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DELPHI BANKRUPTCY

Termination of Delphi Pension Plans

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Highlights

Highlights of GAO-12-909T, a testimony before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, Committee on Oversight and Government Reform, House of Representatives

Why GAO Prepared This Testimony

The Delphi Corporation was a global supplier of mobile electronics and transportation systems that began as part of GM and was spun off in 1999. Delphi filed for bankruptcy in 2005, and in July 2009, PBGC terminated Delphi's six defined benefit pension plans and assumed trusteeship of the plans. Because of the resulting differences in participant benefits, questions have been raised about how PBGC came to terminate the plans, whether treatment for certain Delphi workers was preferential, and the role of Treasury in these outcomes.

GAO's testimony describes key events related to the termination of Delphi pension plans and the reasons for GM providing retirement benefit supplements to certain Delphi employees, and Treasury's role in those events. The testimony is based on GAO's March and December 2011 reports that examine these and other related issues. In preparing these reports, GAO relied on publicly available documents—such as GM and Delphi bankruptcy filings, Treasury officials' depositions, and company reports to the Securities and Exchange Commission—and on documents received from groups GAO interviewed, including Delphi, GM, the Delphi Salaried Retirees Association, PBGC, and Treasury. GAO also coordinated with the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) because of that office's work on Treasury's role in GM's decision to provide top-ups for certain hourly workers, including whether the Administration or Treasury pressured GM to provide additional funding for the hourly plan.

View GAO-12-909T. For more information, contact A. Nicole Clowers at (202) 512-8678 or clowersa@gao.gov or Barbara Bovbjerg at (202) 512-7215 or bovbjergb@gao.gov.

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DELPHI BANKRUPTCY

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What GAO Found

The termination of the six defined benefit plans the Delphi Corporation (Delphi) sponsored, and the provision of benefit protections to some Delphi employees but not others, culminated from a complex series of events involving Delphi, the General Motors Corporation (GM), various unions, the U.S. Department of the Treasury (Treasury), and the Pension Benefit Guaranty Corporation (PBGC). When Delphi spun off from GM in 1999, three unions secured an agreement that GM would provide a retirement benefit supplement (referred to as "top-ups") for their members should their pension plans be frozen or terminated and they were to suffer a resulting loss in pension benefits. These three unions were: (1) the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW); (2) the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (IUE); and (3) the United Steelworkers of America (USWA). No other Delphi employees had a similar agreement to receive a top-up, including salaried workers and hourly workers belonging to other unions. Over the course of events that unfolded over the next decade, the agreements with these three unions ultimately were preserved through the resolution of the bankruptcies of both GM and Delphi. Because Delphi's pension plans were terminated with insufficient assets to pay all accrued benefits, and because PBGC must adhere to statutory limits on the benefits it guarantees, many Delphi employees will receive a reduced pension benefit from PBGC compared with the benefits promised by their defined benefit plans. Those Delphi employees receiving the top-ups will have their reduced PBGC benefit supplemented by GM while others will not.

As GM's primary lender in bankruptcy, Treasury played a significant role in helping GM resolve the Delphi bankruptcy. Treasury's effort to restructure GM included helping GM find the best resolution of the Delphi bankruptcy from GM's perspective. This effort was guided by the following principles: preserving GM's supply chain, resolving Delphi's bankruptcy as quickly as possible, and doing so with the least possible amount of investment by GM. However, court filings and statements from GM and Treasury officials suggest that Treasury deferred to GM's business judgment on decisions about the Delphi pension plans—that is, their sponsorship and the decision to honor existing top-up agreements. According to public records and Treasury officials, Treasury agreed with GM's assessment that the company could not afford the potential costs of taking over sponsorship of the Delphi hourly plan, but that the company had solid commercial reasons to honor previously negotiated top-up agreements with some unions. Nevertheless, Treasury officials said that Treasury did not explicitly approve or disapprove of GM's agreement to honor previously negotiated top-up agreements. PBGC officials stated that PBGC decided to terminate the plans independently of Treasury input.

Mr. Chairman, Ranking Member Quigley, and Members of the Subcommittee:

Thank you for the opportunity to discuss our work on the termination of Delphi's pension plans. As you know, the Delphi Corporation (Delphi) was a global supplier of mobile electronics and transportation systems that began as part of the General Motors Corporation (GM) and was spun off as an independent company in 1999.[1] Following Delphi's bankruptcy, the Pension Benefit Guaranty Corporation (PBGC), the government corporation that insures private-sector defined benefit (DB) plans, terminated Delphi's six plans in July 2009. The plans were estimated to be underfunded by a combined $7.2 billion at termination, of which PBGC expects to cover about $6 billion.[2] Since the termination, there has been controversy over different pension benefit outcomes for certain unionized and non-unionized Delphi retirees. Further, the involvement of the U.S. Department of the Treasury (Treasury) in the bankruptcy of GM, Delphi's former parent company, raised questions for some about the role that Treasury played in PBGC's decision to terminate Delphi's pension plans, the decisions to provide retirement benefit supplements ("top-ups") to certain Delphi employees, and the resulting outcomes for Delphi plan participants.

