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## The Best of Times and the Worst of Times: Lessons from Recent Reforms of the French Retirement System

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## The Best of Times and the Worst of Times: Lessons from Recent Reforms of the French Retirement System

### Notes/Citation Information

Georgia Journal of International and Comparative Law, Vol. 29, No. 3 (2001), pp. 441-490

# THE BEST OF TIMES AND THE WORST OF TIMES: LESSONS FROM RECENT REFORMS OF THE FRENCH RETIREMENT SYSTEM

*Kathryn L. Moore\**

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## I. INTRODUCTION

From the standpoint of longevity, these are the best of times. At no other point in our history have Americans known such lengthy life spans.<sup>1</sup>

Yet this increased longevity is helping to create the worst of times for our nation's social security system.<sup>2</sup> Principally because of increasing life expectancy and the fact that the baby boom generation is reaching retirement age<sup>3</sup> and is followed by a much smaller generation,<sup>4</sup> the American social security system is facing a long-term funding deficit.<sup>5</sup> The Board of Trustees of the Federal Old-Age and Survivors and Disability Trust Funds predicts that unless corrective action is taken, social security benefits will exceed dedicated

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<sup>1</sup> When the American social security system began paying monthly benefits in 1940, 65 year old men had a life expectancy of 12 years and 65 year old women had a life expectancy of 13 years. By 1998, life expectancy for 65 year old men reached 15 years while life expectancy for 65 year old women was just over 19 years. Moreover, the Board of Trustees of the Social Security Trust Funds predicts that by 2075, 65 year old men will have a life expectancy of just under 19 years while 65 year old women will have a life expectancy of 22 years. See Kathryn L. Moore, *Raising the Social Security Retirement Ages: Weighing the Costs and Benefits*, 33 ARIZ. ST. L.J. 543, at 574 (2001) and authorities cited therein.

<sup>2</sup> This Article will use the term social security in its generally accepted meaning in the United States as referring to cash benefits provided by the United States' Old-Age, Survivors, and Disability Insurance (OASDI) program. See Kathryn L. Moore, *Partial Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131, 131 n.2 (1998). In France, the term generally has a much broader meaning; typically, it refers to benefits for family, sickness, and work injuries as well as old-age benefits. See COURS DES COMPTES, LA SÉCURITÉ SOCIALE 5 (2000); Didier Blanchet & Louis-Paul Pélé, *Social Security and Retirement in France*, in SOCIAL SECURITY AND RETIREMENT AROUND THE WORLD 101, 111, at n.3 (Jonathan Gruber & David A. Wise eds., 1999). See also JEAN-JACQUES DUPEYROUX, DROIT DE LA SÉCURITÉ SOCIALE 92-97 (13th ed. 1998); JEAN-PIERRE CHAUCHARD, DROIT DE LA SÉCURITÉ SOCIALE 15 (2d ed. 1998).

<sup>3</sup> The eldest of the baby boom generation will reach the earliest eligibility age for social security retirement benefits (age 62) in 2008. See U.S. GEN. ACCT. OFF., SOCIAL SECURITY: DIFFERENT APPROACHES FOR ADDRESSING PROGRAM SOLVENCY 18 (1998) [hereinafter DIFFERENT APPROACHES].

<sup>4</sup> See AMERICAN ACADEMY OF ACTUARIES, FINANCING THE RETIREMENT OF FUTURE GENERATIONS: THE PROBLEMS AND OPTIONS FOR CHANGE 6 (1998) ("Following World War II, there was a dramatic increase in fertility rates in the United States. Rates began to soar in 1946 and, although they peaked in 1957, their effect on annual birth rates persisted until 1964. Following the post-war increases, fertility rates plummeted and, since the early 1970s, have remained below zero population growth.")

<sup>5</sup> For a comprehensive discussion of the reasons why the American social security system faces long-term funding difficulties, see *id.* at 6-10.

tax revenues by the year 2016, and the social security system will become insolvent, that is, unable to pay benefits in full, by the year 2038.<sup>6</sup>

The United States is not alone in facing these circumstances. Industrialized countries throughout the world are facing similar challenges<sup>7</sup> and reforming their retirement systems in response to them.<sup>8</sup> The experiences of these foreign countries can provide important guidance for the United States as it considers reform of its social security system.<sup>9</sup> Indeed, the House Ways and

<sup>6</sup> 2001 ANN. REP. OF THE BOARD OF TRUSTEES OF FED. OLD-AGE AND SURVIVORS INS. AND DISA. INS. TR. FUNDS 2 (referring to the combined OASDI trust funds and using intermediate assumptions) [hereinafter 2001 ANN. REP.].

<sup>7</sup> "According to currently available projections, in industrial countries, particularly in Europe, the population age structure is expected to change dramatically over the next fifty years as a result of a decline in birth rates, an increase in life expectancy and a reduction in the scale of migration, with possible consequences on the financial viability of pension schemes." GIULIANO BONOLI, *THE POLITICS OF PENSION REFORM: INSTITUTIONS AND POLICY CHANGE IN WESTERN EUROPE* 14 (2000). "Increased life expectancies, accompanied by a surge in births following the Great Depression and World War II, portend enormous strains on public retirement programs around the world. The World Bank estimates that the number of people age 60 and over will triple between 1990 and 2030, placing particular stress on already-developed nations in Europe, Asia, and the Americas." *Social Security Reform Lessons Learned in Other Countries: Hearing Before the House Ways and Means Comm.*, 106th Cong. 2 (1999) [hereinafter referred to as *Lessons*]. See R. Kent Weaver, *The Politics of Pensions: Lessons from Abroad*, in *FRAMING THE SOCIAL SECURITY DEBATE: VALUES, POLITICS, AND ECONOMICS* 183, 185 (R. Douglas Arnold et al. eds., 1998) (noting "[a] common set of pressures for change—demographic pressures, budgetary pressures, competitive pressures, and conservative critiques—have confronted pension systems in all OECD countries."); EMMANUEL REYNAUD, *LES RETRAITES EN FRANCE: LE RÔLE DES RÉGIMES COMPLÉMENTAIRES* 5 (1994) (noting that since the beginning of the 1980s, retirement systems have entered a period of change in all the industrialized countries). See also Jacques-André Schneider, *Supplementary Pension Plans and Collectively Agreed Schemes*, in *PENSIONS IN THE EUROPEAN UNION: ADAPTING TO ECONOMIC AND SOCIAL CHANGE* 173, at 173 (Gerard Hughes & Jim Stewart eds. 2000) "Throughout Europe, demographic and economic pressures are producing often painful reassessment of the prospects for pensions." *Id.*

<sup>8</sup> See BONOLI, *supra* note 7 (analyzing recent pension reforms in United Kingdom, Switzerland, and France); *Lessons*, *supra* note 7, at 2, stating:

Several countries, including Germany, Japan, and the United Kingdom, have raised retirement ages prospectively. Others, including France, Italy, and Sweden, have begun to implement benefit reductions. Still others, including Chile, Mexico, and Australia, have attempted more comprehensive reforms by shifting towards a forward-funded approach based more on personal savings for retirement than strictly on pay-as-you-go public benefits.

<sup>9</sup> In announcing the hearing, House Ways and Means Chairman Bill Archer declared: "[M]any countries have already implemented the types of changes we are just staring to debate in earnest. Whenever possible, we should seek to benefit from this international experience as we proceed down our own path to reform." *Lessons*, *supra* note 7, at 2. The pension reform experiences of other advanced industrial countries are not only of great interest in their own

Means Committee recently devoted a hearing to “social security reform lessons learned in other countries.”<sup>10</sup> Following that lead, this Article examines recent reforms of the French retirement system to see what lessons can be applied to reform of the American social security system.<sup>11</sup>

The Article begins by giving a broad overview of the French retirement system. It then describes the more significant reforms of the system instituted over the last decade. Finally, it discusses the lessons these reforms offer for reform of the American social security system.

## II. OVERVIEW OF THE FRENCH RETIREMENT SYSTEM

The French take a very different approach to retirement income—and social welfare in general—than does the United States. The preamble to the 1946 French Constitution

guarantees to all, notably to the child, to the mother, and to old workers, the protection of health, material security, rest and leisure. Every human being who, because of his age, his physical or mental state, or his economic situation, finds himself unable to work has the right to receive from the collectivity a suitable means of existence.<sup>12</sup>

The American constitution, in contrast, offers no similar guarantee.<sup>13</sup>

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right, they also offer tremendous learning opportunities for the United States. Weaver, *supra* note 7, at 185.

<sup>10</sup> See *Lessons*, *supra* note 7. The House Ways and Means Subcommittee on Social Security also devoted a hearing to considering the experiences of other countries. See *The Future of Social Security for this Generation and the Next: Experiences of Other Countries: Hearing Before the House Ways and Means Subcomm. on Social Security*, 105th Cong., 1st Sess., Serial 105-41 (1997).

<sup>11</sup> In the hearing on social security reform lessons learned in other countries, the House Ways and Means Committee heard testimony regarding reform of the retirement systems in Australia, Argentina, Canada, Chile, Mexico, Sweden, and the United Kingdom. See *Lessons*, *supra* note 7, *passim*. The committee, however, did not hear specific testimony regarding reform of the French retirement system.

<sup>12</sup> Préambule de la constitution du 27 octobre 1946 (Author’s translation). The Current French constitution reaffirms this preamble. See préambule de la constitution du 4 octobre 1948.

<sup>13</sup> Ann I. Park, *Comment, Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1196-97 (1987) (footnotes omitted), stating:

The United States Constitution provides no right to the fulfillment of basic human needs. Many scholars have argued that United States law should

The French retirement system is founded on the notion of solidarity.<sup>14</sup> In fact, the French Social Security Code declares that "the French social security organization is founded on the principle of national solidarity."<sup>15</sup> The French retirement system promotes two types of solidarity: intergenerational solidarity and intragenerational solidarity. Intergenerational solidarity arises from the fact that contributions of current workers are used to fund benefits for current retirees, that is, the system is funded on a pay-as-you go basis.<sup>16</sup> Intergenerational solidarity arises from the system's redistribution between socio-professional categories and genders.<sup>17</sup>

Unlike the French retirement system, the American retirement system is not funded primarily on a pay-as-you go basis. Rather, pre-funded retirement benefits play a much larger role in the American retirement system. As of 1996, about half of the American work force was covered by an employer-sponsored pension plan,<sup>18</sup> and employer-sponsored pension plans held over three trillion dollars in assets.<sup>19</sup> This is not to suggest, however, that intergenerational and intragenerational redistribution play no role in the American retirement system. The American social security system is funded

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explicitly guarantee human welfare rights. American constitutional law, however, has never recognized such rights, nor imposed any positive legal requirement that government provide basic needs—such as subsistence benefits, housing, medical care, or education—to its people.

<sup>14</sup> See LA RETRAITE EN 10 QUESTION 10 REPONSES 6 (la documentation française 1999) (declaring that solidarity is at the heart of the French retirement system); JEAN-MICHEL CHARPIN, L'AVENIR DE NOS RETRAITES 22 (1999). See also Christine Daniel & Carole Tuchsirer, *Assurance, assistance, solidarité: Quels fondements pour la protection sociale?*, 30 LA REVUE DE L'IRE 5, 14 (1999) (declaring that solidarity is considered by almost all as the foundation of all social intervention whatever the form employed to fight against worker insecurity).

<sup>15</sup> See Soc. Sec. Code art. L. 111-1 line 1 (Author's translation).

<sup>16</sup> See CHARPIN 4, *supra* note 14, at 22. For a detailed discussion of the role of solidarity in the French retirement system, see Daniel & Tuchsirer, *supra* note 14; Lucy apRoberts, *la protection sociale d'entreprise ou la solidarité fragmentée*, 30 LA REVUE DE L'IRE 93 (1993); Bernard Friot, *Assurances sociales, solidarité nationale, salaire socialisé*, 30 LA REVUE DE L'IRE 219 (1999).

<sup>17</sup> See CHARPIN, *supra* note 14, at 22-24. See also BONOLI, *supra* note 7, at 24-25 (describing how French retirement system blends contributory and non-contributory elements).

<sup>18</sup> See U.S. GEN. ACCT. OFF., RETIREMENT INCOME: IMPLICATIONS OF DEMOGRAPHIC TRENDS FOR SOCIAL SECURITY AND PENSION REFORM 13. For purposes of this Article, the term "pension plan" refers to both defined benefit and defined contribution plans.

<sup>19</sup> See PENSION AND WELFARE BENEFITS ADMIN., U.S. Dep't of Labor. Abstract of 1996 Form 5500 Annual Reports, Private Pension Plan Bulletin No. 9 Table A5 (Winter 1999-2000), available at [http://www.dol.gov/dol/pwba/public/programs/opr/bullet1996/table\\_a5.htm](http://www.dol.gov/dol/pwba/public/programs/opr/bullet1996/table_a5.htm) (Sept. 4, 2001) (this figure excludes funds held by life insurance companies under allocated group insurance contracts for payment of retirement benefits).



almost exclusively on a pay-as-you go basis<sup>20</sup> and provides for redistribution within generations.<sup>21</sup>

Yet, the term "solidarity" is rarely mentioned in the context of the American social security system.<sup>22</sup> Instead, the American social security system is typically said to balance two competing interests: social adequacy and individual equity.<sup>23</sup> Social adequacy means that all contributors should be provided a certain standard of living regardless of their level of contributions, while individual equity means that each worker should receive a benefit that is directly related, or actuarially equivalent, to the amount of her

<sup>20</sup> For a discussion of the funding structure of the American Social Security system, see Kathryn L. Moore, *Redistribution Under Current Social Security System*, 61 U. PITT. L. REV. 955, 983-85 (2000) and authorities cited therein.

<sup>21</sup> For a detailed discussion of how the American social security system redistributes income, see *id.*

<sup>22</sup> For mention of the term "solidarity" in conjunction with the American social security system, see Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 61-62.

The idea that Social Security is an "earned right" because of the relationship between taxes and benefits is a political fiction, and little if any social solidarity would be lost by replacing it with the more sincere yet equally compelling idea that all people, at the starting line of life, are entitled to financial security in old age as long as they put their labor to use throughout their working lives. This more accurately captures Social Security's original aspiration of encouraging work while protecting workers against 'the major hazards and vicissitudes of life.'

Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U. L. REV. 175, 184-85 (1998)

Indeed, the popularity of so-called 'universal' social insurance programs has hinged on their formal or effective exclusion of Black people. New Deal reformers could promote Social Security as a universal program designed to benefit all classes only by first disqualifying Black workers. 'Instead of a 'universal' welfare state that could create solidarity among workers,' sociologist Jill Quadagno notes, 'the New Deal welfare state instituted a regime that reinforced racial inequality.'

Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 STAN. L. & POL'Y REV. 311, 315 (1998) ("Supporters of the traditional payroll-tax financing mechanism of Social Security argue that this feature of the system ensures political solidarity for it by reinforcing the notion that it is a universal 'social insurance' program rather than a welfare program."); *Helvering v. Davis*, 301 U.S. 619, 641 (1937) (in upholding the social security program against a constitutional challenge, the Court declared, "The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided.").

