Levine, an ERISA lawyer with Groom Law Group in Washington, thinks the search for guaranteed income is part of a 40-year, pre-ERISA full circle back toward individual responsibility that could bring a resurgence in annuities, along with new asset allocation models that include professional money management.

Sen. Tom Harkin, D-Iowa, chairman of the Senate HELP Committee, said: “The world has changed, and we are facing a real retirement crisis.” He is hoping that later this year Congress will consider his proposal for a universal access pension program with professional investment managers and reduced employer demands.

Another back-to-the-future moment may well come as EBSA officials work to update the fiduciary standard created in ERISA. “I think that was a critical concept, and I think Congress got it right,” said Ms. Borzi. “I am the first to admit that the Department of Labor got it wrong” with regulations implementing the law that allowed for exclusions. “At least 35 years have gone by, and business models have grown up without any inclination to really go back to the first principles,” she said. “It's a functional definition. It is all about reducing conflict of interest.”

If EBSA officials prevail in their mission to revert to a tighter fiduciary standard, “it is probably the most significant regulatory bookend of anything that's happened” since the passage of ERISA, said Mr. Salisbury.

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