My testimony discusses key events related to the termination of Delphi pension plans and the reasons for GM providing retirement benefit supplements to certain Delphi employees, and Treasury's role in those events. My comments are based on our March and December 2011

[1]At the time of the spinoff, Delphi established two pension plans, with assets and liabilities transferred from their GM counterparts: the Delphi Hourly-Rate Employees Pension Plan (hourly plan) and the Delphi Retirement Program for Salaried Employees (salaried plan). Delphi acquired four more plans after the spin-off from GM. Before bankruptcy reorganization, GM's legal name was General Motors Corporation. The legal name of the new entity created in the bankruptcy process is General Motors Company (the entity that purchased the operating assets of the pre-reorganization corporation, which we discuss later in this statement). As of October 19, 2009, General Motors Company became General Motors LLC. Throughout this statement, in cases where a distinction is important, we refer to the pre-reorganization corporation as "old GM" and the post-reorganization company as "new GM."

[2]A DB plan promises a benefit that is generally based on an employee's final pay and years of service. The employer is generally responsible for funding all or most of the benefit, investing and managing plan assets, and bearing the investment risk.

reports that examined these and related issues.[3] To construct a timeline of events and identify Treasury's role in those events for our reports, we relied on publicly available documents, such as bankruptcy filings by GM and Delphi, Treasury officials' depositions, company reports to the Securities and Exchange Commission, press releases; and documents received from groups we interviewed, including Delphi, GM, the Delphi Salaried Retirees Association (DSRA), PBGC, and Treasury. We performed the work on which this statement is based from October 2010 to December 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We also coordinated with the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) because of that office's work on Treasury's role in GM's decision to provide top-ups for certain hourly workers, including whether the Administration or Treasury pressured GM to provide additional funding for the hourly plan.

Key Events Leading to the Termination of Delphi's Pension Plans

Three Unions Secured Top-Up Agreements in Negotiations Following Delphi's Spin-Off from GM

As part of Delphi's spin-off from GM in 1999, GM was required to collectively bargain with the unions affected by the spin-off—including the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW); the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (IUE); and the United Steelworkers of America (USWA), as well as other

[3]See GAO, *Key Events Leading to the Termination of the Delphi Defined Benefit Plans*, GAO-11-373R (Washington, D.C.: Mar. 30, 2011); and GAO, *Delphi Pension Plans: GM Agreements with Unions Give Rise to Unique Differences in Participant Benefits*, GAO-12-168 (Washington, D.C.: Dec. 15, 2011). These products provide additional details on the scope and methodology of this work.

"splinter" unions.[4] As a result of these negotiations, GM agreed to pay top-ups to "covered employees" with UAW, IUE, or USWA if the Delphi pension plans were terminated or frozen at a later date, covering any difference between the amount PBGC would pay them and the benefit amount promised by the Delphi plans.[5] Also, on December 22, 1999, Delphi agreed to indemnify GM for all benefits provided by GM under the UAW benefit guarantee.[6] At the time GM entered into these agreements, Delphi's salaried plan was fully funded while Delphi's hourly plan was not fully funded.[7]

[4]The splinter unions include the International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; Michigan Regional Council of Carpenters, Local 687 and Interior Systems, Local 1045; International Brotherhood of Painters and Allied Trades of the United States and Canada, Sign and Display Union Local 59; International Brotherhood of Teamsters; International Brotherhood of Boilermakers; International Union of Operating Engineers; and United Catering Restaurant Bar and Hotel Workers.

[5]"Covered employees" were generally defined as those who had been represented by these unions as GM workers and now as Delphi workers with no break in employment or seniority as of May 28, 1999.

[6]This indemnification would allow GM to have a claim against Delphi for any expenses incurred by GM for coverage of guaranteed benefits.

[7]According to data provided by Delphi, based on a fair market valuation of plan assets the Delphi salaried plan was 108.8 percent funded as of year-end 1998 and 122.7 percent funded as of year-end 1999 while the Delphi hourly plan was 69.1 percent funded as of year-end 1999. A plan is fully funded if as of a particular date, plan assets equal or exceed the relevant measure of plan obligations. However, for the typical pension plan invested in a mix of stocks and bonds, measures of funded status can be highly volatile, so that a plan that is fully funded on one date could be substantially less than fully funded on a subsequent date.

After Delphi Filed for Bankruptcy, Delphi and GM Agreed to Extend the Top-Up Agreements with the Three Unions

From 2001 to 2005, Delphi suffered large losses, and the company filed for bankruptcy in October 2005. After Delphi filed for bankruptcy, Delphi and GM agreed to extend the top-up agreements with UAW, IUE, and USWA.[8] The splinter unions negotiated for other benefits at this time, but were not guaranteed top-ups. No other agreements were reached in relation to top-ups for salaried workers.