<sup>23</sup> See Kathryn L. Moore, *Redistribution Under a Partially Privatized Social Security System*, 64 BROOK. L. REV. 969, 969-70 (1998) and authorities cited therein.

contributions.<sup>24</sup> Although for many years developments in the American social security system promoted social adequacy over individual equity,<sup>25</sup> individual equity, rather than social adequacy, has been the focus of much of the recent American social security debate, particularly by proponents of partial privatization of the system.<sup>26</sup>

Retirement income in France, as in the United States, is typically provided by a three tier system. The three tiers in France, however, differ from those in the United States. Specifically, in France, retirement income is usually provided by (1) mandatory base regimes, that is, systems, (2) mandatory complementary regimes, and (3) optional supplemental retirement plans.<sup>27</sup> In the United States, in contrast, the three tiers consist of (1) social security, (2)

<sup>24</sup> See ROBERT J. MYERS, *SOCIAL SECURITY* 10 (4th ed. 1993).

<sup>25</sup> See MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* 215 (1979); J. DOUGLAS BROWN, *ESSAYS ON SOCIAL SECURITY* 25 (1977).

<sup>26</sup> For example, proponents of the Social Security Advisory Council's two partial privatization proposals devote thirteen pages of their twenty-two-page "Comparison of Plans" to comparing rates of return under the Advisory Council's three proposed reforms. See I 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY REPORT: FINDINGS AND RECOMMENDATIONS 36-49 (1997). In contrast, they devote one sentence—and a footnote—to the issue of adequacy.

All of the plans considered by the Council have tried to insure the adequacy of retirement income in comparison to poverty thresholds. . . . Since ultimately the PSA plan provides a flat benefit for full-career workers [equivalent to sixty-five percent of the current poverty level for an elderly person living alone], the retirement income adequacy provided through the central defined benefit plan is not as large as in the other plans, although the PSA accounts are expected to more than make up for the difference.

See *id.* at 35 & n.2.

For an argument that social adequacy should trump individual equity in reform of the American social security system, see Moore, *supra* note 2, at 164-68.

<sup>27</sup> See COURS DES COMPTES, *supra* note 2, at 5; LAMY, *PROTECTION SOCIALE* 1691 (2000); LAURENCE LAUTRETTE, *LE DROIT DE LA RETRAITE EN FRANCE* 36-79 (1999).

Not all commentators, however, divide the French retirement system in this manner. For example, the European Commission and some authors treat the mandatory complementary retirement regimes as part of the first tier because these regimes are compulsory and funded on a pay-as-you go basis. See SOPHIE MICHAS BÉGUERIE, *REGIMES PRIVÉS DE RETRAITES COMPLÉMENTAIRES: PERSPECTIVES COMPARATIVE ET EUROPÉENNE* 3 (1998) (noting that some authors and the European Commission have treated the mandatory complementary retirement regimes as part of the first tier); Philippe Liagre, *Le retraite collective d'entreprise après la loi du 8 août 1994*, DR. SOC. 411, 416 n.37 (1995). See also FRANCIS KESSLER, *DROIT DE LA PROTECTION SOCIALE* 378 (2000) (noting that mandatory complementary retirement regimes could be considered as second stage of first tier). On the other hand, some commentators treat both the mandatory complementary retirement regimes and voluntary supplemental retirement plans as part of the second tier. See, e.g., REYNAUD, *supra* note 7, at 28. For purposes of this Article, the way in which the system is divided is less important than recognizing each of the elements of the system.

optional employer-sponsored pensions, and (3) individual savings.<sup>28</sup> Of course, retirement income in France may be supplemented by individual savings, and individual savings are sometimes referred to as the "fourth" tier of the French retirement system.<sup>29</sup> This section will give a general overview of each of the first three tiers of the French retirement system.<sup>30</sup>

### A. First Tier

The first tier of the French retirement system consists of mandatory base regimes. There are more than 120 different mandatory base regimes in France today,<sup>31</sup> although only about 26 of these regimes are open to new participants.<sup>32</sup> The mandatory base regimes are typically divided into four different categories: (1) the general regime,<sup>33</sup> (2) the special regimes,<sup>34</sup> (3) the agricultural regime, and (4) the regimes for non-agricultural, non-wage earners.<sup>35</sup> Of these four categories, the general regime is by far the most

<sup>28</sup> See Christopher Bone, *An Actuarial Perspective on How Social Security Reform Could Influence Employer-Sponsored Pensions*, in PROSPECTS FOR SOCIAL SECURITY REFORM 333, at 333 (Olivia S. Mitchell et al. eds., 1999) (describing U.S. retirement income system as three-legged stool). Commentators also sometimes point to a fourth source of retirement income for the elderly; the federal safety-net program called Supplemental Security Income. See Moore, *supra* note 1, at 165 & n.202 (1998) and authorities cited therein.

<sup>29</sup> Philippe Laigre & Pierre Mascomere, *La Retraite Supplémentaire*, Liaisons Sociales Supplément au No. 12044 du Novembre 1995, at 10.

<sup>30</sup> For a brief overview of individual initiatives, see LAMY, *supra* note 27, at 1693-94; Cinquante ans de Sécurité sociale continuité et mutations à l'aube du XXIème siècle: Groupe no. 1: Les fonds de pension 26 (1996) [hereinafter Cinquante ans, Groupe no. 1].

<sup>31</sup> See Blanchet & Pélé, *supra* note 2, at 111-12 ("there are about 120 first-pillar retirement schemes other than the general regime"); GILLES HUTEAU & ERIC LE BONT, SÉCURITÉ SOCIALE ET POLITIQUES SOCIALES 15 (2d ed. 1997) (stating that there are almost 150 first-tier regimes).

<sup>32</sup> See *L'avenir des systèmes de retraite*, Avis du Conseil économique et social présenté par M. René Teulade, rapporteur au nom de la section des Affaires sociales, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Avis et Rapports du Conseil Economique et Social 4 (Jan. 11 & 12, 2000) (noting that about 100 base regimes are in the course of extinction because they do not accept new participants while 26 base regimes do accept new participants).

<sup>33</sup> The French general regime encompasses health insurance, coverage for work injuries, and family benefits as well as retirement benefits for wage earners from the private sector. See COURS DES COMPTES, *supra* note 2, at 7 (describing the organization of the general regime). This Article will focus solely on the retirement benefits provided through the general regime, and, in particular, on "l'assurance vieillesse," or old-age benefits.

<sup>34</sup> The special regimes are public regimes much like the United States' Railroad Retirement System or state or local government systems for state and local government employees who are not covered by the American Social Security System.

<sup>35</sup> See, e.g., COURS DES COMPTES (dividing the social security regimes into four groups described in text); BONOLI, *supra* note 7, at 127 (same); HUTEAU & LE BONT, *supra* note 31, at

important in terms of coverage. As of 1996, about 65% of workers were affiliated with the general regime,<sup>36</sup> while 3% of workers were affiliated with the agricultural regime,<sup>37</sup> 20% of workers were affiliated with one of the more than 120 special regimes,<sup>38</sup> and the remaining 12% of workers were affiliated with one of the six non-agricultural, non-wage earner regimes.<sup>39</sup> Because the general regime is so important in terms of coverage, this section will focus principally on the general regime. This is not to suggest, however, that the other first tier regimes are not important. Indeed, the very existence of this multiplicity of first tier regimes makes the French retirement system extremely complex<sup>40</sup> and difficult to reform.<sup>41</sup>

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15-16 (same); LAUTRETTE, *supra* note 27, at 36-41 (same).

<sup>36</sup> The general regime covers the vast majority of wage earners from the private sector. See Blanchet & Pél , *supra* note 2, at 111; LAUTRETTE, *supra* note 27, at 36; REYNAUD, *supra* note 7, at 18. In 1996, there were about 14 million workers contributing to the regime and 9.2 million retirees receiving benefits from the regime. See *L'avenir des systemes de retraite*, *supra* note 32, at 10, tbl. 1.

<sup>37</sup> The agricultural regime covers wage earners employed in the agricultural sector. See REYNAUD, *supra* note 7, at 18. In 1996, there were about 650,000 workers contributing to the regime and 2.17 million retirees receiving benefits from the regime. See *L'avenir des systemes de retraite*, *supra* note 32, at 10, tbl. 1.

<sup>38</sup> The special regimes cover state employees, workers in the public sector, and a few categories of private sector wage earners, such as miners. See LAUTRETTE, *supra* note 27, at 38; REYNAUD, *supra* note 7, at 18. In 1996, there were about 4.7 million workers contributing to the special regimes and 3.5 million retirees receiving benefits from the regimes. See *L'avenir des systemes de retraite*, *supra* note 32, at 10, tbl. 1. Although there are more than 120 different special regimes, only 15 accept new participants. See DUPEYROUX, *supra* note 2, at 791 & n.4; LIVRE BLANC SUR LES RETRAITES: GUARANTIR DANS L'EQUITE LES RETRAITES DE DEMAIN 40 (1991); REYNAUD, *supra* note 7, at 13. The importance of the individual special regimes varies from regimes that cover few beneficiaries, such as the regime for the Comic Opera or the Bank of France, to regimes of much larger import, such as the regimes for the SNCF (the French railway system) or mines. *Id.* See also REYNAUD, *supra* note 7, at 13 & Tbls. 2 & 3 (identifying the most important special regimes, the number of workers affiliated with those regimes and the number of pensions paid by those regimes).

<sup>39</sup> The non-agricultural, non-wage earner regimes cover workers outside of the other three categories, including professionals, such as lawyers, independent merchants and business owners, and craftsmen. See LAUTRETTE, *supra* note 27, at 39; REYNAUD, *supra* note 7, at 19. In 1996, there were about 2.3 million workers contributing to these regimes and 3.8 million retirees receiving benefits from the regimes. See *L'avenir des systemes de retraite*, *supra* note 32, at 10, tbl. 1. (These figures include the regime for "exploitants agricoles.")

<sup>40</sup> See Blanchet & Pél , *supra* note 2, at 111.

<sup>41</sup> See DUPEYROUX, *supra* note 2, at 305. Moreover, this multiplicity of regimes is viewed as one of the failures of the French retirement system. When the general regime was originally enacted in 1945, the founders anticipated that the general regime would ultimately extend to the entire population. Efforts to extend the general regime to the entire active population, however, met with fierce opposition and uniformity has never been achieved. See *id.* at 276 & n.1;

### 1. General Regime

The French general regime was created in 1945,<sup>42</sup> ten years after the American social security system was enacted.<sup>43</sup> Like the American social security system,<sup>44</sup> the French general regime is funded principally<sup>45</sup> on a pay-as-you go basis; that is, current contributions to the system are used to fund current benefits.<sup>46</sup> Participating workers are required to contribute 6.55% of earnings<sup>47</sup> up to a ceiling<sup>48</sup> that is indexed to changes in average annual wages,<sup>49</sup> and participating employers are required to contribute 8.2% of earnings up to the ceiling plus an additional 1.6% of all earnings, both above and below the ceiling.<sup>50</sup>

The general regime pays retirees a fixed amount per month for life based on a benefit formula,<sup>51</sup> which may be described as  $P = S.A.M. \times t \times d/D$ , where  $P$  = pension,  $S.A.M.$  = average annual salary,  $t$  = rate,  $d$  = duration of participation in general regime, and  $D$  = maximum duration of participation

HUTEAU & LE BONT, *supra* note 31, at 12; Blanchet & Pélé, *supra* note 2, at 111.

<sup>42</sup> See Ord. 4 oct. 1945. The ordinance enacting the French social security system in 1945 did not use the term "general regime," although that term is now used to refer to the system established by the 1945 ordinance. See DUPEYROUX, *supra* note 2, at 274.

<sup>43</sup> See 11 Pub. L. No. 74-271, 49 Stat. 620 (1935).

<sup>44</sup> For a discussion of the funding structure of the American social security system, see Moore, *supra* note 20, at 983-85 (2000) and authorities cited therein.

<sup>45</sup> In 1993, the general regime was amended to provide for new sources of funds, the "fonds de solidarité vieillesse," for benefits which are not attributable to contributions. For a detailed discussion of this amendment, see *infra* p. 474. In addition, the 1999 social security financing law created a special reserve to help finance the anticipated increase in benefits beginning in 2005. For a discussion of this provision, see *infra* p. 474.

<sup>46</sup> See DUPEYROUX, *supra* note 2, at 701; CHAUCHARD, *supra* note 2, at 307.

<sup>47</sup> Earnings are defined very broadly. See Soc. Sec. Code art. L. 242-1; DUPEYROUX, *supra* note 2, at 726-42.

<sup>48</sup> See BONOLI, *supra* note 7, at 127 n.6 (noting that generally the ceiling is about 120% of inflation); TONY LYNES, PAYING FOR PENSIONS: THE FRENCH EXPERIENCE 24, 54-56 (1985) (discussing various levels at which general regime ceiling adjusted between 1947 and 1980s). See also *infra* p. 459 (discussing fact that in recent years general regime ceiling has risen much more rapidly than average wages).

<sup>49</sup> See Soc. Sec. Code art. D. 242-3; DUPEYROUX, *supra* note 2, at 717. In 2000, the ceiling was equal to 44,100 francs for earnings calculated on a quarterly basis. See Decr. No. 99-1029 (Dec. 9, 1999), reprinted in Soc. Sec. Code (2001), at 2038-39. (On December 22, 2000, US \$1 was worth 7.10 French francs. See Liberation 24 (Dec. 23 & 24, 2000)). For a discussion of how the ceiling is set each year, see DUPEYROUX, *supra* note 2, at 744.

<sup>50</sup> See Soc. Sec. Code art. D. 242-4; DUPEYROUX, *supra* note 2, at 717.

<sup>51</sup> The American social security system also pays benefits in the form of a life annuity. For a discussion of the benefit structure of the American social security system, see Moore, *supra* note 20, at 985-90 and authorities cited therein.

taken into account (150 quarters).<sup>52</sup> The following describes each of the elements of the benefit formula in more detail.

*a. Average Annual Salary*

The first element of the formula, S.A.M. or "salaire annuel moyen," refers to the retiree's average annual salary. For retirees reaching age 60 before January 1, 1994, the average annual salary is based on the retiree's highest 10 years of earnings. The number of years of salary taken into account is scheduled to gradually increase to the retiree's highest 25 years of earnings for retirees who reach age 60 on or after January 1, 2008.<sup>53</sup> Just as the salary on which worker contributions are based is capped,<sup>54</sup> the salary which may be taken into account in calculating the average annual salary for purposes of benefit calculation is also capped.<sup>55</sup>

*b. Rate*

The second element of the formula, "t" or "taux," is the rate. The rate is capped at fifty percent and is generally a function of the age at which the retiree begins to collect benefits and the amount of time the retiree (or a third party on behalf of the retiree)<sup>56</sup> contributed (or is treated as having contributed)<sup>57</sup> to any base regime. Retirees reaching age 60 prior to January

<sup>52</sup> See DUPEYROUX, *supra* note 2, at 472.

<sup>53</sup> See Soc. Sec. Code arts. R. 351-29, 351-29-1; DUPEYROUX, *supra* note 2, at 476 & n.3.; Decret No. 93-1022 du 27 août 1993 relatif au calcul des pension de retraite, Title II, J.O. DE LA REPUBLIQUE FRANÇAISE 12145, 12146 (Aug. 28, 1993). Beginning in 1994, the average period was increased by one year for participants born in 1934 and is scheduled to increase by one year each year until it reaches 25 years in 2008 for participants born on or after 1948. Soc. Sec. Code art. R. 351-29-1. See also *infra* p. 477.

<sup>54</sup> See *infra* p. 480.

