



**AMERICAN BENEFITS**  

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**COUNCIL**

**TESTIMONY OF**

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**ON BEHALF OF**

**AMERICAN BENEFITS COUNCIL**

**BEFORE THE**

**U.S. SENATE COMMITTEE  
ON HEALTH, EDUCATION, LABOR AND PENSIONS**

**HEARING ON**

**THE POWER OF PENSIONS: BUILDING A  
STRONG MIDDLE CLASS AND STRONG ECONOMY**

**JULY 12, 2011**

My name is Edmond P. Bertheaud, Jr., and I am Chief Actuary and Director of Corporate Insurance for the Du Pont Company. I also serve on the Policy Board of Directors for the American Benefits Council (the "Council") for whom I am testifying today. On behalf of DuPont and the Council, I want to thank the Committee for holding this hearing on such a critical topic and for inviting us to testify.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

DuPont is a science-based products and services company. Founded in 1802, DuPont puts science to work by creating sustainable solutions essential to a better, safer, healthier life for people everywhere. Operating in more than 90 countries, DuPont offers a wide range of innovative products and services for markets including agriculture and food; building and construction; communications; and transportation.

DuPont has operated a defined benefit pension plan for over 100 years. The plan pays monthly benefits based on years of service and average pay. The intent of the plan is to provide a retirement income stream. There has never been an option to receive pension benefits in a lump sum, except as required to preserve benefit forms after acquisitions.

Starting in the early 1970s, DuPont has operated a defined contribution plan in addition to the defined benefit plan. This plan provided the opportunity for employees to save by payroll deduction and was meant to supplement retirement income from the pension plan. For most of this plan's existence, the company matched half of the employee's contribution up to 6% of the employee's base pay.

Beginning in 2007, DuPont chose to change its emphasis from defined benefit to defined contribution. The defined contribution plan now provides a 3% company contribution plus a full match of the employee contributions up to 6% of pay. New employees no longer participate in the defined benefit plan, but to help existing employees with the transition, accruals in that plan continue at one-third of their previous rate.

## **VIEWS ON DEFINED BENEFIT PLANS**

Defined benefit plans are an effective means of providing long-service employees with a secure retirement. Such plans protect employees from investment risk and offer employees guaranteed income for life. As a matter of policy, we and many other Council members are supportive of the defined benefit system. However, the legal and

competitive environments have caused many companies to move away from the defined benefit system. We hope that a discussion of those reasons would be helpful to the Committee.

In brief, here are our concerns together with concerns of other Council members:

- (1) Defined benefit plan funding rules used to be structured to permit companies to contribute less during challenging economic times and more during favorable economic times. This made defined benefit plans very attractive to companies. Unfortunately, over the last 25 years, the pendulum has swung in the exact opposite direction. Now, the rules are less flexible. Extremely large and potentially unaffordable contributions can be required when times are toughest.
- (2) Defined benefit funding used to be predictable. Now it is significantly unpredictable, which is inconsistent with business planning.
- (3) Employees do not value the promise of lifetime income as much as they value retirement "accounts". Because of the other factors listed here, employers have less incentive to educate employees about the advantages of defined benefit plans.
- (4) Publicly-traded plans sponsors have financial reporting considerations. Under U.S. generally accepted accounting principles, defined benefit pension plan assets and liabilities are determined annually in a snapshot view. Such snapshots affect the sponsor's balance sheet immediately, so that when sudden shortfalls arise as a result of a severe economic downturn such as we experienced in 2008 and 2009, or due to low spot interest rates, investors can become concerned. Shortfalls can also cause volatility in the sponsor's corporate income and the rating agencies consider them in the same category as debt. By contrast, the cost for defined contribution plans is as stable as employee compensation, result in no long-term company liabilities and require very little explanation to investors.
- (5) The PBGC has maintained a practice of intervening in the normal business transactions of defined benefit plan sponsors. This is true even when there is not increased risk to the PBGC.
- (6) The Administration has proposed imposing a \$16 billion tax on defined benefit plan sponsors through premium increases for an alleged PBGC deficit that plan sponsors generally did not create. PBGC premiums should be set only after extensive consideration by Congress of the real risks posed to the PBGC by defined benefit pension plans.

- (7) In recent years, the regulation of employee benefit plans has grown considerably, and the employee benefits field has become an area of the law that is well-known for its complexity and burdensome regulatory regime. To be sure, plan sponsors appreciate the importance of rules that are appropriately protective of sound objectives. But those interests are not well-served when requirements are unnecessarily broad and overly burdensome. Rather, the government should establish a coordinated legal and regulatory regime under which individual savers and employer plan sponsors can operate effectively.

## DISCUSSION

**Funding.** Employers can provide substantial help to employees when it comes to retirement savings and income with respect to all types of retirement plans. Employers are in an excellent position to know the retirement needs of their employee populations and can tailor their retirement programs to these needs. The government is in a unique position to help employers in this regard through supportive public policy. Many employers have maintained defined benefit pension plans over the years because public policy supported employer actions that served employees' needs.

There has, however, been a steady trend away from defined benefit plans for some time now. One reason for this trend is a dramatic change in public policy regarding funding. Pursuant to that change, the largest, least manageable funding obligations arise during the hardest economic times.

We recognize the great strengths of the Pension Protection Act of 2006 ("PPA"). It was critical to establish the fundamental principle that a promise made is a promise kept. But it is also critical to learn from the economic downturn and refine the PPA in ways that respond to the lessons from the downturn. To help defined benefit plans, it is critical that plan sponsors have the flexibility to contribute less in the tough economic times.