In September 2007, GM and Delphi entered into a global settlement agreement that included a plan to transfer assets and liabilities from Delphi's hourly pension plan to the GM hourly pension plan, and for Delphi to freeze new accruals to its hourly plan. The agreement did not establish a specific effective date, but listed various conditions that had to be met for it to become effective. Before becoming effective, the agreement was modified in September 2008, based on further negotiations described below.

Under Delphi's initial reorganization plan, the company planned to emerge from bankruptcy without terminating its pension plans. However, in April 2008, the deal with investors that would have made this possible fell through. Five months later, in September 2008, Delphi and GM amended their September 2007 global settlement agreement to specify that GM would take responsibility for approximately $3.4 billion of net liabilities in Delphi's hourly plan in two phases. In the first phase, GM would assume a portion of Delphi's hourly plan with net liabilities of $2.1 billion. This transfer took place on September 29, 2008. In the second phase, upon "substantial consummation" of Delphi's reorganization, the remaining assets and liabilities in Delphi's hourly plan would be transferred to GM. No comparable arrangements were made for a transfer of assets and liabilities for Delphi's salaried plan or other smaller

[8]In June 2007, GM, Delphi, and UAW entered into a memorandum of understanding (MOU) extending the GM benefit guarantee for Delphi UAW workers, which would be enforceable if benefit accruals for future credited service in the Delphi hourly plan were frozen and if the plan were terminated. On August 5, 2007, GM and Delphi entered into a MOU with Delphi IUE, and on August 16, 2007, with Delphi USWA, providing the same top-up guarantee as the Delphi UAW MOU.

plans. In September 2008, Delphi froze its salaried plan and three of its smaller plans, and in November 2008, Delphi froze its hourly plan.[9]

Losses throughout the Automotive Industry Pushed Delphi Near Liquidation and GM to Seek Assistance from Treasury

Beginning in the fall of 2008, economic conditions deteriorated throughout the automotive industry. Delphi experienced declining revenues as GM and other manufacturers sharply reduced production in response to rapidly falling sales. According to documents provided by PBGC, when Delphi's financing agreement with its debtor-in-possession (DIP) lenders expired on April 21, 2009, Delphi's operations were threatened by the prospect of imminent liquidation. On April 21, PBGC determined that it would seek termination of the Delphi salaried and hourly pension plans to avoid the losses that would result if the DIP lenders were to foreclose on their collateral and break up Delphi's controlled group. However, at the request of Delphi and the DIP lenders, PBGC agreed not to proceed with the termination in order to allow the parties to continue negotiating. In exchange, the DIP lenders agreed to give PBGC advance notice of any decision to foreclose so that PBGC could commence termination of the Delphi pension plans in time to protect PBGC's claims.

[9] A freeze is an amendment to a DB plan to limit some or all future pension accruals for some or all participants. For more information on types of freezes and their effects, see GAO, *Defined Benefit Pensions: Plan Freezes Affect Millions of Participants and May Pose Retirement Income Challenges*, GAO-08-817 (Washington, D.C.: July 21, 2008).

GM's losses in the fall of 2008 led the company to seek assistance from Treasury through the Automotive Industry Financing Program (AIFP).[10] As a condition of receiving this assistance, GM was required to develop a restructuring plan to identify how the company planned to achieve and sustain long-term financial viability. In April and May 2009, Treasury worked with GM to develop a restructuring plan through the Presidential Task Force on the Auto Industry (Auto Task Force) and its staff (auto team).[11] On June 1, 2009, GM filed for bankruptcy and sought the approval of the bankruptcy court for the sale of substantially all of the company's assets to a new entity ("new GM").[12] In court documents, a Treasury official stated that Treasury was mandated by the President to act in a "commercially reasonable manner" as it related to GM's restructuring and ensure that the new GM assumed only those liabilities of the old company that were thought to be "commercially necessary" for the new company to operate.[13] As GM's primary lender, Treasury was

[10]In December 2008, Treasury established AIFP under the Troubled Asset Relief Program (TARP) to help stabilize the U.S. automotive industry and avoid disruptions that would pose systemic risk to the nation's economy. TARP was originally authorized under the Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. No. 110-343, div. A, 122 Stat. 3765 (codified as amended at 12 U.S.C. §§ 5201-5261). EESA originally authorized Treasury to purchase or guarantee up to $700 billion in troubled assets. The Helping Families Save Their Homes Act of 2009 amended EESA to reduce the maximum allowable amount of outstanding troubled assets under EESA by almost $1.3 billion, from $700 billion to $698.741 billion. Pub. L. No. 111-22, div A, § 402(f),123 Stat. 1632, 1658. Under EESA the appropriate committees of Congress must be notified in writing when the Secretary of the Treasury, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines that it is necessary to purchase other financial instruments to promote financial market stability. § 3(9)(B), 122 Stat. 3767 (codified at 12 U.S.C. § 5202(9)(B)). The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, (1) reduced Treasury's authority to purchase or insure troubled assets to $475 billion and (2) prohibited Treasury from using its authority under EESA to incur any additional obligations for a program or initiative unless the program or initiative already had begun before June 25, 2010. Pub. L. No. 111-203, § 1302, 124 Stat. 1376, 2133 (2010).