<sup>55</sup> See DUPEYROUX, *supra* note 2, at 476 n.2. See also REYNAUD, *supra* note 7, at 15 (noting that salary taken into account in calculating benefits is the capped salary that serves as the base for contributions).

<sup>56</sup> See DUPEYROUX, *supra* note 2, at 473 n.3.

<sup>57</sup> Individuals are treated as having contributed to a base regime during involuntary interruptions of work giving rise to maternity, workers' compensation or unemployment benefits, certain periods of unemployment not giving rise to unemployment benefits, periods of national service if the individual was a participant in a base regime before the national service, periods of educational break for parents, and single women who have raised children are given two quarters credit for each child. See Soc. Sec. Code §§ L. 351-3, 351-4 and R. 351-14; DUPEYROUX, *supra* note 2, at 473 n.3. In addition, individuals may be treated as having contributed to a base regime during certain periods of professional activity prior to April 1,

1, 1994, are entitled to begin collecting benefits at age 60 at the maximum rate of 50 percent if they have 150 quarters or 37.5 years of participation in a base regime by age 60. For retirees reaching age 60 on or after January 1, 1994, the number of quarters required for benefits at the maximum rate beginning at age 60 is scheduled to increase gradually to 160 quarters or 40 years by 2008.<sup>58</sup>

Certain categories of retirees are entitled to the full rate of fifty percent regardless of the amount of time they contributed (or are treated as having contributed) to a base regime. Specifically, retirees who begin to collect benefits at or after age 65,<sup>59</sup> qualified disabled workers,<sup>60</sup> certain deported or interned members of the Resistance,<sup>61</sup> and veterans and prisoners of war<sup>62</sup> are entitled to the full rate regardless of the length of their participation in a base regime. In addition, women workers who have raised three or more children and have worked in manual labor for at least five years are eligible for the full rate once they have contributed or are treated as having contributed to the general regime, agricultural regime, or both for 30 years.<sup>63</sup>

For individuals who elect to retire before they are eligible for the full rate, the rate is decreased by 1.25% for each missing quarter. The missing quarters are based on the lesser of the number of quarters required until the retiree reaches age 65 or the number of quarters required for the full rate at age 60.<sup>64</sup> Thus, for example, suppose that an individual born in March 1940 wishes to retire at age 61 on April 1, 2001. As of April 1, 2001, the individual will have 150 quarters of participation in the general regime while the law requires that an individual born that year have 157 quarters of coverage for the full rate at age 60. Because the individual wishes to retire 4 years, or 16 quarters, before age 65, the reduction based on age is 1.25% x 16, or 20%. Because the

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1983. *See id.* at 473 n.3.

<sup>58</sup> *See* DUPEYROUX, *supra* note 2, at 473; Decret No. 93-1022 du 27 août 1993 relatif au calcul des pension de retraite, Title II, J.O. 12145, 12145-46 (Aug. 28, 1993). Beginning in 1994, the period of participation was increased by one quarter for individuals born in 1934 and is scheduled to increase by one quarter each year until it reaches 160 in 2003 for retirees born in 1943 or after. *See* DUPEYROUX, *supra* note 2, at 473 n.4. *See also infra* p. 477.

<sup>59</sup> *See* Soc. Sec. Code art. L. 351-8 line 1; DUPEYROUX, *supra* note 2, at 475.

<sup>60</sup> To qualify as disabled, workers must be unable to work without grave injury to their health. *See* Soc. Sec. Code art. Secs. L. 351-7, 351-8 line 2, R. 351-21; DUPEYROUX, *supra* note 2, at 473-74. For a description of the disability benefits that apply to qualified disabled workers prior to age 60, *see id.* at 459-64. *See also* Soc. Sec. Code arts. L. 341-1-342-6, R. 341-1-342-6, D. 341-1-342-1.

<sup>61</sup> *See* Soc. Sec. Code art. L. 351-8 line 3; DUPEYROUX, *supra* note 2, at 474.

<sup>62</sup> *See* Soc. Sec. Code art. L. 351-8 line 5, DUPEYROUX, *supra* note 2, at 474.

<sup>63</sup> *See* Soc. Sec. Code arts. L. 351-8 line 4, R. 351-23, 351-24; DUPEYROUX, *supra* note 2, at 474.

<sup>64</sup> *See* DUPEYROUX, *supra* note 2, at 474.

individual has 7 quarters of participation less than is required for the full rate at age 60 (157-150), the reduction based on quarters of participation required for the full rate is  $1.25\% \times 7$ , or 8.75%. Because the reduction based on quarters required for the full rate (8.75%) is less than that based on quarters until age 65 (20%), the individual's rate will be reduced by the former and thus equal  $50\% - 8.75\%$  or 41.25%.

*c. Participation Ratio*

The final element of the formula ( $d/D$ ) is the ratio of the duration of participation in the general regime (capped at 150 quarters)<sup>65</sup> to the maximum number of quarters of participation taken into account (150).<sup>66</sup> Thus, suppose that as of 2001, a retiree born in 1941 has 158 quarters of participation: 120 quarters in the general regime and 38 quarters in the agricultural regime.<sup>67</sup> The retiree's general regime benefit will equal  $S.A.M. \times t \times 120/150$ .<sup>68</sup> Individuals who retire after age 65 with less than 150 quarters of participation in the general regime are credited with an additional 2.5% of participation per quarter, or 10% per year for employment beyond age 65, until the maximum participation of 150 quarters is reached.<sup>69</sup>

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<sup>65</sup> In order to qualify for a quarter of coverage, a participant must earn at least  $200 \times$  the S.M.I.C. (minimum wage) during the year. A participant's entire annual salary will be taken into account, regardless of when earned, in calculating the quarters of participation, but a participant can be credited with no more than 4 quarters in any given year. Thus, an occasional worker who earns a total of  $200 \times$  the S.M.I.C. over a 10 month period will be credited with one quarter of coverage, while a highly paid short-term worker who earns  $4 \times 200 \times$  the S.M.I.C. in the first two months of the year will be credited with four quarters of coverage even if she does not work throughout the rest of the year. See Soc. Sec. Code art. R. 351-9; DUPEYROUX, *supra* note 2, at 475.

<sup>66</sup> See Soc. Sec. Code art R. 351-6; DUPEYROUX, *supra* note 2, at 475. Even though the number of quarters of participation required for the full rate at age 60 is gradually increasing to 160, the maximum number of quarters taken into account in calculating the ratio remains 150. See DUPEYROUX, *supra* note 2, at 475 n.1.

<sup>67</sup> As of 1988, the average retiree received benefits from 1.5 different base regimes. See LIVRE BLANC SUR LES RETRAITES, *supra* note 38, at 55.

<sup>68</sup> Cf. DUPEYROUX, *supra* note 2, at 475 n.2. Because benefits under the agricultural regime are calculated in an almost identical manner, the retiree's agricultural regime benefits will equal  $S.A.M. \times t \times 38/150$ . See *id.*

<sup>69</sup> See Soc. Sec. Code art. R. 351-7; DUPEYROUX, *supra* note 2, at 475-76.



*d. Adjustments*

General regime benefits are subject to a number of additional adjustments. For example, benefits are adjusted each year in conjunction with changes in wages or prices,<sup>70</sup> and benefits may be reduced (or eliminated) if the retiree continues to work beyond the age of 60.<sup>71</sup> In addition, benefits may be increased for retirees who have three or more children,<sup>72</sup> for retirees with a dependent spouse under certain, limited circumstances,<sup>73</sup> and for disabled retirees who rely on a third person for assistance with daily living activities.<sup>74</sup> Finally, dependent surviving spouses or former spouses<sup>75</sup> may receive a survivors benefit equal to the greater of a threshold amount<sup>76</sup> or 54%<sup>77</sup> of their

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<sup>70</sup> Between 1987 and 1999, pensions were adjusted based on changes in prices. Traditionally, however, pensions were adjusted on the basis of changes in wages. See Soc. Sec. Code art. R. 351-29-2; *L'avenir des systèmes de retraite*, *supra* note 32, at 7, 9; DUPEYROUX, *supra* note 2, at 477-78; REYNAUD, *supra* note 7, at 15; Rolande Reullan, *Retraites: l'impossible réforme est-elle achevée?*, DR. SOC. 911, at 919-20. (Dec. 1993). See also *infra* p. 474.

<sup>71</sup> In order to be eligible for reduced benefits, workers must be at least 60 years of age, have at least 150 quarters of coverage, and work part-time in a position that is covered by the general regime or agricultural regime. The amount of reduction varies between 30% and 70%, depending on how much the retiree works. See Soc. Sec. Code art. L. 351-15, 315-16; DUPEYROUX, *supra* note 2, at 479.

<sup>72</sup> Benefits for these workers are increased by ten percent. See Soc. Sec. Code art. L. 351-12, R. 351-30; DUPEYROUX, *supra* note 2, at 476-77. This uniquely French provision is related to France's longstanding pro-natal policy. See Ecole Nationale d'Administration, *Cinquante ans de Sécurité sociale continuité et mutations à l'aube du XXIème siècle: Groupe no. 3: Le système de retraite et les droits des femmes 4* (Apr. 1996) [hereinafter, *Cinquante ans, Groupe no. 3*]. For an overview of France's unique family benefits and pro-natal policy, see, for example, DUPEYROUX, *supra* note 2, at 40-41, 49.

<sup>73</sup> Specifically, the increased benefit is only available if the spouse is 65 or older (or between 60 and 65 in the case of disability), is not otherwise eligible for an old age or disability benefit, and has resources below a particular threshold. See Soc. Sec. Code arts. L. 351-13, R. 351-31; DUPEYROUX, *supra* note 2, at 477. As the number of women working and earning their own pensions has increased, the importance of this provision has decreased. Thus, while about one in five households benefitted from the provision in 1960, less than 3 percent of the general regime retirees benefitted from the provision by 1996. See *Cinquante ans, Groupe no. 3, supra* note 72, at 3-4.

<sup>74</sup> See Soc. Sec. Code art. L. 355-1; DUPEYROUX, *supra* note 2, at 477.

<sup>75</sup> In order to receive the benefit, the former dependent spouse must not have remarried. If the former insured spouse has not remarried, then the benefit is divided between the insured spouse's current and former spouses based on the respective duration of each marriage. See Soc. Sec. Code art. L. 353-3; DUPEYROUX, *supra* note 2, at 486-88.

<sup>76</sup> The minimum benefit was equal to 17,633 francs per year in 2000. See Decr. no. 99-1146 du 29 dec. 1999, art. 1, cited in Soc. Sec. Code art. L. 353-1.

<sup>77</sup> See Soc. Sec. Code art. D. 353-1.

working spouse's benefit upon the death<sup>78</sup> of the insured spouse,<sup>79</sup> and very low wage earners may receive a minimum benefit.<sup>80</sup>

## 2. Other Base Regimes

Three of the other base regimes<sup>81</sup> are "aligned" with the general regime so that they have almost identical contribution and benefit provisions.<sup>82</sup> The special regimes and the other base regimes that are not aligned with the general regime have very different provisions. For example, most of the special regimes<sup>83</sup> accrue benefits at the rate of 2% per year, up to a maximum of 75%,<sup>84</sup> and base benefits on final pay.<sup>85</sup> One of the non-wage, non-agricultural regimes, in contrast, calculates benefits as a percentage of a minimum level of benefits.<sup>86</sup> Overall, the special regimes typically pay much higher benefits than does the general regime,<sup>87</sup> while the other base regimes that are not aligned with the general regime typically pay much lower benefits than does the general regime.<sup>88</sup>

In November 1995, then-Prime Minister Alain Juppé announced the need to reform the special regimes to alleviate the financial pressures they faced as

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<sup>78</sup> The survivors benefit is also available if the insured spouse disappears for more than a year. See Soc. Sec. Code art. L. 353-2; DUPEYROUX, *supra* note 2, at 484.

<sup>79</sup> See Soc. Sec. Code art. L. 353-1.

<sup>80</sup> The minimum benefit was 38,949 francs per year in 1998 and is designed to ensure that workers who contribute to the general regime receive a benefit that, when added to the complementary retirement benefit, is larger than the "minimum vieillesse" benefit which is available to all individuals over the age of 65 regardless of whether they ever contributed to any retirement plan. See DUPEYROUX, *supra* note 2, at 476 & 1131-35.

<sup>81</sup> The three base regimes aligned with the general regime are the base regime for salaried agricultural workers managed by the social agricultural mutual insurance, the base regime for industrialists and merchants managed by the ORGANIC funds, and the base regime for craftsmen managed by the CANCAVA funds. See *id.* at 471.

<sup>82</sup> See *id.* There are some minor differences. For example, the extension from 10 to 25 of the number of years of salary that are taken into account in calculating the average annual salary is more gradual for the non-wage, non-agricultural regimes than for the general regime. See *id.* at 476 n.3.

<sup>83</sup> The special regimes for miners and sailors are an exception. See *id.* at 795.

<sup>84</sup> See *id.* at 795-96.

<sup>85</sup> For all workers, other than notary clerks and Opera artists, the base is at least the last six months of earnings. See DUPEYROUX, *supra* note 2, at 796.

<sup>86</sup> See REYNAUD, *supra* note 7, at 16.

<sup>87</sup> See BONOLI, *supra* note 7, at 129; REYNAUD, *supra* note 7, at 14.

<sup>88</sup> See REYNAUD, *supra* note 7, at 16 (giving brief overview of way in which benefits calculated and explaining that for the most part these regimes pay much lower benefits than do the general regime).

a result of the aging of the population and to provide for greater uniformity between all of the base regimes.<sup>89</sup> He created a commission to propose specific measures to implement this reform,<sup>90</sup> but the proposed reform met with such fierce public opposition—the most significant strikes since 1968—that the commission was dissolved less than two weeks after it was installed, and the proposed reform was abandoned.<sup>91</sup> Calls to reform the special regimes to create greater uniformity between all of the base regimes have been renewed,<sup>92</sup> but no major overhaul of the special regimes has yet been enacted.

### B. Second Tier

The second tier of the French retirement system consists of mandatory complementary retirement regimes. French law<sup>93</sup> requires that workers who are covered by the general regime or the agricultural regime also be covered by one or more mandatory complementary retirement regimes.<sup>94</sup> In addition,

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<sup>89</sup> See BONOLI, *supra* note 7, at 141 (“Financial problems coupled with the more favourable conditions enjoyed by members of this scheme, were the key reasons put forward in order to justify a reform of the rail workers scheme, as well as of other public sector schemes.”); Francis Kessler, *Quel avenir pour le regime des retraites fonctionnaires de l’Etat?: Une contribution au debat sur la reforme des regimes speciaux*, 34 *REVUE DE DROIT SANITAIRE ET SOCIAL* 423, at 423 (1998). Specifically, Juppé declared that the period of participation required for benefits at the full rate would have to be extended from 37 ½ to 40 years, as is in the general regime, and that a “caisse de retraite des agents de la fonction publique de l’Etat” would have to be created like the “caisse nationale de retraite des agents des collectivites locales.” See *id.*

<sup>90</sup> See Kessler, *supra* note 89, at 423.

<sup>91</sup> See *id.* See also DUPEYROUX, *supra* note 2, at 315, 318, 813; HUTEAU & LE BONT, *supra* note 31, at 25; *Tactical Retreat*, *ECONOMIST*, Dec. 16, 1995, at 45. The reform of the special regimes was part of a much more comprehensive reform of the entire French social security system. Reform of pensions provided by the special regimes was abandoned but the remainder of the comprehensive reform was pursued. See BONOLI, *supra* note 7, at 146.