In this respect, when many defined benefit plans were put in place, their sponsors considered them to be long-term commitments. Plan sponsors expected to fund the plans as needed, but had flexibility to do so in a measured way when cash was available. Over time, the focus of changes in funding rules has been to view the sponsor's responsibility less as a long-term commitment and more as a short-term requirement, with much of the flexibility removed. Restoration of this flexibility is critical.

**ERISA section 4062(e).** The PBGC recently proposed regulations regarding various corporate transactions, including the shutdown of operations. These proposed regulations would reverse longstanding PBGC written policy and would impose potentially enormous liabilities with respect to routine transactions that involve no

layoffs or shutdowns and pose no threat to the PBGC. Companies will find it extremely difficult to continue sponsoring defined benefit pension plans if their routine business transactions trigger large liabilities unrelated to any risk to the PBGC. In our view, this regulatory project is a critical test of defined benefit plan public policy. Given the depth of our concerns, we were very encouraged when last fall PBGC Director Joshua Gotbaum recognized the importance of these proposed regulations and extended the comment period to receive further input. We thank the Chairman and Ranking Member of this Committee for their leadership with respect to that extension. We further hope that this hearing will lead to an open dialogue among Congress, plan sponsors, and the PBGC so that the PBGC rules will encourage rather than discourage plan maintenance.

**PBGC premiums.** Recently there has been increased attention paid to the possibility of increasing premiums paid to the Pension Benefit Guaranty Corporation including the possibility of it being included in deficit reduction measures. The Pension Benefit Guaranty Corporation is charged with protecting the pension benefits of workers and retirees in the event a company sponsoring a defined benefit pension plan goes bankrupt. The PBGC is partially financed through premiums paid by the sponsors of defined benefit pension plans. We urge Congress to take the time to fully analyze the implications of proposals to increase the premiums.

Proponents of increasing PBGC premiums have often cited the PBGC's deficit and the need to ensure that companies sponsoring pension plans be responsible for that deficit. While many have tossed about the figure of \$23 billion as PBGC's deficit, there are many serious questions about this number which should be critically examined by Congress. For example, the \$23 billion number is based on a study of the cost of buying annuities to satisfy pension liabilities, despite the fact that the PBGC does not purchase annuities. This can have a very material effect on the size of the deficit. The PBGC actually resembles an ongoing pension plan in that it pays out benefits over many years.

Moreover, PBGC's report states that almost 30% of its self-reported deficit is solely attributable to the drop in interest rates over 12 months. Interest rates have been low as part of a national strategy to address recent economic challenges. It would be inappropriate to raise premiums without examining the role interest rates play in the PBGC's deficit.

While we understand the pressures that Congress is facing to address budget deficits, significant increases in PBGC premiums must be carefully examined - and not adopted based on pressure to find revenue raisers.

**Regulatory Burdens.** Regulations should not conflict, go beyond the statute in interpretation, be overly broad or hastily implemented because that causes frustration, extra costs and confusion. President Obama acknowledged the critical importance of avoiding regulatory conflicts and burdens in his January 18, 2011, executive order on Improving Regulation and Regulatory Review.

One area of current concern is the use of swaps by pension plans. Pension plans use swaps to manage interest rate risks and other risks, and to reduce volatility with respect to funding obligations. If swaps were to become materially less available to plans, plan costs and funding volatility would rise sharply. This would undermine participants' retirement security and would force employers to reserve, in the aggregate, billions of additional dollars to address increased funding volatility. These reserves would have to be diverted from investments that create and retain jobs and that spur economic growth and recovery.

In enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress adopted "business conduct" standards to help plans and other swap counterparties by ensuring that swap dealers and major swap participants (MSPs) deal fairly with plans and other counterparties. A conflict has grown out of the business conduct standards and the DOL proposed fiduciary definition so that compliance with the business conduct standards would create a prohibited transaction under ERISA. The interaction of the business conduct standards under the Dodd-Frank Act and the DOL's proposed fiduciary definition regulations should be publicly and formally resolved in a way that provides legal certainty that using swaps will not cause a violation of ERISA by the time the CFTC finalizes the business conduct standards.

Furthermore, under the proposed business conduct standards, if a swap dealer or MSP "functions as an advisor to a plan with respect to" a swap, the swap dealer or MSP must act "in the best interests" of the plan with respect to the swap. Under the proposed rules, many standard communications used by a swap dealer or an MSP in the selling process would cause the swap dealer or MSP to be treated as an advisor. This means that swap dealers or MSPs acting solely as counterparties would be required to also act in the best interests of the plan. A swap dealer or MSP as a party to a swap transaction cannot have a conflicting duty to act against its own interests and in the best interests of its counterparty with respect to the swap. If such a conflict were to be imposed on swap dealers and MSPs, all swaps with plans would cease.

If a swap dealer or MSP clearly communicates to a plan in writing that it is functioning solely as the plan's counterparty or potential counterparty, no communication by the swap dealer or MSP should be treated as a "recommendation".

Employers are committed to helping their employees save for retirement. However, the current defined benefit plan structure does not facilitate the creation or maintenance of pension plans. If Congress desires more defined benefit plans, significant changes may need to be made. The Council and its members look forward to working with this committee and Congress to find solutions.

I appreciate this opportunity to discuss pension issues with the Committee. Thank you for your time. I would be happy to answer any questions.