[11]Treasury established an internal working group—the auto team—to oversee AIFP and provide analysis in support of the Auto Task Force.

[12]On June 1, 2009, GM filed a voluntary petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code (11 U.S.C. §§ 1101-1174) and conducted a court-supervised asset sale (under 11 U.S.C. § 363), in which substantially all of the operating assets of the company were sold to General Motors Company, or "new GM," and most of the company's debt and liabilities remained in the possession of Motors Liquidation Company, or "old GM," to be addressed in bankruptcy court. New GM emerged on July 10, 2009.

[13]Deposition of Treasury Official at 185, No. 04-44481 (RDD) (S.D. N.Y. July 21, 2009) and Motion of Defendants U.S. Department of the Treasury et al. at 10, No. 2:09-cv-13616 (E.D. Mich. Feb. 16, 2010).

concerned about GM's overall exposure to risks related to distressed suppliers, including Delphi. Specifically, Treasury was concerned about how GM's Delphi liabilities would fit within the new company's business plan. According to a Treasury official deposition, Treasury's mandate to restructure GM included helping GM determine the "best resolution" of the Delphi bankruptcy from GM's perspective, which was guided by three principles (see table 1). However, according to Treasury's February 2010 court motion, the Auto Task Force did not dictate what should be done with the Delphi pensions.

Table 1: Treasury's Guiding Principles for Resolving GM's Liabilities Related to Delphi

Principle	Treasury rationale
Development of a resolution that guaranteed the "sanctity" of GM's supply chain	Treasury did not want GM's attention, which was focused on its own restructuring, to be diverted to finding suppliers for the products provided by Delphi.
Quick resolution of the Delphi bankruptcy	Treasury wanted Delphi's bankruptcy to conclude sooner rather than later, given that Delphi already had been in bankruptcy for 3 years.
A resolution that required the least possible amount of investment by GM	Because GM already had invested billions of dollars in Delphi during Delphi's bankruptcy process, Treasury believed that GM should not provide additional money to Delphi absent an overall resolution of the Delphi bankruptcy.

Source: Deposition of Treasury Official, No. 04-44481 (RDD) (S.D. N.Y. July 21, 2009).

In May 2009, Treasury had anticipated that Delphi's salaried pensions would be terminated, but that GM would assume additional liabilities for the Delphi hourly plan, as called for in the second phase of the September 2008 agreement. Additionally, on June 1, 2009, Delphi announced that its hourly plan would be "addressed by GM." However, the phase 2 transfer called for Delphi to pay a $2.055 billion administrative claim to GM, which it could not do. In the Treasury official's deposition, it was noted that shortly after GM's bankruptcy filing, GM notified Treasury that it had not built sufficient funding into its restructuring plan to take on the hourly plan, but that it had built in the assumption that it would provide the top-up for Delphi UAW retirees. The second phase of the transfer of hourly plan liabilities from Delphi to GM was not in GM's reorganization plan and never took place.

GM's Reorganization Maintained Delphi UAW Top-Ups Based on UAW's Continued Relationship with GM

As part of the sale of the assets of old GM to new GM, GM negotiated with UAW—which represented its largest employee group—to modify wages, benefits, and work rules to be more cost competitive. As a result of these negotiations, GM and UAW agreed that new GM would assume all employment-related obligations and liabilities under any assumed employee benefit plan relating to employees who are or were covered by

UAW collective bargaining agreements in its master sale and purchase agreement, which included GM's obligation to provide top-ups to Delphi UAW retirees.[14] No other negotiations took place that resulted in comparable obligations concerning top-ups for members of the two other unions, IUE and USWA (although they had previously secured top-up agreements with GM) or for the splinter unions or the salaried employees who had no previous top-up agreements with GM.

On June 19, 2009, IUE and USWA objected to the proposed sale of GM's assets because retirees of Delphi represented by IUE and USWA would not receive the same benefits as retirees of Delphi represented by UAW.[15] The court overruled these unions' objection to the sale, stating that new GM needed a "properly motivated workforce to enable [new GM] to succeed," requiring it to enter into "satisfactory agreements with the UAW" and was not "similarly motivated in triaging its expenditures to assume obligations for retirees of unions whose members, with little in the way of exception, no longer work for GM."[16] Accordingly, the bankruptcy court approved the sale of GM's assets on July 5, 2009, and those assets were conveyed to new GM on July 10, 2009.