<sup>92</sup> See, e.g., Lawrence J. Speer, *France Announces Pension Reform; Fails to Consider Capitalization Funds*, 27 *PENS. & BEN. REP. (BNA)* 830 (Mar. 28, 2000) (noting that Prime Minister Lionel Jospin proposed to “require France’s 5 million public sector employees to work a minimum of 40 years to receive a full pension. At present civil servants work 37.5 years for a full pension, while France’s 14.5 million private sector employees are required to put in 40 years work for the same retirement benefits.”); Alain Vasselle, *Senateur, Rapport d’Information fait au nom de la commission des Affaires sociales sur la reforme des retraites 45-46* (contending that it is essential that the special regimes begin reforms to equalize their treatment with the less generous general and aligned regimes). For a critique of certain proposals to reform the special regimes, see Kessler, *supra* note 89.

<sup>93</sup> See Loi du 29 décembre 1972; Soc. Sec. Code art L. 921-1.

<sup>94</sup> See DUPEYROUX, *supra* note 2, at 970. See also KESSLER, *supra* note 27, at 204-05, 373-74 (explaining that participation in mandatory complementary retirement regimes is required

most individuals affiliated with a non-agricultural, non-wage earner regime must also be covered by a mandatory complementary retirement regime.<sup>95</sup> Because the special regimes typically provide much higher levels of benefits than do the other base regimes,<sup>96</sup> most workers<sup>97</sup> covered by a special regime need not be covered by a mandatory complementary retirement regime.<sup>98</sup>

With a few limited exceptions,<sup>99</sup> the mandatory complementary retirement regimes covering workers affiliated with the general regime and the agricultural regime are federated by one of two organizations: (1) the *Association des regimes de retraite complementaire* (ARRCO), and (2) the *Association generale des institutions de retraites des cadres* (AGIRC).<sup>100</sup> This section will discuss these two mandatory complementary retirement regimes<sup>101</sup> because they are the most important in terms of coverage.<sup>102</sup>

because of the relatively limited level of benefits provided by the general regime). *But see* Laurent Caussat, *Les accords du 25 avril 1996 relatifs aux regimes interprofessionnels de retraite complementaire: un exercice d'alerte avant l'arrivee du cyclone?*, DR. SOC. 729, 729 n.3 (1996) (noting that there may be legislative exceptions to this requirement and enumerating one such exception: workers under employment solidarity contract).

<sup>95</sup> See REYNAUD, *supra* note 7, at 17-19, 35-36 (giving overview of the coverage for specific groups of non-agricultural, non-wage earners and describing population covered by a mandatory complementary retirement regime).

<sup>96</sup> See *supra* p. 456. See also Ruellan, *supra* note 70, at 916.

<sup>97</sup> Miners are an exception to the rule; they are also covered by ARRCO and AGIRC. See REYNAUD, *supra* note 7, at 14.

<sup>98</sup> See *id.* (noting that retirement benefits provided by the special regimes are typically much higher than the retirement benefits provided by the other first tier regimes and thus most workers covered by a special regime are not covered by a mandatory complementary retirement regime).

<sup>99</sup> For an enumeration of the few limited exceptions, see DUPEYROUX, *supra* note 2, at 970 n.4, 987 n.6; Caussat, *supra* note 94, at 729 n.3; REYNAUD, *supra* note 7, at 17.

<sup>100</sup> Both organizations were founded by voluntary national collective accords and became mandatory in 1972. See REYNAUD, *supra* note 7, at 17-18; Blanchet & Pél , *supra* note 2, at 111. For a brief history of the organizations, see DUPEYROUX, *supra* note 2, at 981-82, 986-87; REYNAUD, *supra* note 7, at 29-31.

<sup>101</sup> For a discussion of the other mandatory complementary retirement regimes, see REYNAUD, *supra* note 7, at 46-53. See also DUPEYROUX, *supra* note 2, at 824 (giving brief overview of mandatory complementary retirement regimes for non-agricultural, non-wage earners).

<sup>102</sup> See DUPEYROUX, *supra* note 2, at 973 & n.4, 986, 988 (describing ARRCO, AGIRC, and IRCANTEC, which covers certain public sector workers, as the principal mandatory complementary retirement regimes and showing that in 1995 ARRCO had 15 million active participants and 9 million beneficiaries, AGIRC had 2.8 million active participants and 1.5 million beneficiaries, and IRCANTEC had 1.9 million active participants and 1.27 million beneficiaries).

### 1. Overview of ARRCO and AGIRC

Like the general regime, ARRCO and AGIRC are funded principally on a pay-as-you-go basis.<sup>103</sup> Unlike the general regime and most pay-as-you-go systems, however, ARRCO and AGRIC are defined contribution, rather than defined benefit, systems.<sup>104</sup> In principle, the contribution rates are fixed in advance, while benefits are not fixed in advance but instead depend on the contributions levied. Thus, if the scheme's financial situation worsens, pensions will automatically be reduced, unless the social partners elect to increase contributions. There is no advance commitment or contractual obligation to increase contributions to provide retirees a defined level of benefits.<sup>105</sup> In practice, however, ARRCO and AGIRC have increased the level of contributions over the years and have not required retirees to bear the entire burden of a worsening financial situation.<sup>106</sup>

### 2. ARRCO

ARRCO covers all workers in the private sector, that is, both managers and non-managers.<sup>107</sup> It does not, however, cover all of the wages<sup>108</sup> of all workers. Rather, it only covers the wages of managers up to the general regime ceiling<sup>109</sup> and the wages of non-managers up to three times the general regime ceiling.<sup>110</sup> For purposes of ARRCO, wages up to the general regime ceiling are typically referred to as level A wages while wages between the general regime

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<sup>103</sup> See DUPEYROUX, *supra* note 2, at 975, 982; Emmanuel Reynaud, *Financing retirement pensions: Pay-as-you-go and Funded Systems in the European Union*, 48 INT'L SOC. SECURITY REV. 41, 47-48 (1995); LAUTRETTE, *supra* note 27, at 52. *But see* KESSLER, *supra* note 27, at 382 n.2 (noting that ARRCO has reserves equal to about one year's worth of benefits).

<sup>104</sup> See Reynaud, *supra* note 103, at 47-48.

<sup>105</sup> See *id.*; LYNES, *supra* note 48, at 42.

<sup>106</sup> See also Reynaud, *supra* note 103, at 48 ("This reduction has been organized in such a way as to share the cost of balancing the scheme between contributors and pensioners.").

<sup>107</sup> Originally, ARRCO only covered non-managers. See DUPEYROUX, *supra* note 2, at 972. It was extended to cover executives in 1973. See *id.* at 985.

<sup>108</sup> Since January 1, 1996, wages have been defined in the same manner as earnings for purposes of the general regime. See Avenant 48, art. 12. See also Soc. Sec. Code art. L. 242-1; DUPEYROUX, *supra* note 2, at 983.

<sup>109</sup> See Avenant 48 art. 13. See also DUPEYROUX, *supra* note 2, at 985; Caussat, *supra* note 94, at 729; REYNAUD, *supra* note 7, at 39.

<sup>110</sup> See Avenant 48 art. 13. See also DUPEYROUX, *supra* note 2, at 983; REYNAUD, *supra* note 7, at 39. Very few non-managers, however, earn more than the general regime ceiling. See DUPEYROUX, *supra* note 2, at 984 n.1; Caussat, *supra* note 94, at 730 & n.5.

ceiling and three times that ceiling are typically referred to as level B wages.<sup>111</sup> Contributions to ARRCO are usually divided so that the employer pays 60% of the contribution while the employee pays 40% of the contribution.<sup>112</sup>

*a. AARCO's Funding Provisions*

Traditionally, ARRCO was funded by both mandatory contributions and voluntary contributions. Accords signed in 1993 and 1996 phased in increases in the mandatory contribution rates and phased out voluntary contributions. This section will begin by discussing mandatory contributions. It will then address voluntary contributions.

Prior to 1993, the rate for mandatory contributions was set at 4%.<sup>113</sup> Effective January 2, 1993, the rate was gradually increased to 6% beginning in 1999.<sup>114</sup> Traditionally, this rate applied to non-managers' wages<sup>115</sup> up to 3 times the general regime ceiling,<sup>116</sup> and managers' wages up to the general regime ceiling. Pursuant to an accord signed April 25, 1996, the rate on wages up to the general regime ceiling (level A wages) will remain 6% while the rate applied to non-managers' wages above the general regime ceiling to 3 times that ceiling (level B wages)<sup>117</sup> will gradually increase to 16% by 2005.<sup>118</sup>

<sup>111</sup> See, e.g., DUPEYROUX, *supra* note 2, at 983.

<sup>112</sup> Prior to an April, 25, 1996 accord, pursuant to collective bargaining agreements, employers typically paid 60% of the ARRCO contribution while employees paid 40% although ARRCO did not mandate any particular division of contributions. See DUPEYROUX, *supra* note 2, at 983. An April 25, 1996 accord made the 60/40 division mandatory, unless a prior accord or convention provided for a different division. See Avenant 48 du 18 Juin 1998 à l'Accord du 8 décembre 1961 art. 15 [hereinafter Avenant 48]. See also KESSLER, *supra* note 27, at 391; Caussat, *supra* note 94, at 732.

<sup>113</sup> See DUPEYROUX, *supra* note 2, at 983; REYNAUD, *supra* note 7, at 35-36.

<sup>114</sup> See Avenant 48, art. 13. See also DUPEYROUX, *supra* note 2, at 983; REYNAUD, *supra* note 7, at 35-36.

<sup>115</sup> Since January 1, 1996, earnings are defined by Section L. 242-1 of the social security code. See DUPEYROUX, *supra* note 2, at 983. Prior to that date, they were based on earnings for purposes of income tax. *Id.*

<sup>116</sup> See *id.* at 983.

<sup>117</sup> Although the increase in mandatory rate is significant, its application is relatively limited because very few non-managers earn wages above the general regime ceiling. See Caussat, *supra* note 94, at 730 n.5.

<sup>118</sup> See Avenant 48, art 13(b). See also DUPEYROUX, *supra* note 2, at 986. Specifically, the rate is 10% beginning in 2000, 12% beginning in 2002, 14% beginning in 2004, and 16% beginning in 2005. See Avenant 48, art. 13(b); KESSLER, *supra* note 27, at 391 n.1. For employers that became affiliated with ARRCO after 1996, the 16% rate applies beginning in 2000. See Avenant 48, art. 13(b). See also KESSLER, *supra* note 27, at 391 n.1; DUPEYROUX, *supra* note 2, at 986.

The mandatory rate is adjusted by a “taux d’appel” or “calling rate”<sup>119</sup> that is designed to stabilize benefit levels.<sup>120</sup> In the early years, the calling rate was less than 100%<sup>121</sup> while it has been 125% since 1992.<sup>122</sup> Thus, actual mandatory contributions on wages up to the general regime ceiling are now equal to 6% x 125%, or 7.5%.<sup>123</sup> Points for benefits purposes, however, are based on the “contractual” mandatory rate of 6%.<sup>124</sup>

Prior to accords signed in 1993 and 1996, ARRCO permitted voluntary contributions but limited them such that total contributions (that is, voluntary and mandatory “contractual” contributions) could not exceed 8% of level A wages and 16% of non-managers’ level B wages.<sup>125</sup> A December 10, 1993, accord limited voluntary contributions so that total contributions (that is, voluntary and mandatory “contractual” contributions) can not exceed 6% of level A wages and 16% of non-manager’ level B wages.<sup>126</sup> Thus, since 1999 (when the mandatory regular rate reached 6%), no voluntary contributions have been permitted on level A wages.<sup>127</sup> Beginning in 2005, when the mandatory contractual rate on non-managers’ level B wages reaches 16%, no voluntary contributions on level B wages will be possible.<sup>128</sup> Like mandatory contributions, voluntary contributions are subject to the calling rate.<sup>129</sup>

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<sup>119</sup> See Blanchet & Pélé, *supra* note 2, at 116 tbl. 3.4, n.a.

<sup>120</sup> See KESSLER, *supra* note 27, at 391; DUPEYROUX, *supra* note 2, at 974.

<sup>121</sup> See Blanchet & Pélé, *supra* note 2, at 116 tbl. 3.4 n.a.

<sup>122</sup> See DUPEYROUX, *supra* note 2, at 983.

<sup>123</sup> Cf. Blanchet & Pélé, *supra* note 2, at 116 tbl. 3.4 n.a. (referring to the unadjusted mandatory rate as the “basic statutory contribution rate”).

<sup>124</sup> See DUPEYROUX, *supra* note 2, at 974.

<sup>125</sup> See *id.* at 983.

<sup>126</sup> See Avenant 48, art. 13(1)(b). See also DUPEYROUX, *supra* note 2, at 983.

<sup>127</sup> See DUPEYROUX, *supra* note 2, at 984. There is an exception, however, for obligations created prior to January 2, 1993. See Accord du 10 Février 1993 pris pour l’application de certaines dispositions de l’accord du 8 décembre 1961 codifié, art. 3 (noting that enterprises or professional sectors can continue to contribute at a higher rate or decrease their rate to 6% in the case of obligations created prior to January 2, 1993).

<sup>128</sup> See Avenant 48, art. 13(1)(b); DUPEYROUX, *supra* note 2, at 984.

<sup>129</sup> See DUPEYROUX, *supra* note 2, at 983 n.3.

*b. ARRCO's Benefit Provisions*

ARRCO benefits are calculated using a points system.<sup>130</sup> Each year the cost of a point, or the "reference wage," is set,<sup>131</sup> and workers acquire a number of points that is directly proportional to their contributions (and the contributions that their employers make on their behalf<sup>132</sup>) for the year.<sup>133</sup> Thus, for example, suppose that during a particular year the "reference wage," or cost of a point, is 60 francs, and a worker (and employer on her behalf) contributes a total of 3000 francs that year.<sup>134</sup> The worker will acquire 50 points (3000/60) that year. Workers may also accrue credit for past services<sup>135</sup> and for periods of inactivity such as certain periods of unemployment<sup>136</sup> and disability.<sup>137</sup>

A worker's pension is then equal to the total number of points accrued over her career multiplied by the value of a point, which is fixed each year.<sup>138</sup> Thus, for example, suppose that a worker accrued 1000 points over her career. Each year she will receive 1000 x the value of a point that year. Thus, during a year in which a point is worth 2.5 francs, she will receive 2500 francs.<sup>139</sup>

<sup>130</sup> See *id.* at 984; REYNAUD, *supra* note 7, at 40. But see DUPEYROUX, *supra* note 2, at 984 (noting that a few regimes base benefits on a percentage of salary); LYNES, *supra* note 48, at 68 (same).

<sup>131</sup> Prior to January 1, 1999, ARRCO consisted of more than 40 different regimes. Compare DUPEYROUX, *supra* note 2, at 980 (stating that there were 45 different ARRCO regimes before January 1, 1999) with KESSLER, *supra* note 27, at 384 (referring to 43 different ARRCO regimes before January 1, 1999). Thus, prior to January 1, 1999, each separate ARRCO regime applied its own set of rules to determine the price and value of ARRCO points. See *id.* at 384, 390 n.2. See also DUPEYROUX, *supra* note 2, at 980; Caussat, *supra* note 94, at 732; LYNES, at 68. Effective January 1, 1999, when ARRCO became a single regime, there is only one price and value for ARRCO points. See KESSLER, *supra* note 27, at 385.

<sup>132</sup> As discussed above, contributions for purposes of accruing points are based on "contractual" mandatory contributions and voluntary contributions. Actual contributions due to the calling rate are not taken into account. Thus, a point may actually cost more than the reference wage.

<sup>133</sup> See DUPEYROUX, *supra* note 2, at 984; REYNAUD, *supra* note 7, at 40.

<sup>134</sup> On December 22, 2000, \$1 U.S. was worth 7.10 french francs. See LE LIBERATION 24 (Dec. 23 & 24, 2000).

<sup>135</sup> See Avenant 48, Annexe A., art. 21(2).

<sup>136</sup> See *id.* at art. 23 & 24.

<sup>137</sup> See *id.*, at art. 22. For a complete discussion of the periods during which points may be accrued, see LAMY, PROTECTION SOCIALE, *supra* note 27, at 1484-92.

<sup>138</sup> See Avenant 48, Annexe A, art. 1(2). See also DUPEYROUX, *supra* note 2, at 984; REYNAUD, *supra* note 7, at 40.

<sup>139</sup> As of 1996, the average ARRCO pension was 1,169 francs. See Cinquante ans de Sécurité sociale continuité et mutations à l'aube du XXIème siècle: Groupe no. 2: Les regimes de retraite complémentaire: bilan d'un fonctionnement original et perspectives 13 (1996) [hereinafter Cinquante ans, Groupe no. 2].



In theory, the reference wage, once set, is a statistical constant that increases with increases in the average wage while the value of a point depends on the amount of money contributed to the regime and the number of retirees collecting benefits that year.<sup>140</sup> In fact, however, the social partners have the power to use different rules to set the reference wage and value of points and have done so.<sup>141</sup> For example, for a number of years, the reference wage was indexed to increases in the average wage while the value of points was indexed to increases in prices.<sup>142</sup> For the years 1996 through 2000, the reference wage was indexed to the growth in the average annual wage plus 3.5 percent<sup>143</sup> while the value of points was indexed to increases in average wages minus 1 percent for the years 1999 and 2000.<sup>144</sup>

As of April 1, 2001, the cost of an ARRCO point was 76.7965 francs, or 11.7076 Euros, while the value of such a point was 6.7983 francs, or 1.0364 Euros.<sup>145</sup> Workers who have raised three or more children are entitled to a 5% increase in their benefits each year.<sup>146</sup> In addition, retirees with dependent children are entitled to a 5% increase in their benefits for each child for as long as the child remains a dependent.<sup>147</sup>

In theory, the normal retirement age is 65, and benefits are decreased for individuals who begin to collect retirement benefits before age 65.<sup>148</sup> In fact, however, individuals who fulfill the requirements for retirement at the full rate in the general regime prior to age 65 may also receive full benefits from ARRCO at that time.<sup>149</sup>

<sup>140</sup> See E-Mail Correspondence from Arnaud d'Yvoire. See also DUPEYROUX, *supra* note 2, at 977.

<sup>141</sup> See Correspondence, *supra* note 140; REYNAUD, *supra* note 103, at 48.

<sup>142</sup> See PIERRE KHALFA ET AL., *LES RETRAITES AU PERIL DU LIBERALISME* (2000).

<sup>143</sup> See Accord du 25 Avril 1996 Relatif aux Regimes de Retraite Complementaire des Salaries ARRCO, arts. 17 & 18.

<sup>144</sup> See *id.* at art. 19.

<sup>145</sup> See *Valeur Annuelle Du Point ARRCO* (visited Sept. 17, 2001) <<http://www.rrco.fr/Vpoints/vp2001.htm>>.

<sup>146</sup> See Avenant 48, Annexe A, art. 17(2). See also KESSLER, *supra* note 27, at 390; DUPEYROUX, *supra* note 2, at 984.

<sup>147</sup> See Avenant 48, Annexe A, art. 17(1). See also KESSLER, *supra* note 27, at 390; DUPEYROUX, *supra* note 2, at 984.

<sup>148</sup> See Avenant 48, Annexe A, art. 18. See also Blanchet & Pél , *supra* note 2, at 115.

<sup>149</sup> See Avenant 48, Annexe A, art. 19; Avenant 48, Annexe E. See also KESSLER, *supra* note 27, at 388; Blanchet & Pél , *supra* note 2, at 115; DUPEYROUX, *supra* note 2, at 992-93. The "Association pour la Structure Financiere" pays for the extra cost through a variety of contributions. See Blanchet & Pél , *supra* note 2, at 115; KESSLER, *supra* note 27, at 388.

Surviving spouses and surviving former spouses who have not remarried are entitled to a benefit equal to 60% of their deceased spouse's benefit.<sup>150</sup> Orphaned children under the age of 21 are entitled to a benefit equal to 50% of their deceased parents' benefit until they reach the age of 21.<sup>151</sup>

### 3. AGIRC

Unlike ARRCO, AGIRC only covers managers,<sup>152</sup> and it only covers the wages<sup>153</sup> of managers between the general regime ceiling and eight times that ceiling.<sup>154</sup> For purposes of AGIRC, wages between the general regime ceiling and four times that ceiling are typically referred to as level B wages while wages between four times the general regime ceiling and eight times that ceiling are typically referred to as level C wages.<sup>155</sup>

#### a. AGIRC's Funding Provisions

Just as ARRCO's funding provisions have evolved considerably over the last decade, so too have AGIRC's funding provisions. Prior to 1991, AGIRC only covered the wages of managers between the general regime ceiling and four times that ceiling.<sup>156</sup> In 1991, however, AGIRC began to mandate contributions on wages between four times the general regime ceiling and eight times that ceiling.<sup>157</sup> Prior to accords signed on February 9, 1994, and April 24, 1996, the rates imposed on the two levels could be different, and

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<sup>150</sup> See Avenant 48, Annexe A, arts. 27 & 28. See also DUPEYROUX, *supra* note 2, at 984; KESSLER, *supra* note 27, at 389. The survivor may begin to collect this benefit at age 55. See Avenant 48, Annexe A, arts. 27 & 28. See also DUPEYROUX, *supra* note 2, at 984; KESSLER, *supra* note 27, at 388.

<sup>151</sup> See KESSLER, *supra* note 27, at 389; DUPEYROUX, *supra* note 2, at 985.

<sup>152</sup> For a discussion of the definition of managers for purposes of AGIRC, see KESSLER, *supra* note 27, at 393-94; Memo social 2000, at 1217-18; DUPEYROUX, *supra* note 2, at 988.

<sup>153</sup> As in ARRCO, wages for purposes of AGIRC have been defined as essentially the same as wages for purposes of the general regime since January 1, 1996. See Convention Collective Nationale de Retraite et de Prévoyance des Cadres du 14 mars 1947 et Deliberations prises pour son application, Mise à jour janvier 1998, art. 5 [hereinafter AGIRC Convention]; KESSLER, *supra* note 27, at 398; DUPEYROUX, *supra* note 2, at 989 n.3.

<sup>154</sup> See AGIRC Convention, art. 6; DUPEYROUX, *supra* note 2, at 989. AGIRC provides death benefits in addition to retirement benefits, and contributions for death benefits include wages up to the general regime ceiling. See KESSLER, *supra* note 27, at 395; Memo social 2000, at 1219. This Article will only address the retirement benefits provided by AGIRC.

<sup>155</sup> See DUPEYROUX, *supra* note 2, at 990.

<sup>156</sup> See *id.*; REYNAUD, *supra* note 7, at 29.

<sup>157</sup> See DUPEYROUX, *supra* note 2, at 990.

voluntary contributions were permitted.<sup>158</sup> Pursuant to the February 9, 1994, and April 24, 1996, accords, contribution rates on both level B and level C wages were gradually increased to 16% beginning in 1999, and voluntary contributions were eliminated.<sup>159</sup> Contributions on level B wages are divided between the employer and employee so that the employer pays 10% of level B wages while the employee pays 6% of level B wages.<sup>160</sup> The way in which level C wages are divided between employer and employee varies from employer to employer.<sup>161</sup>

Like contributions to ARRCO,<sup>162</sup> contributions to AGIRC are subject to a "taux d'appel" or calling rate.<sup>163</sup> Since 1995, the calling rate has been 125%.<sup>164</sup> In addition, the April 24, 1996 accord created an exceptional temporary contribution that will gradually increase from .07% and .35% in 2001.<sup>165</sup> Like the calling rate, these exceptional temporary contributions do not give rise to points and are designed to stabilize benefit levels.<sup>166</sup>

### *b. AGIRC's Benefit Provisions*

Like ARRCO, AGIRC uses a points system to calculate benefits.<sup>167</sup> Each year AGIRC defines the cost of a point, or the "reference wage,"<sup>168</sup> and managers acquire a number of points that is directly proportional to their contributions (and the contributions their employers make on their behalf<sup>169</sup>)

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<sup>158</sup> See *id.*

<sup>159</sup> See AGIRC Convention, art. 6; DUPEYROUX, *supra* note 2, at 990.

<sup>160</sup> See AGIRC Convention, art. 6, § 2(D); KESSLER, *supra* note 27, at 398.

<sup>161</sup> See AGIRC Convention, art. 6, § 3(C); KESSLER, *supra* note 27, at 398.

<sup>162</sup> See section on ARRCO's Funding Provisions, p. 464.

<sup>163</sup> See AGIRC Convention, Annexe III, art. 1; KESSLER, *supra* note 27, at 398; DUPEYROUX, *supra* note 2, at 990. See also LYNES, *supra* note 48, at 56-57 (noting that between 1952 and 1965, calling rate was less than 100%).

<sup>164</sup> See KESSLER, *supra* note 27, at 398; DUPEYROUX, *supra* note 2, at 990. Between 1952 and 1966, the calling rate was less than 100%. See *id.*

<sup>165</sup> See AGIRC Convention, Annexe III, art. 2; KESSLER, *supra* note 27, at 398; DUPEYROUX, *supra* note 2, at 990 n.1. When the rate was .07% in 1997, the employer was required to pay .045% while the employee was required to pay .025%. When the rate reaches .035%, the employer will be required to pay .22% while the employee will pay .13%. See *id.* The exceptional contribution is based on all of the manager's wages. See AGIRC Convention, Annexe III, art. 2; KESSLER, *supra* note 27, at 398.

<sup>166</sup> See AGIRC Convention, Annexe III, art. 2; KESSLER, *supra* note 27, at 398.

<sup>167</sup> See DUPEYROUX, *supra* note 2, at 991; REYNAUD, *supra* note 7, at 40.

<sup>168</sup> See AGIRC Convention, Annexe I, art. 2; DUPEYROUX, *supra* note 2, at 991. The reference wage is adjusted each year based on the change in the median salary of covered workers. See Memo social 2000, at 1224.

<sup>169</sup> As discussed above, contributions for purposes of acquiring points are based on

for the year.<sup>170</sup> Traditionally, managers could also accrue points for past services and during certain periods of unemployment, disability, and military service,<sup>171</sup> but these provisions are gradually being eliminated.<sup>172</sup> Each manager is also guaranteed a certain minimum number of points each year regardless of the amount of contributions made on his behalf.<sup>173</sup> Currently, the guaranteed minimum number of points is 120.<sup>174</sup> Each worker's pension is then equal to the total number of points accrued over her career multiplied by the value of a point, which is fixed each year.<sup>175</sup>

As in ARRCO, in theory, the reference wage, once set, is a statistical constant that increases with increases in the average wage while the value of a point depends on the amount of money contributed to the regime and the number of retirees collecting benefits that year.<sup>176</sup> In fact, however, the social partners have the power to use different rules to set the reference wage and value of points and have done so.<sup>177</sup> For example, for the years 1996 through 2000, the reference wage was indexed to the growth in the average annual wage plus four percent<sup>178</sup> while the value of points was indexed to increases in average wages minus one percent for the years 1996 through 2000.<sup>179</sup>

"contractual" mandatory contributions and voluntary contributions. Actual contributions due to the calling rate are not taken into account. Thus, a point may actually cost more than the reference wage.

<sup>170</sup> See AGIRC Convention, Annexe I, art. 3; DUPEYROUX, *supra* note 2, at 991; REYNAUD, *supra* note 7, at 40.

<sup>171</sup> See AGIRC Convention, Annexe I, arts. 8, 8 bis, 8 ter; DUPEYROUX, *supra* note 2, at 991 n.2; KESSLER, *supra* note 27, at 398.

<sup>172</sup> See Accord du 25 avril 1996 relatif au regime de retraite des cadres AGIRC art. 7; section on reductions in benefits, *infra* p. 477.

<sup>173</sup> See KESSLER, *supra* note 27, at 396; Memo social 2000, at 1219.

<sup>174</sup> See KESSLER, *supra* note 27, at 396; Memo social 2000, at 1220. When voluntary contributions were permitted, the guaranteed minimum number of points could vary from employer to employer depending on the employer's contribution rate. See KESSLER, *supra* note 27, at 396; Memo social 2000, at 1219-20.

<sup>175</sup> See AGIRC Convention, Annexe I, arts. 1, 37; DUPEYROUX, *supra* note 2, at 992; REYNAUD, *supra* note 7, at 40. As of 1996, the average AGIRC pension was 3742 francs. See Cinquante ans, Groupe no. 2, *supra* note 139, at 13. See also E-mail correspondence from Arnaud d'Yvoire, Secrétaire-Général, Observatoire des Retraites, to Kathryn Moore, March 21, 2001 (explaining that AGIRC uses a complex mathematical formula to fix the value of points each year that takes into account benefits to be paid over the next ten years and allows a reserve) (on file with author).

<sup>176</sup> See *id.* See also DUPEYROUX, *supra* note 2, at 977.

<sup>177</sup> See E-Mail Correspondence from Arnaud d'Yvoire, *supra* note 140.

<sup>178</sup> See Accord du 25 Avril 1996 Relatif aux Regimes de Retraite des Cadres AGIRC, art. 1.

<sup>179</sup> See *id.* at art 2.

As of 2001, the reference wage, or cost, of an AGIRC point was 26.79 francs while the value of a point was 2.4126 francs.<sup>180</sup> Retirees who have raised 3 or more children are entitled to increased benefits. Traditionally, benefits were increased by 10% for 3 children, 15% for 4 children, 20% for 5 children, 25% for 6 children, and 30% for 7 or more children,<sup>181</sup> but these additional benefits have been reduced for active workers.<sup>182</sup> Surviving spouses and surviving former spouses who have not remarried are entitled a benefit equal to 60% of the deceased spouse's benefit.<sup>183</sup> Orphaned children under the age of 21 are entitled to a benefit equal to 30% of their deceased parents' benefit.<sup>184</sup>

As in ARRCO, the normal retirement age is theoretically 65, and benefits are decreased for individuals who begin to collect retirement benefits before age 65.<sup>185</sup> In fact, however, individuals who fulfill the requirements for retirement at the full rate in the general regime prior to age 65 may receive full benefits from AGIRC at that time.<sup>186</sup>

### C. Third Tier

The third tier of the French retirement system consists of optional supplemental retirement plans. Principally because of the size and significance of the obligatory retirement regimes, optional supplemental retirement

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<sup>180</sup> See *Paramètres de calcul de la retraite 2001* (visited Sept. 17, 2001) <<http://www.agirc.fr/Regime/Chiffres/fchiffres.htm>>.

<sup>181</sup> See AGIRC Convention, Annexe I, art. 6 bis; DUPEYROUX, *supra* note 2, at 992.