Delphi Publicly Stated That It Was Unable to Fund Its Plans and the Plans Were Terminated

On June 1, 2009, Delphi, citing its inability to fund its plans and a lack of feasible alternatives, publicly stated that PBGC "may initiate an involuntary termination" of the Delphi salaried plan. Delphi and GM entered into agreements with PBGC that provided PBGC an unsecured claim in Delphi's bankruptcy and released PBGC's current claims and

[14]The master sale and purchase agreement outlined, among other things, the assets being sold by old GM to new GM and the liabilities being assumed by new GM from old GM. In re GMC, 407 B.R. 463, 481 (Bankr. S.D.N.Y. 2009) (Decision on debtor's motion for approval of (1) sale of assets to Vehicle Acquisitions Holdings LLC; (2) assumption and assignment of related executory contracts; and (3) entry into UAW retiree settlement agreement).

[15]Objection to Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k) and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, to (I) Approve (A) the Sale Pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Schedule Sale Approval Hearing, In re General Motors Corporation, No. 09-50026(REG) (Bankr. S.D.N.Y. June 19, 2009).

[16]407 B.R. 512.

foreign liens on Delphi's assets on July 21, 2009.[17] On July 22, 2009—12 days after the sale of GM's assets to new GM—PBGC announced the termination of all six of Delphi's qualified DB plans, and on August 10, 2009, PBGC assumed trusteeship of the plans. PBGC determined that the Delphi pension plans were underfunded by $7 billion when they were terminated. PBGC estimates that it will need to make up about $6 billion of that shortfall using PBGC funds,[18] leaving plan participants to bear the loss of the $1 billion difference through reduced benefit amounts provided by PBGC, consistent with statutory limitations.[19]

New GM Ultimately Agreed to Provide Top-Ups for IUE and USWA to Help Finalize Delphi's Bankruptcy

The approval of the sale of old GM did not resolve IUE's and USWA's claims that new GM was required to continue to provide the pension benefit guarantees in accordance with collectively bargained agreements. Both old GM and new GM denied these claims. According to a company filing, new GM maintained that it was not obligated to assume or to continue to abide by old GM's collective bargaining agreements with IUE and USWA, while old GM maintained that it was entitled to cancel or terminate all obligations arising from collective bargaining agreements between old GM and IUE or USWA. In the summer of 2009, IUE and USWA shifted the focus of their objections from the GM bankruptcy settlement to the Delphi bankruptcy settlement. On July 9 and July 15, 2009, IUE and USWA, along with some of the splinter unions, filed

[17]PBGC agreed to release its $196 million of foreign liens (foreign subsidiaries had not filed for bankruptcy) and other termination claims in exchange for a $3 billion unsecured claim in Delphi's bankruptcy, a $70 million cash contribution from GM, and 10 percent of the first $7.2 billion of distributions from Delphi Automotive LLP, the newly created British partnership that purchased most of Delphi's assets.

[18]GM also assumed about $2 billion in net liabilities when it accepted the transfer of about a fourth of Delphi's hourly plan in September 2008. In addition, GM expects to pay an estimated $1 billion in top-up benefits to Delphi hourly employees.

[19]PBGC pays participant benefits only up to certain limits set forth by the Employee Retirement Income Security Act of 1974. 29 U.S.C. §§ 1322 and 1322a. Participants whose benefits under the plan would otherwise exceed these statutory limits may have their benefits reduced to the guaranteed amount, unless the plan has sufficient assets to pay the nonguaranteed portion of their benefits, either in part or in full.

objections against Delphi's proposed reorganization plan and sale.[20] On July 15, 2009, DSRA filed an objection against Delphi's bankruptcy based on Delphi's modified plan, including the termination of the salaried plan. On July 30, 2009, the Delphi bankruptcy court overruled the IUE, USWA, and DSRA objections and authorized the consummation of Delphi's modified reorganization plan.

While new GM maintained that it was not obligated to provide top-ups to Delphi IUE and USWA retirees, it did have reason to want to resolve Delphi's bankruptcy, given GM's reliance on Delphi for parts.[21] Moreover, IUE and USWA, which still represented part of Delphi's workforce, needed to give their consent to finalize the sale of assets in Delphi's bankruptcy.[22] According to a GM official's court declaration, a prolonged cessation in the supply of parts from Delphi to GM would have had a "devastating effect on GM, its ability to reorganize, and the communities that depend on employment by GM and its community of parts

[20]Preliminary Objection of IUE-CWA to Motion for Order Authorizing and Approving the Equity Purchase and Commitment Agreement Pursuant to Sections 105(a), 363(b), 503(b) and 507(a) of the Bankruptcy Code, No. 05-44481 (RDD), (Bankr. S.D.N.Y. July 9, 2009) and Joinder of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union to Preliminary Objection of IOUE Locals and IBEW and IAM to Debtors' Motion for Order Authorizing and Approving Modified Plan of Reorganization, No. 05-44481 (RDD), (Bankr. S.D.N.Y. July. 15, 2009). Objection to Debtors' Proposed Modifications to Debtors' First Amended Plan of Reorganization (As Modified) at 2, No. 05-44481 (RDD) (Bankr. S.D.N.Y. July 15, 2009).