<sup>182</sup> See Reduction in Benefits, *infra* p. 477.

<sup>183</sup> See AGIRC Convention, Annexe I, art. 12, 13 quater, 13 quinquies; DUPEYROUX, *supra* note 2, at 992. Generally, the survivor may not begin to collect this benefit until age 60. See AGIRC Convention, Annexe I, art. 12; DUPEYROUX, *supra* note 2, at 992 & n.2. If, however, the surviving spouse has at least 2 dependent children under the age of 21, the survivor may begin to collect benefits regardless of age. See AGIRC Convention, Annexe I, art. 13.

<sup>184</sup> See AGIRC Convention, Annexe I, art. 13 bis; DUPEYROUX, *supra* note 2, at 992.

<sup>185</sup> See AGIRC Convention, Annexe I, art. 6. See also Blanchet & Pél , *supra* note 2, at 115.

<sup>186</sup> See AGIRC Convention, Annexe V; Blanchet & Pél , *supra* note 2, at 115; DUPEYROUX, *supra* note 2, at 992-93. The "Association pour la Structure Financière" pays for the extra cost through a variety of contributions. See Blanchet & Pél , *supra* note 2, at 115; DUPEYROUX, *supra* note 2, at 992-93.

plans play a minor role in the French retirement system.<sup>187</sup> For example, in 1995, these plans only provided about 2 percent of total retirement benefits.<sup>188</sup>

In 1997, the French legislature sought to expand the third tier by enacting legislation creating "plans d'épargne retraite" or retirement savings plans.<sup>189</sup> The legislation, however, was highly controversial, and the government that came into power shortly after the legislation was enacted declined to promulgate the decrees required to give effect to the legislation.<sup>190</sup>

This section will begin by giving a general overview of optional supplemental retirement plans in the private sector.<sup>191</sup> It will then discuss the legislation creating retirement savings plans.

### 1. *Optional Supplemental Retirement Plans*

Optional supplemental retirement plans can be put into operation in one of three ways: (1) directly by the employer, (2) through a supplementary retirement institution, or (3) by contracting with one of three "classic" insurance organizations.<sup>192</sup> There are no precise figures on the number of optional supplemental retirement plans put into operation directly by

<sup>187</sup> See BÉGUERIE, *supra* note 27, at 465 (noting that base regimes and complementary regimes have left little space for the development of supplementary retirement regimes); Laigre & Mascomere, *supra* note 29, at 10 (attributing limited development of supplemental retirement regimes to weight of mandatory retirement regimes and availability (now being phased out) of supplemental contributions to ARRCO and AGIRC); REYNAUD, *supra* note 7, at 54 (explaining that mandatory complementary retirement regimes leave little room for optional supplemental retirement plans); Francois Durin, *Regimes surcomplementaires et fonds de pension*, DR. SOC. 136, 138 (1992) (same).

<sup>188</sup> See Laigre & Mascomere, *supra* note 29, at 19. See also BÉGUERIE, *supra* note 27, at 465 n.248 (noting that according to a 1986 study less than 5% of ARRCO beneficiaries were estimated to benefit from a supplementary retirement plan while according to 1989 survey 6.6% of AGIRC beneficiaries were estimated to receive supplementary retirement benefits).

<sup>189</sup> See *Legislation Creating Retirement Savings Plans*, p. 468.

<sup>190</sup> See *id.*

<sup>191</sup> For a description of the two optional supplemental retirement plans in the public sector, see JACQUES NIKONOFF, *LA COMEDIE DES FONDS DE PENSION: UNE FAILLITE INTELLECTUELLE* 245-46 (1999); *Cinquante ans, Groupe no. 1*, *supra* note 30, at 24; REYNAUD, *supra* note 7, at 61-64. For a discussion of optional retirement plans for non-salaried workers, see NIKONOFF, *supra* note 191, at 243-44; *Cinquante ans, Groupe no. 1*, *supra* note 30, at 23-24. For a description of "indemnités de depart a la retraite" and "contrat individuel d'assurance-retraite," two products that may also provide supplemental retirement income, see PATRICK TURBOT, *LES FONDS DE PENSION* 109-10 (2d ed. 1998); *Cinquante ans, Groupe no. 1*, *supra* note 30, at 24-25; Laigre, Mascomere, *supra* note 29, at 108-10.

<sup>192</sup> See BÉGUERIE, at 467; DUPEYROUX, *supra* note 2, at 997; *Cinquante ans, Groupe no. 1*, *supra* note 30, at 18; Laigre & Mascomere, *supra* note 29, at 86.

employers,<sup>193</sup> but they are generally believed to be limited in number.<sup>194</sup> The plans are typically defined benefit plans.<sup>195</sup> They may be integrated plans that promise participants a percentage of their final (or final average) salary that takes into account benefits provided by the mandatory retirement regimes,<sup>196</sup> or they may be non-integrated plans that promise a benefit that is independent of the benefits provided by the mandatory regimes.<sup>197</sup> The plans usually impose a minimum service requirement, which can be as long as fifteen years, and require that the employee be working for the employer at the time of retirement in order to be eligible for benefits.<sup>198</sup> Typically, the benefits are funded solely by the employer.<sup>199</sup> Article 9 of the Commerce Code requires that the employer indicate the amount of its liability for supplementary retirement benefits in an annex to its annual balance sheet,<sup>200</sup> and permits, but

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<sup>193</sup> See Laigre & Mascomere, *supra* note 29, at 13 (noting that the amount of supplemental retirement benefits put into operation directly by employers is not known); REYNAUD, *supra* note 7, at 56 (same). Cf. BÉGUERIE, *supra* note 27, at 469 n.268 (citing 1991 article that estimated total obligations for employer-operated supplemental retirement pension and end of career indemnities equal to 14 billion francs for Elf Aquitaine, 9 billion francs for Pechiney, and 7 billion francs for Saint Gobain).

<sup>194</sup> See KESSLER, *supra* note 27, at 435 (stating that these types of supplemental retirement plans rarely used); BÉGUERIE, *supra* note 27, at 469 (stating that this form of supplemental retirement plan occupies a marginal place in the supplemental retirement scheme). *But see* REYNAUD, *supra* note 7, at 56 (speculating that scope of this form of plan is probably significant).

<sup>195</sup> See Cinquante ans, Groupe no. 1, *supra* note 30, at 18; Laigre & Mascomere, *supra* note 29, at 20. A defined benefit plan is a retirement plan in which the benefit is expressed as a certain amount to be paid at the participant's retirement. For a more detailed discussion of defined benefit plans, see Kathryn L. Moore, *Partial Privatization of Social Security: Assessing its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 341, 347-48 (2000); LAUTRETTE, *supra* note 27, at 71-72; Laigre & Mascomere, *supra* note 29, at 25.

<sup>196</sup> For example, they may promise a benefit that equals 75% of final pay after the mandatory retirement regime benefits are taken into account. See Memo social 1229 (2000); BÉGUERIE, *supra* note 27, at 469 & n.272; Laigre & Mascomere, *supra* note 29, at 20.

<sup>197</sup> For example, they may promise a benefit equal to 2% of final average pay. See Memo social 1229 (2000); BÉGUERIE, *supra* note 27, at 470; Laigre & Mascomere, *supra* note 29, at 20.

<sup>198</sup> See Laigre & Mascomere, *supra* note 29, at 23. See also Laigre, *supra* note 27, at 415 (questioning whether these provisions violate European Community law which requires free movement of workers).

<sup>199</sup> See Laigre & Mascomere, *supra* note 29, at 21. If the employer accepts employee contributions, those contributions must be paid to an external organization and not directly to the employer. See *id.*

<sup>200</sup> See C. COM., art. 9, al 2.

does not require, the employer to include in its annual balance sheet a reserve to offset some or all of this liability.<sup>201</sup>

Like American pension trust funds,<sup>202</sup> supplementary retirement institutions are entities that are legally separate from the employer and have the sole purpose of providing benefits that supplement those provided by the mandatory retirement regimes.<sup>203</sup> In 1994, there were about 125 supplemental retirement institutions that paid about 4.5 billion francs in benefits;<sup>204</sup> most of the institutions were funded on a pay-as-you go basis,<sup>205</sup> and about one-half were closed to new participants.<sup>206</sup> A law enacted in August 1994<sup>207</sup> limited the creation of new supplementary retirement institutions<sup>208</sup> and requires that benefits accrued or in the course of accrual after August 1994 be vested.<sup>209</sup> Like plans put into operation directly by the employer, plans operated by supplemental retirement institutions are typically defined benefit plans.<sup>210</sup>

Finally, optional supplemental retirement plans may be put into operation by "sociétés d'assurance,"<sup>211</sup> "institutions de prevoyance,"<sup>212</sup> or "mutuelles."<sup>213</sup>

<sup>201</sup> See *id.* al 3. But see Laigre, *supra* note 198, at 414 (contending that art. L. 913-2 of the social security code, enacted in 1994, which declares null any provision in a convention, accord, or unilateral action of the employer that would bring about the loss of retirement benefits that have been accrued or are in the course accrual, requires that employer provide greater protection of benefits than that mandated by the Commerce Code).

<sup>202</sup> See Cinquante ans, Groupe no. 1, *supra* note 30, at 19 (stating that supplementary retirement institutions constitute "exactly" pension funds in the Anglo-saxon sense of the term).

<sup>203</sup> See Soc. Sec. Code art. L 941-1(I); Laigre, Mascomere, *supra* note 29, at 89.

<sup>204</sup> See DUPEYROUX, *supra* note 2, at 997.

<sup>205</sup> See Cinquante ans, Groupe no. 1, *supra* note 30, at 20.

<sup>206</sup> See DUPEYROUX, *supra* note 2, at 997 n.5; Cinquante ans, Groupe no. 1, *supra* note 30, at 19; Laigre & Mascomere, *supra* note 29, at 90; REYNAUD, *supra* note 7, at 54-55. Cf. BÉGUERIE, *supra* note 27, at 468 (stating that about 2/3 are closed).

<sup>207</sup> See Loi no. 94-678 du 8 août 1994 relative à la protection sociale complémentaire des salaires et portant transposition des directives no 92-49 et no 92-62 des 18 juin et 10 novembre 1992 du Conseil des communautés européennes, J.O. 11655 (1994).

<sup>208</sup> Specifically, new supplementary retirement institutions may only be created by enterprises that join ARRCO and AGIRC after August 8, 1994. See Soc. Sec. Code art. L. 941-1(II); DUPEYROUX, *supra* note 2, at 997 & n.6.

<sup>209</sup> See Social Security Code art. L. 941-2. How effective the law is in enforcing this guarantee is subject to debate. See Philippe Laigre, *supra* note 27, at 411 (critiquing the law).

<sup>210</sup> See Cinquante ans, Groupe no. 1., *supra* note 30, at 19.

<sup>211</sup> Sociétés d'assurance are governed by the code d'assurance. For a discussion of sociétés d'assurance and the rules that govern them, see KESSLER, *supra* note 27, at 426-27; Laigre & Mascomere, *supra* note 29, at 87.

<sup>212</sup> Institutions de prevoyance are governed by the social security code. For a discussion of institutions de prevoyance and the rules that govern them, see KESSLER, *supra* note 27, at 423-26; Laigre & Mascomere, *supra* note 29, at 87-88.

<sup>213</sup> Mutuelles are governed by the code de la mutualité. For a discussion of mutuelles and



In 1993, optional supplemental retirement plans put into operation by these three "classic" insurance organizations paid about 5 billion francs in benefits.<sup>214</sup> Unlike the first two types of plans, plans created by contracting with an insurance organization are typically defined contribution plans.<sup>215</sup> The plans may credit contributions to an individual account for each participant and provide participants with a life annuity upon retirement,<sup>216</sup> or they may credit participants with points or units and base benefits on the number of points or units accrued and the value of those points or units.<sup>217</sup> Unlike the defined benefit plans, the defined contribution plans typically do not require that the employee be working for the employer at the time of retirement in order to be eligible for retirement benefits.<sup>218</sup>

## 2. Legislation Creating Retirement Savings Plans

Unlike the American retirement system and the retirement systems in many other developed countries, the French retirement system is financed almost entirely on a pay-as-you go basis; only about one percent of French retirement benefits are prefunded.<sup>219</sup> In March 1997, the French legislature sought to increase the level of prefunded benefits in France by enacting a law creating retirement savings plans<sup>220</sup> which would institutionalize a third tier of prefunded retirement benefits.<sup>221</sup> The retirement savings plans, which were

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the rules that govern them, see KESSLER, *supra* note 27, at 419-23; Laigre & Mascomere, *supra* note 29, at 88-89.

<sup>214</sup> See Laigre, *supra* note 27, at 416.

<sup>215</sup> See Laigre & Mascomere, *supra* note 29, at 24.

<sup>216</sup> See *id.* at 24-25.

<sup>217</sup> See *id.* at 25-26.

<sup>218</sup> See BÉGUERIE, *supra* note 27, at 471.

<sup>219</sup> See DUPEYROUX, *supra* note 2, at 1012 & n.1 (noting that in contrast 30% of benefits in the Netherlands, 20% of benefits in the United Kingdom, and 17% of benefits in the United States are prefunded). See also BÉGUERIE, *supra* note 27, at 465 (noting that compared to Germany and England, prefunded retirement regimes in France appear to be in a state of quasi-under-development).

<sup>220</sup> See Loi no. 97-277 du 25 mars 1997 créant les plans d'épargne retraite, J.O. 4657 (26 mars 1997).

<sup>221</sup> See BÉGUERIE, *supra* note 27, at 476 (stating that this legislation was designed to institutionalize a third tier of retirement income based on capitalization); Philippe Laigre, *les Plans d'Épargne Retraite: la Main Visible du Marche*, DR. SOC. 482, 482 (1997) (stating that the ambition of the law, more or less expressly acknowledged, was to create in France a tier of retirement income based on capitalization). For discussions of this legislation, see, for example, BÉGUERIE, *supra* note 27, at 475-84; DUPEYROUX, *supra* note 2, at 1014-18.

much like American 401(k) plans,<sup>222</sup> were to be available to all private sector workers covered by the general regime (or agricultural regime) and ARRCO and AGIRC<sup>223</sup> and were to be managed by insurance organizations.<sup>224</sup> The legislation was highly controversial from the outset,<sup>225</sup> and a few months after the law was enacted, a new government took power<sup>226</sup> and declined to promulgate the 11 decrees required to give effect to the legislation.<sup>227</sup> As a result, the legislation creating retirement savings plans never went into effect,<sup>228</sup> and the proper role for prefunded retirement benefits remains a hotly debated issue in France today.<sup>229</sup>

There is general agreement that the first two ties of the French retirement system should remain funded principally<sup>230</sup> on a pay-as-you go basis.<sup>231</sup> There

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<sup>222</sup> See Lawrence J. Speer, *French Government's Pension Reserve Fund Will Grow Dramatically in Future*, 26 PENS. & BEN. REP. (BNA) 2362 (Oct. 4, 1999). The principle difference between the retirement savings plans and 401(k) plans is that the retirement savings plans were to be distributed solely in the form of an annuity.

<sup>223</sup> See Loi no. 97-277, *supra* note 220, at art. 1. In addition, lawyers covered by the "Caisse nationale des barreaux français" could also participate in a retirement savings plan, as well as French citizens living outside the country even if they were not covered by a complementary retirement regime. See *id.* at art. 2.

<sup>224</sup> See *id.* at art. 8.

<sup>225</sup> In fact, the Senators who opposed the legislation filed a constitutional challenge to the legislation, but the challenge was rejected. See Decision no. 97-388 DC du 20 mars 1997, J.O. 4661 (26 mars 1997). See Lawrence J. Speer, *France to Revise Law Creating First Private Sector Pension Funds*, 24 PENS. & BEN. REP. (BNA) 2194 (Sept. 29, 1997) ("Left-wing politicians are strongly opposed to the tax-free status that the Thomas Law grants to employer and employee contributions to private pension funds.").

<sup>226</sup> Indeed, "[t]he current Socialist-led government came to power in mid-1997 in part on a promise to scrap" the legislation. See Lawrence J. Speer, *France Unveils Employee Savings Plans Resembling Capitalization Pension Funds*, 27 PENS. & BEN. REP. (BNA) 1864, 1864 (Aug. 8, 2000).

<sup>227</sup> In his general political declaration, the then-new Prime Minister Lionel Jospin stated that "the dispositions recently adopted in favor of pensions which could infringe on the pay-as-you-go regimes will be put off." See KESSLER, *supra* note 27, at 435-36; BÉGUERIE, *supra* note 27, at 481; DUPEYROUX, *supra* note 2, at 1017 n.2.

<sup>228</sup> See Lawrence J. Speer, *supra* note 226, at 1864 (noting that Socialist government voted to abolish the legislation creating the retirement savings plans).

<sup>229</sup> See DUPEYROUX, *supra* note 2, at 1017-18 (noting that the debate is not closed and identifying the various approaches that may be taken); Ruellan, *supra* note 70, at 928 (noting that so passionate is the debate between proponents of pay-as-you go systems and proponents of prefunded systems that one barely dares to ask whether there is a place for prefunded regimes in the French retirement system). See also Vasselle, *supra* note 92, at 52 (favoring prefunding).

<sup>230</sup> The 1999 social security financing law created a small reserve to help fund future benefits in the general and aligned regimes. See Recent Reforms of the French Retirement Spoken *infra*, p. 474.

<sup>231</sup> See DUPEYROUX, *supra* note 2, at 161.

is a vigorous debate, however, as to the proper scope of a third tier of prefunded benefits.<sup>232</sup> Proponents of prefunding contend that prefunded third tier benefits (1) offer the opportunity for better rates of return, (2) are needed to compensate for recent reductions in the retirement benefits provided by the mandatory retirement regimes,<sup>233</sup> and (3) are needed to provide essential capital for French industry to reinforce and stabilize the French economy.<sup>234</sup> Opponents of prefunding point out that prefunded retirement benefits in France in the early to mid-20th century failed to provide adequate benefits in times of high inflation<sup>235</sup> and contend that prefunding (1) is dangerous because it

<sup>232</sup> See, for example, authorities cited in *id.* at 157 n.1. See also Speer, *supra* note 226, at 1864, stating:

Pension funds have been a political hot potato in France throughout much of the past decade. While most of the world's industrialized nations have added some form of individual retirement savings to the pension mix, France stands out for its opposition to any plan that threatens the intragenerational solidarity-based approach of its generous, state-run pay-as-you-go system.

Lawrence J. Speer, *French Regulations Law Fails to Offer Stock Option Taxation Plans*, 27 PENS. & BEN. REP. (BNA) 1067 (Apr. 25, 2000) (noting that Finance Commission Chair Henri Emmanuelli "has warned the government against any attempt to build preferential tax treatment into personal retirement savings accounts that threatens the government-run pay-as-you-go system.").

<sup>233</sup> See *infra* pp. 474-69 for discussion of ways in which benefits have been decreased in general regime and ARRCO and AGIRC.

<sup>234</sup> See KESSLER, *supra* note 27, at 435 & n.3 and authorities cited therein. See also Muller, *supra* note 264, at 431; Lawrence Speer, *Private Pension Funds Essential, France's President Chirac Says*, 26 PENS. & BEN. REP. (BNA) 1838 (July 19, 1999) (noting that on July 14, 1999, French President Jacques Chirac said, "It is essential to create a private pension fund system, to allow people to improve their retirement, but also so that France can reclaim control of its own companies."); *France Flip-Flops Again on Private Pension Funds*, 25 PENS. & BEN. REP. (BNA) 819 (Apr. 6, 1998), stating:

Through the second half of 1997, Minister of Economy and Finance Dominique Strauss-Kahn was among the more pragmatic Socialist leaders, arguing that private pension fund would offer a strong boost to French capital markets, provide a logical complement to the existing retirement system and limit the influence of foreign institutional investors on the national economy. Strauss-Kahn since has renounced this position, primarily after the government agreed to offer new fiscal incentives to existing institutional investors in the 1998 budget.

<sup>235</sup> See, e.g., Yves Saint-Jours, *A propos d'éventuel plans d'épargne-retraite entreprise*, DR. OUVRIER 145, 145 (Avril 1999) (pointing to failure of capitalized (ROP) retirement benefits for workers and peasants early in 20th century as one of many criticisms of third tier capitalized retirement benefits). Cf. *L'avenir des systèmes de retraite*, *supra* note 32, at 4, 5 (noting that funded pensions established late in the 19th century were reduced to almost nothing by 1945 as a result of inflation and that France chose to fund its retirement benefits on a pay-as-you-go basis because past periods of high inflation showed the fragility of funded systems); DUPEYROUX,

destabilizes the international financial markets, (2) will not provide the level of returns proponents contend, (3) will not create additional savings for French enterprises to use, and (4) could harm the current system.<sup>236</sup>

### III. RECENT REFORMS OF THE FRENCH RETIREMENT SYSTEM

France faces a demographic shift much like that in the United States.<sup>237</sup> First, life expectancy in France is increasing. In 1950, men had a life expectancy at birth<sup>238</sup> of 63.4 years while women had a life expectancy at birth of 69.2 years.<sup>239</sup> By 1998, men's life expectancy at birth had risen to 74.6 years while women's life expectancy at birth had risen to 82.2 years,<sup>240</sup> and, by 2040, men's life expectancy at birth is projected to increase to 80.9 years while women's life expectancy at birth is projected to increase to 89.2 years.<sup>241</sup> Not only is life expectancy increasing, but France has a large baby boom generation<sup>242</sup> followed by relatively smaller generations.<sup>243</sup> Principally as a result of these demographic shifts,<sup>244</sup> the elderly dependency ratio, that is, the

*supra* note 2, at 159 (noting that funded benefits were abandoned in 1941 because savings were ruined between the two World Wars).

<sup>236</sup> See KESSLER, *supra* note 27, at 435 & n.4 and authorities cited therein. See also KHALFA ET AL., *supra* note 142 (contending that current retirement system is not in as much difficulty as claimed and objecting to capitalization for variety of reasons); Saint-Jours, *supra* note 235, at 145 (offering variety of arguments against capitalization and contending that current pay-as-you-go system should be reinforced); Speer, *supra* note 225, at 2194 ("Socialist Prime Minister Lionel Jospin told the National Assembly in June that the proposed private pension fund system 'could damage the distribution-based regime' and insisted that new debate be held on the law.").

<sup>237</sup> See INTRODUCTION *supra* p. 443 for a discussion of the impending demographic shift in the United States.

<sup>238</sup> Arguably life expectancy at age 60, the age by which most French retire, is more relevant than life expectancy at birth. *L'avenir de nos retraites*, a recent official report by Jean-Michel Charpin, the Commissaire au Plan, however, refers to life expectancy at birth, not age 60. Thus, this Article will use those figures. For a discussion of life expectancy at age 60, see *Cinquante ans, Groupe no. 1*, *supra* note 30, at 5 (noting that life expectancy at age 60 is expected to increase from 19 years in 1995 to 25.1 years in 2040).

<sup>239</sup> See *L'avenir de nos retraites*, *supra* note 32, at 46.

<sup>240</sup> See *id.*

<sup>241</sup> See *id.*

<sup>242</sup> See *L'avenir de nos retraites*, *supra* note 14, at 48 (noting that between 1946 and the end of the 1960s, there were about 800,000 children born each year compared to about 650,000 between the two World Wars and that the increase was quite rapid with a little more than 500,000 born in 1940, 600,000 in 1945, but 800,000 in 1946 and 830,000 in 1950).

<sup>243</sup> In recent years, the birth rate has been, and is expected to remain at the relatively low rate of 1.8. See CHARPIN, *supra* note 14, at 49; *Cinquante ans, Groupe no. 1*, *supra* note 30, at 6.

<sup>244</sup> Of course, other factors, such as the immigration rate, affect the dependency ratio. For a detailed discussion of the assumptions underlying these projections, see CHARPIN, *supra* note

ratio of retirees to working age individuals, is expected to increase from .39 in 1995 to .43 in 2010 to .71 in 2040.<sup>245</sup> This increasing dependency ratio is putting enormous pressure on France's retirement system because it is funded almost exclusively on a pay-as-you-go basis and thus fewer and fewer workers must support more and more retirees.<sup>246</sup>

As the description of the French retirement system in the preceding section illustrates, the French retirement system has been reformed a multitude of times in a multitude of ways over the last decade. Some of the reforms are designed to make the system comply with European Community law.<sup>247</sup> Other reforms, in contrast, are designed to respond to the financial pressures the retirement system faces as a result of the aging of the French population. This section will focus on reforms enacted in response to those financial pressures.<sup>248</sup>

Generally, these reforms can be categorized in one of four ways: (1) as increasing the contribution rate; (2) as reducing benefits; (3) as creating new sources of funding; or (4) as reorganizing the basic structure of the system.<sup>249</sup>

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14, at 45-57.

<sup>245</sup> See *id.* at 53. Of course, the number of children relative to the working age population is also relevant in determining the relative cost of an aging population. If the dependency ratio includes children under age 20 as well as individuals aged 60 and over, the dependency ratio is projected to increase from .87 in 1995 to .91 in 2010 to 1.19 in 2040. See *id.*

<sup>246</sup> See CHARPIN, *supra* note 14, at 81-105; J. Speer, *supra* note 222, at 2362 ("By most estimates, France's extremely generous pay-as-you-go pension system will come under unsustainable demographic pressure by 2015.")

<sup>247</sup> For example, in 1994 AGIRC increased from age 50 to 60 the age at which survivors benefits are available to widows and decreased from age 65 to 60 the age at which survivors benefits are available to widowers. This was done to make the system conform with European Community law requiring equality in the treatment of men and women. See *Cinquante ans, Groupe no. 2*, *supra* note 139, at 14 n.3.

Similarly, a new book, *Livre IX*, was added to the social security code to comply with European Community law regarding complementary retirement regimes and supplemental retirement institutions. See *Loi no. 94-678 du 8 août 1994 relative à la protection sociale complémentaire des salariés et portant transpositions des directives no 92/49 et no 92/96 des 18 juin et 10 novembre 1992 du Conseil des Communautés européennes*. For a critique of these changes, see Philippe Laigre, *Les institutions de retraite complémentaire et leurs fédérations après la loi du 8 août 1994*, DR. SOC. 306 (No. 3 Mars 1995); Philippe Laigre, *La retraite collective d'entreprise après la loi du 8 août 1994*, DR. SOC. 411 (No. 4 Avril 1995).

<sup>248</sup> Of course, some of the reforms enacted to make the system conform with European Community law, such as amending the age at which survivors benefits are available, obviously also have a financial impact.

<sup>249</sup> Cf. Weaver, *supra* note 7, at 200 (noting that governments can respond to demographic and other pressures facing retirement systems in three basic ways: (1) "they can try to cut back on the generosity of specific provisions in their pension programs"; (2) "they can refinance pension programs, either by adding dedicated revenues like payroll taxes or general revenues";

Using these four categories, this section will describe how the French retirement system has been reformed over the last decade in response to the long-term financial difficulties it faces.<sup>250</sup>

#### A. *Increases in the Contribution Rate*

The ARRCO and AGIRC mandatory contribution rates were increased significantly over the last ten years as a result of accords signed in 1993, 1994, and 1996. First, the ARRCO mandatory contribution rate on level A wages gradually increased from 4% to 6% by 1999.<sup>251</sup> In addition, the ARRCO mandatory contribution rate on non-managers' level B wages is scheduled to increase gradually from 6% to 16% by 2005.<sup>252</sup> Finally, the AGRIC mandatory contribution rate on managers' level B and C wages was increased from 8% to 16% by 1999.<sup>253</sup>

Not only were the mandatory contribution rates increased during the 1990s, but the calling rates were also increased. Specifically, both the ARRCO and AGIRC calling rates were increased from about 120% and 117%, respectively, to 125% by January 1995.<sup>254</sup>

or (3) "they can attempt to restructure their pension programs in fundamental ways—for example by adding or deleting tiers of programs.").

<sup>250</sup> This section will not discuss every single reform of the French retirement system in the last decade. For example, it will not discuss the September 25 and September 27, 1995, amendments which changed the definition of wages for purposes of ARRCO and AGIRC to conform with the definition of wages for purposes of the general regime rather than wages for purposes of the income tax. See *Cinquante ans, Groupe no. 2, supra* note 139, at 25 n.2. Similarly, this section will not discuss the failed reform of the special regimes which was also designed to address the system's long-term funding difficulties.

<sup>251</sup> See Accord du 10 Fevrier 1993 pris pour l'application de certaines dispositions de l'accord du 8 décembre 1961 codifié, art 1. See also ARRCO Funding Section, *infra* pp. 460.

<sup>252</sup> See Accord du 25 avril 1996 relatif aux regimes de retraite complémentaire des salaires ARRCO, art. 26. See also ARRCO Funding Provision, *infra* pp. 460.

<sup>253</sup> See Accord du 25 avril 1996 relatif au regime de retraite des cadres AGIRC, art. 11 (accelerating scheduled increase in mandatory contribution rate on level B and C wages so that it reaches 16% by 1999); Accord du 9 février 1994 relatif au regime de retraite des cadres, (scheduling gradual increase in the mandatory contribution rate to reach 16% by 2003). See also DUPEYROUX, *supra* note 2, at 990; AGRIC Funding Provision, *infra* pp. 464.

<sup>254</sup> See E-Mail Correspondence from Arnauld d'Yvoire, *supra* note 140 (noting that 1994 AGRIC accord increased the calling rate from 117% to 121% in 1994 and 125% as of January 1995). The ARRCO calling rate reached 125% in 1992. See *Cinquante ans, Groupe no. 2, supra* note 139, at 48 (showing ARRCO and AGIRC calling rates since 1947). In addition, Unedic, which provides unemployment insurance and finances AGIRC and ARRCO retirement benefits that are attributable to periods of unemployment, agreed to increase its short-term contributions although it will later reduce its contributions to recoup these increased contributions. See E-Mail

## B. Reductions in Benefits

In 1993, the rules governing the general and aligned regimes were modified in three ways, the effect of each of which was to reduce benefits.<sup>255</sup> First, the period of participation required for benefits at the full rate was gradually increased from 150 to 160 quarters.<sup>256</sup> Second, the number of years taken into account in calculating the annual average salary was gradually increased from 10 to 25.<sup>257</sup> Finally, the method for indexing benefits was changed from a system based on changes in wages to one based on changes in prices for a period of five years beginning on January 1, 1994.<sup>258</sup> The 1999 social security financing law extended the practice of revaluing benefits based on changes in the cost of living rather than wages through the end of 1999.<sup>259</sup>

Not only were general regime benefits reduced during the 1990s, but ARRCO and AGIRC benefits were also reduced during this period. For example, pursuant to a February 9, 1994 accord, AGIRC gradually reduced the family allowance, that is, the increase in benefits it provides for workers who

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Correspondence from Arnauld d'Yvoire, *supra* note 140.