[21]According to a July 2009 declaration of a GM official, since the spin-off from GM, Delphi was GM's largest component parts supplier, accounting for approximately 11.3 percent of GM's North American purchases and 9.6 percent of GM's global purchases in 2008. Declaration of Randall L. Pappal in Support of Debtors' Motion for Entry of Order Approving (I) Master Disposition Agreement for Purchase of Certain Assets of Delphi Corp., (II) Related Agreements, (III) Assumption and Assignment of Executory Contracts, (IV) Agreement with PBGC, and (V) Entry into Alternative Transaction in Lieu Thereof, at 4, In re General Motors Corp., No. 09-50026 (Bankr. S.D.N.Y. July 8, 2009).

[22]Master Disposition Agreement among Delphi Corp.; GM Components Holdings, LLC; Gen. Motors Co., Motors Liquidation Co.; DIP Holdco3, LLC; and the Other Sellers and Other Buyers Party Hereto at 96 (July 26, 2009).

suppliers."[23] As a result, new GM continued negotiating with IUE and USWA to resolve their objections against Delphi's bankruptcy case.

On September 10, 2009, new GM, old GM, IUE, and USWA signed a settlement agreement that, among other things, required new GM to provide top-ups to retirees of Delphi represented by IUE or USWA who were covered by the benefit guarantee agreements that GM had entered with IUE and USWA in 1999.[24] As part of the settlement agreement, IUE and USWA agreed to withdraw their objections against Delphi's bankruptcy, resulting in the completion of Delphi's reorganization on October 6, 2009, with the sale of its assets. The settlement agreement did not provide top-ups to the splinter unions or to any other non-covered employees, including all members of Delphi's salaried plan. On September 14, 2009, DSRA filed a complaint against PBGC in U.S. District Court related to the termination of Delphi's salaried plan.[25] DSRA amended its complaint on November 5, 2009, to include new GM,

[23]The July 2009 declaration of a GM official stated that Delphi was a sole-source, just-in-time supplier of many critical parts to GM, including parts that are used in almost every GM product line in North America and identified several ways in which a cessation of parts delivery by Delphi could affect GM, including that (1) most parts that Delphi manufactures for GM are not readily available from an alternate source, and while GM could accelerate efforts to re-source Delphi parts in the event of a supply interruption, the sheer magnitude of the parts to be re-sourced and revalidation required would take at least several months to achieve; (2) because GM operates on a just-in-time inventory delivery system, GM plants relying on just-in-time shipments may run out of inventory of such parts and have to shut down within a matter of days, if Delphi ever ceased shipping even a small fraction of production parts to GM; and (3) the shutdown of GM plants as a result of termination of deliveries of affected parts from Delphi could idle tens of thousands of GM workers, significantly decrease GM's revenues, and increase GM's costs to expedite resourcing efforts.

[24]Settlement Agreement Between and Among GMCO/MLC-IUE-CWA and USWA Regarding Retiree Health Care, Life Insurance, Pension Top-Up, and Modification and GMCO Assumption of MLC-IUE-CWA CBA, dated Sept. 10, 2009.

[25]Complaint for Equitable Relief, No. 2.09-cv-13616 (E.D. Mich. Sept. 14, 2009).

Treasury, and the Auto Task Force as defendants. New GM, Treasury, and the Auto Task Force were later removed as defendants in the case.[26]

GM's agreements with certain unions give rise to differences in participant benefits. Because Delphi's pension plans were terminated with insufficient assets to pay all accrued benefits in July 2009, and because PBGC must adhere to statutory limits on the amount of benefits it guarantees to individuals, many Delphi retirees will receive less from PBGC than their full benefit promised by Delphi. Based on PBGC's review of cases as of June 2011, when GAO conducted its study, just under half of both the hourly and salaried plan participants had received reductions in their promised benefits due to the application of statutory benefit limits.[27] However, the approximately 60 percent of participants in the hourly plan receiving the top-ups are protected from such benefit reductions because GM will supplement their PBGC benefit to replace any benefit loss, while other hourly employees as well as employees in Delphi's salaried plan and the other smaller plans are not protected from such losses.

Treasury Worked with GM to Resolve the Delphi Bankruptcy

As GM's primary lender in bankruptcy, Treasury played a significant role in helping GM resolve the Delphi bankruptcy in terms of GM's interests. However, court filings and statements from GM and Treasury officials suggest that Treasury deferred to GM's business judgment about the Delphi pension plans—that is, their sponsorship and the decision to honor existing top-up agreements. According to public records and Treasury officials, Treasury agreed with GM's assessment that the company could not afford the potential costs of sponsoring the Delphi hourly plan.

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[26]Delphi salaried retirees are in litigation against PBGC about termination of Delphi's pension plans. Black v. Pension Benefit Guar. Corp., No. 2:09-cv-13616 (Bankr. E.D. Mich. filed Nov. 5, 2009). The court dismissed the retirees' claims against new GM in March 2010 and against Treasury and Treasury officials in September 2011. Black v. Pension Benefit Guar. Corp., No. 2:09-cv-13616 (E.D. Mich. March 12, 2010) (Order dismissing General Motors LLC). Order Granting Defendant United States Dep't of the Treasury, Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven L. Rattner, and Ron. A. Bloom's Reviewed Motion to Dismiss, No. 09-13616 (E.D. Mich. Sept. 1, 2011).

[27]PBGC pays participants' benefits only up to certain limits set forth by the Employee Retirement Income Security Act of 1974 (ERISA) and related regulations. Participants whose benefits under the plan would otherwise exceed these statutory limits may have their benefits reduced to the guaranteed amount, unless the plan has sufficient assets to pay the nonguaranteed portion of their benefits, either in part or in full.

Additionally, PBGC officials have maintained that their agency's decision to terminate the Delphi plans was made independent from Treasury's input. Treasury officials said that while Treasury did not explicitly approve or disapprove of GM's agreeing to honor previously negotiated top-up agreements with some unions, it agreed that GM had solid commercial reasons to enter into such an agreement.

Decisions Related to Plan Sponsorship

From Treasury's initial discussions with PBGC about Delphi's pensions in April 2009 until after GM's bankruptcy filing on June 1, 2009, Treasury had anticipated that PBGC would terminate Delphi's salaried pension plan but that GM would assume the remaining portion of Delphi's hourly plan, as called for in the second phase of the September 2008 agreement.[28] According to a Treasury official's deposition and our interviews with Treasury officials, Treasury agreed with GM's rationale not to assume the now underfunded Delphi salaried plan, because that plan had been fully funded when GM transferred it to Delphi in 1999. However, the Treasury official's deposition indicated that Treasury thought it was reasonable for GM to assume the Delphi hourly plan for UAW-represented workers, because of UAW's continuing role with the new GM and because the hourly plan, which covered both the UAW and other union-represented workers, had not been fully funded at the time the plan was transferred from GM to Delphi in 1999.[29]

According to our review of the records, Treasury was involved in discussions with PBGC and GM on how to address Delphi's pensions before GM's bankruptcy filing. Specifically, according to a Treasury official's deposition, initial discussions with PBGC, GM, and Treasury in April and May 2009 centered on trying to reach an agreement under which, among other things, the Delphi salaried plan would be terminated and GM would assume the hourly pension plan. According to PBGC officials, discussions in April and May 2009 revolved around how to deal with Delphi's pension plans in light of the collapse of the automotive market, growing concerns about Delphi's imminent liquidation and inability to maintain its pension plans, and GM's own financial difficulties and impending bankruptcy. However, PBGC officials told us that at this

[28]Deposition of Treasury Official, No. 04-44481 (RDD) (S.D. N.Y. July 21, 2009).

[29]According to the deposition, Treasury was not focused on the other unions' plans at this time but was concerned about UAW because of UAW's role for new GM.

time, they had not reached any agreement with GM or Delphi about the future of the Delphi pension plans.

According to court filings, GM officials first informed Treasury on June 3, 2009, (shortly after GM's bankruptcy filing) that they had concerns about taking on the hourly plan and had not built the cost of doing so into their restructuring plan. In June 2009, GM developed and provided Treasury with an assessment of the costs of Delphi's pensions, which explained that the restructuring plan did not assume the transfer of remaining Delphi hourly or salaried plans. The assessment also stated that, subject to certain conditions, GM was obligated to absorb the second transfer of Delphi's hourly plan but did not expect Delphi to meet those conditions.[30] GM also noted that it was not obligated to absorb Delphi's salaried plans. After reviewing GM's calculations and engaging in discussions with GM's pension team, Treasury agreed with GM's assessment that taking on the Delphi hourly plan was a "3 billion dollar liability that GM could not afford."[31] In a legal brief, Treasury asserted that the department did not dictate what should be done with the Delphi pensions and that Treasury agreed with GM's decisions.[32]

According to PBGC, Treasury did not play an active role in PBGC's decision to terminate the Delphi plans, although by statute the Secretary of the Treasury is one of PBGC's three board members.[33] According to PBGC officials, PBGC's director informed the board of PBGC's decision to seek termination of the Delphi plans, gave the board advance notice of

[30]The assessment added that since the first transfer in September 2008, the unfunded liability for the remainder of Delphi's hourly plan had increased from $1.5 billion to approximately $3.2 to 3.5 billion as of March 31, 2009.

[31]Deposition of Treasury Official, No. 05-44481 (RDD) (S.D. N.Y. July 21, 2009). Upon termination in July 2009, PBGC calculated that the underfunding of the hourly plan totaled $4.4 billion.

[32]Motion of Defendants U.S. Dep't of the Treasury et al. to Dismiss or, in the Alternative, for Summary Judgment at 24, No. 2:09-CV-13616 (E.D. Mich. Feb. 16, 2010).

[33]29 U.S.C. § 1302(d). As we reported in GAO-12-168, PBGC's decision to terminate the plans was ultimately precipitated by the apparent lack of a viable sponsor, impending foreclosure on Delphi's assets, and the prospect of increased losses for PBGC and the plans that would occur upon liquidation. Our examination of PBGC termination decisions for nine of its ten largest insurance claims (Delphi's being the tenth) shows the agency making assessments similar to those it made for the Delphi pension plans. See GAO-12-168 for more details on this work.

subsequent implementation of that decision, and routinely kept the board informed of the agency's actions in the Delphi bankruptcy case, consistent with PBGC's practice in other large cases. The law gives the board responsibility to establish and oversee PBGC policies, but according to PBGC, the board decides broad policy issues that may arise from cases without getting involved directly in those cases.[34] For their part, Treasury officials acknowledged that the department had multiple roles in this process by virtue of its roles in PBGC oversight and in managing the U.S. investment in new GM, but noted that Treasury does not communicate with PBGC about its GM investment activities.[35] Moreover, in response to questions from Congress, the Treasury Secretary stated that Treasury did not make the decision to terminate Delphi's pension plans.[36]

Decisions Related to Top-Up Agreements

Although GM decided not to assume the second installment of Delphi's hourly plan, GM did decide to honor existing top-up agreements for commercial reasons that Treasury found reasonable. As noted in a Treasury official's deposition, during GM's bankruptcy process, GM was prepared to honor the obligation of providing top-ups to Delphi UAW retirees, while the situation was less clear in relation to comparable agreements with IUE and USWA. GM officials told us that the company agreed to honor the top-up agreement with UAW during its restructuring because of its dependence on the union, whose members made up a substantial part of GM's workforce. As previously noted, GM agreed to provide top-ups to the Delphi UAW retirees as part of GM's master sale and purchase agreement, to which Treasury gave its approval.

According to a Treasury official's deposition, Treasury was kept apprised of GM's ongoing bargaining with IUE and USWA on a variety of issues, including the top-ups.[37] According to Treasury officials, Treasury's consent for transactions greater than $100 million, which had been

[34] 29 U.S.C. § 1302(d) and (f).

[35] GAO-10-492.

[36] The Federal Bailout of AIG: Hearing before the H. Comm. on Oversight and Government Reform, 111th Cong. 310 (2010) (answers to questions for the record from Timothy Geithner, Secretary of the Treasury).

[37] Deposition of Treasury Official, No. 04-44481 (RDD) (S.D. N.Y. July 21, 2009).

required before GM's bankruptcy, was not required of new GM. Therefore, Treasury's consent was not required when the settlement agreement was signed 2 months after new GM began operations. Negotiations resulted in the September 2009 settlement agreement between new GM, old GM, IUE, and USWA. According to the agreement, the parties entered into it after consideration of the "factual and legal arguments regarding these issues, as well as the costs, risks, and delays associated with litigating these issues."[38]

Although Treasury officials said Treasury did not explicitly approve or disapprove of GM providing top-ups to the Delphi UAW, USWA, and IUE retirees, Treasury subsequently commented on GM's decision. In its legal brief, Treasury stated that GM had solid commercial reasons for providing the top-ups.[39] Specifically, Treasury stated that its aim in negotiating the details of GM's reorganization plan was to ensure that new GM would assume only those liabilities of old GM that were "commercially necessary" for new GM to operate. Treasury noted in the brief that because of new GM's dependence on the UAW workforce and the costs, risks, and delays associated with litigating USWA's and IUE's claims related to the Delphi bankruptcy, new GM had solid commercial reasons to agree to provide the top-ups to the Delphi UAW, USWA, and IUE retirees. Additionally, Treasury officials noted that, unlike the hourly plan, the salaried plan was fully funded at the time GM transferred it to Delphi. Also, because GM was never obligated to provide top-ups to the salaried or other retirees not represented by UAW, IUE, and USWA, GM did not have any legal obligation to agree to provide top-ups to these groups.

This concludes my prepared statement. I would be pleased to answer any questions you may have.

[38]Settlement Agreement Between and Among GMCO/MLC-IUE-CWA and USWA Regarding Retiree Health Care, Life Insurance, Pension Top-Up, and Modification and GMCO Assumption of MLC-IUE-CWA CBA, dated Sept. 10, 2009.

[39]Motion of Defendants U.S. Dep't of the Treasury et al. at 28, No. 2:09-cv-13616 (E.D. Mich. Feb. 16, 2010).

GAO Contact and Staff Acknowledgments

For further information on this testimony or GAO's March and December 2011 reports on the termination of Delphi's pension plans, please contact me at (202) 512-8678 or clowersa@gao.gov, or Barbara Bovbjerg, Managing Director, Education, Workforce, and Income Security Issues at (202) 512-7215 or bovbjergb@gao.gov. Other key contributors to this statement include Mark M. Glickman, Sarah Farkas, Charles Jeszeck, Heather Krause, Raymond Sendejas, Margie Shields, and Craig Winslow. Contact points for our Congressional Relations and Public Affairs offices may be found on the last page of this statement.

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