<sup>255</sup> See Ruellan, *supra* note 96, at 918.

<sup>256</sup> See Decret No. 93-1022 du 27 août 1993 relatif au calcul des pension de retraite, Title I, J.O. 12145, 12145-46 (Aug. 28, 1993). For a discussion of this provision, see *infra* and Ruellan, *supra* note 96, at 918-19.

<sup>257</sup> See Decret No. 93-1022 du 27 août 1993 relatif au calcul des pension de retraite, Title II, J.O. 12145, 12146 (Aug. 28, 1993). For a discussion of this provision, see *supra* p. 452 and Ruellan, *supra* note 96, at 919.

<sup>258</sup> See Loi no. 93-936, *infra* note 273; Decret No. 93-1023 du 27 août 1993 fixant les modalités de revalorisation des avantages d'invalidité et de vieillesse, J.O. 12147 (Aug. 28, 1993); Ruellan, *supra* note 96, at 919-20. In fact, benefits had been indexed to changes in prices rather than wages since 1987 as a result of a series of laws enacted each year setting a rate based on prices rather than on wages as provided by the social security code. See Ruellan, *supra* note 96, at 919-20. The 1993 reform amended the law so that the government can fix the amount of indexation by decree rather than through the parliament. See Bonoli, *supra* note 7, at 140. See also Blanchet & Pélé, *supra* note 2, at 188 (noting that indexing pension on prices instead of wages has "the effect of reducing the relative standard of living of older pensioners"); Weaver, *supra* note 7, at 201 (noting that "[a]lthough most indexation reforms produce modest results in the early years, they compound over time to produce striking results" and citing indexation reform in Great Britain as an example where indexation reform can significantly reduce benefits over long run); *supra* p. 455.

<sup>259</sup> See LAMY, PROTECTION SOCIALE 2000, at 2337; Lawrence J. Speer, *France to Create Pension Reserve Fund to Ward Off Insolvency in Next Century*, 25 PENS. & BEN. REP. (BNA) 2230 (Sept. 28, 1998) (noting that "[i]ndexing to inflation, rather than salaries, will save the government more than FF 10 billion (1.76 billion, at exchange rate FF 5.65 = \$1) in 1999."); Lawrence J. Speer, *France Unwilling to Use Private Pension Funds Against Deficit*, 25 PENS. & BEN. REP. (BNA) 2031 (Sept. 14, 1998) (same).

raise three or more children.<sup>260</sup> The accord applied the reduction to both active workers and retirees,<sup>261</sup> but the Court of Cassation held that the reduction as applied to retirees who had already begun to receive their retirement benefits prior to the date of the accord constituted an impermissible retroactive reduction in benefits.<sup>262</sup> The April 25, 1996, AGIRC accord reduced benefits by gradually eliminating all credit awarded workers during periods of unemployment, disability, and military service,<sup>263</sup> other than the guarantee of minimum points—equal to 120 points—for a mandatory contribution rate of 16%.<sup>264</sup>

In addition, the value of ARRCO and AGIRC points grew at a slower rate in the last decade than they have in the past. In the past, the value of ARRCO and AGIRC points was often indexed to the increase in prices.<sup>265</sup> In 1994, however, AGIRC points retained the same value as they had in 1993.<sup>266</sup> In addition, the value of ARRCO points grew at less than the average increase in

<sup>260</sup> Specifically, a service percentage equal to 96% in 1995, 85% in 1996, and 80% after January 1, 1997, was applied to the family allowance. The effect of the service percentage was to reduce the family allowance by 4% in 1995, 15% in 1996, and 20% thereafter. See DUPEYROUX, *supra* note 2, at 992; AGIRC retraite des cadres, *repond à vos questions V-VI* (Apr. 1995); L'accord AGIRC: un mauvais coup porte a la famille, *Le Figaro* 2-B (Feb. 23, 1994). For a discussion of the family allowance, see *supra* p. 465.

<sup>261</sup> Cf. AGIRC *repond à vos questions*, at VI (noting that applying reduction only to current workers would violate equity between the generations).

<sup>262</sup> See Cour de Cassation (Chambre sociale) (Nov. 23, 1999), DR. SOC. 333, 336 (2000). See also Partick Tillie, *Droit liquides dans le regime AGIRC: la nature du droit a retraite et la sécurité juridique en question*, DR. OUVRIER 41 (Feb. 2000) (discussing decision and subsequent modification of decision); Jean-Jacques Dupeyroux, *Sur les regimes complémentaires: bref rappel de quelques données de base*, DR. SOC. 409 (2000) (critiquing decision).

<sup>263</sup> See first paragraph of section on AGIRC's benefits provisions, pp. 465.

<sup>264</sup> See Accord du 15 avril 1996 relatif au regime de retraite des cadres AGIRC, art. 7; Fabienne Muller, *Les accords du 25 avril 1996: un tournant pour les regimes obligatoires de retraite complémentaire?*, 32 *Revue de Droit Sanitaire Sociale* 647, 654 (1996).

<sup>265</sup> See KHALFA ET AL., *supra* note 142, at 138.

<sup>266</sup> See February 9, 1994 AGIRC accord, art. 1. See also Phillipe de Caigny, *Crise de la retraite des cadres: des solutions bonne ou mauvaises*, DR. SOC. 322, 323 (2000) (noting that the social partners decided not to modify the value of a point in 1994).



wages in 1993 through 2000.<sup>267</sup> Similarly, the value of AGIRC points grew at one percent less than the average increase in wages between 1996 and 2000.<sup>268</sup>

Moreover, the reference wage, or cost of points, increased between 1996 and 2000. Traditionally, the reference wage was indexed to the increase in the average annual salary.<sup>269</sup> Between 1996 and 2000, however, the AGIRC reference wage increased at the rate of the increase in the average wage plus 4%<sup>270</sup> while the ARRCO reference wage increased at the rate of the increase in the average wage plus 3.5%.<sup>271</sup> This change had the effect of attributing fewer points to the same contribution and thus decreasing future benefits.

According to management, the combined effect of the 1993 amendments to the general regime and the modifications to ARRCO and AGIRC produced by the February 10, 1993, February 9, 1994, and April 25, 1996 ARRCO and AGIRC accords was to reduce the replacement rates for non-manager from 73% of final average salary in 1996 to 71% of final average salary in 2005 and to reduce the replacement rates for managers from 66% of final average salary in 1996 to 62% of final average salary in 2005.<sup>272</sup>

<sup>267</sup> The February 10, 1993 ARRCO accord decreased the "rendement de reference" from 13.8% in 1992 to 13.62% in 1993, 13.46% in 1994, and 13.3% in 1995. See February 10, 1993 ARRCO Accord, art. 2. The "rendement de reference" is a complex notion which takes into account a variety of factors such as the value of a point, the reference wage, adjustments for family benefits, and administrative expenses. See Jacques Amzallag, *Dispositions de l'accord du 10 février 1993: Deux séries de mesures*, LA RETRAITE COMPLEMENTAIRE ARRCO 6, 7 (1993). As a result of the reduction in the rendement de reference, the social partners decided to revalue points at 1.2% less than the average increase in wages in 1993 and 1% less than the average increase in wages in 1994 and 1995. See *id.* The remainder of the decrease in the rendement de reference was offset by a reduction in administrative charges. See *id.*

The April 25, 1996 ARRCO accord continued to increase the value of points at less than the average increase in salary until 2000. See Accord du 25 avril 1996 relatif aux regimes de retraite complémentaire des salaires ARRCO, arts. 17, 19.

<sup>268</sup> See Accord du 25 avril 1996 relatif au regime de retraite des cadres AGIRC, art. 2.

<sup>269</sup> See KHALFA ET AL., *supra* note 142, at 138; Lynes, *supra* note 48, at 44 ("the broad intention is that the number of points earned by the average *cadre* [manager] in the course of a year should be kept roughly constant from year to year, by raising the price of a point ( *salaire de référence*) in line with average earnings. Since 1957 the index used for this purpose is that of the median salary of a *cadre*.").

<sup>270</sup> See Accord du 25 avril 1996 relatif au regime retraite des cadres AGIRC, art. 1. See also E-Mail Correspondence from Arnaud d'Yvoire to Kathryn Moore, *supra* note 140 (noting that decision to increase the reference wage at a higher rate than the increase in the average wage constituted a fundamental rupture with prior practice and theory).

<sup>271</sup> See Accord du 25 avril 1996 relatif aux regimes de retraite complémentaire des salaires ARRCO, art. 18.

<sup>272</sup> See Caussat, *supra* note 94, at 732-33. Cf. Muller, *supra* note 264, at 652 (noting that according to CGT, the Confederation General du Travail, the effect of the accords was to reduce the rights of non-managers by 17.5% and the rights of managers by 20% in five years).

### C. Creation of New Sources of Funding

In the 1990s, two new sources of funding were created to help fund first tier retirement benefits. First, in 1993, the "fonds de solidarité vieillesse" (FSV), was created to provide funding for certain non-contributory retirement benefits.<sup>273</sup> Specifically, it provides funding for (1) minimum retirement benefits,<sup>274</sup> (2) additional benefits awarded retirees for raising children,<sup>275</sup> (3) additional benefits awarded certain retirees with dependent spouses,<sup>276</sup> and (4) benefits based on certain periods for which workers are credited with participation in a base regime even though they made no contribution to the regime during that period.<sup>277</sup> The FSV is funded by a tax on alcoholic and non-alcoholic beverages,<sup>278</sup> a 6% tax on employer contributions to fund employee

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<sup>273</sup> See Loi no. 93-936 du 22 juillet 1993 relative aux pensions de retraite et la sauvegarde de la protection sociale, J.O. 10374 (23 juillet 1993), codified at Soc. Sec. Code art. L. 135-1-135-6. Law 93-936, Law 93-936, Title I. Prior to the creation of the FSV, these noncontributory benefits were either funded by the each retirement regime, by a fund financed by all of the regimes, or reimbursed by the State. See DUPEYROUX, *supra* note 2, at 467. See also Bonoli, *supra* note 7, at 138 (contending that the creation of FSV was added to the 1993 reform in response to pressure of trade unions and was essential to the political success of the 1993 reform of the general regime); Jean-Francois Chadelat, *Le Fonds de solidarité vieillesse*, DR. SOC. 727, 730 & 733 (July-Aug. 1994) (contending that the creation of the FSV is particularly significant and praiseworthy because it involves the creation of an administrative organization that, for the first time, clearly separates benefits attributable to contributions from those attributable to "national solidarity").

<sup>274</sup> See Soc. Sec. Code art. L. 135-2(1) & (2); DUPEYROUX, *supra* note 2, at 467; Ruellan, *supra* note 96, at 917. For a description of these minimum retirement benefits, see DUPEYROUX, *supra* note 2, at 1131-35; REYNAUD, *supra* note 7, at 19-20. This was the only element of the 1993 reforms to affect all of the first tier retirement regimes, including the special regimes. The remaining elements of the 1993 reforms only affected the general and aligned regimes. See Ruellan, *supra* note 96, at 918.

<sup>275</sup> See Soc. Sec. Code art. L. 135-2(3)(a); DUPEYROUX, *supra* note 2, at 467; Ruellan, *supra* note 70, at 917. For a discussion of the adjustment as applied to the general regime, see section on adjustments to benefits.

<sup>276</sup> See Soc. Sec. Code art. L. 135-2(3)(b); DUPEYROUX, *supra* note 2, at 467; Ruellan, *supra* note 96, at 917. For a discussion of the adjustment as applied to the general regime, see section on adjustments to benefits.

<sup>277</sup> See Soc. Sec. Code art. L. 135-2(4) & 135-7; DUPEYROUX, *supra* note 2, at 467; Ruellan, *supra* note 70, at 917. Those periods include periods of unemployment and national service. For a discussion of these periods, see section on participation.

<sup>278</sup> See Soc. Sec. Code art. L. 135-3(2); DUPEYROUX, *supra* note 2, at 466; Ruellan, *supra* note 70, at 918.

welfare benefits,<sup>279</sup> and 1.3% of the proceeds of the "Contribution Sociale Généralisée" (CSG).<sup>280</sup>

Second, article 2 of the 1999 social security financing law created a reserve to help fund future general and aligned regime retirement benefits.<sup>281</sup> The reserve is managed by the FSV and is financed from a variety of sources.<sup>282</sup> The reserve held about 2 billion francs by September 1999<sup>283</sup> and was expected to grow to approximately 23.4 billion francs by the end of 2000.<sup>284</sup>

In addition, during the 1990s, a number of new sources of funding were created to help fund AGIRC. First, the February 9, 1994, AGIRC accord authorized the imposition of an exceptional "solidarity" contribution by retirees to fund benefits attributable to periods of unemployment,<sup>285</sup> although this "solidarity" contribution has not yet been put into effect.<sup>286</sup> In addition, the February 9, 1994, AGIRC accord required certain categories of unemployed managers to pay in part for points attributable to their unemploy-

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<sup>279</sup> See Soc. Sec. Code art. L. 135-3(3); DUPEYROUX, *supra* note 2, at 781-82. This source of funding was not part of the original FSV but was added in 1996.

<sup>280</sup> See Soc. Sec. Code art. L. 135-3(1); DUPEYROUX, *supra* note 2, at 466; Ruellan, *supra* note 70, at 917-18. The FSV was amended in 1998 to provide for additional CSG funding. See Soc. Sec. Code art. L. 135-3(4). The CSG consists of four distinct levies: (1) a levy on income from employment or other sources of income designed to replace employment income, such as pensions, see Soc. Sec. Code art. L. 136-1-5, (2) a levy on income from property, see Soc. Sec. Code art. L. 136-6, (3) a levy on investment income, see Soc. Sec. Code art. L. 136-7, and (4) a levy on gambling winnings, see Soc. Sec. Code art. L. 136-7-1.

<sup>281</sup> See Loi no. 98-1194 du 23 décembre 1998, Loi de financement de la sécurité sociale pour 1999; COUR DES COMPTES, *supra* note 2, at 136. See also Speer, *supra* note 92, at 830; Lawrence J. Speer, *France to Create Pension Reserve Fund to Ward Off Insolvency in Next Century*, 25 PENS. & BEN. REP. (BNA) 2530 (Nov. 2, 1998); Lawrence J. Speer, *France to Create Pension Reserve Fund to Ward Off Insolvency in Next Century*, 25 PENS. & BEN. REP. (BNA) 2230 (Sept. 28, 1998).

In contrast, the April 25, 1996 ACCRO and AGIRC accords did not consider increasing their reserves beyond their current reserves equal to about 6 months or so of benefits. See Caussat, *supra* note 94, at 733.

<sup>282</sup> For a discussion of the sources of funding for the reserve, see COUR DES COMPTES, at 136-37; Speer, *supra* note 222; Speer, *supra* note 92, at 830.

<sup>283</sup> See Speer, *supra* note 222, at 2362.

<sup>284</sup> See COUR DES COMPTES, *supra* note 2, at 137.

<sup>285</sup> See February 10, 1994 AGIRC accord, art. 5. The Court of Cassation held that this contribution was permissible and did not constitute an impermissible retroactive reduction in benefits. Cour de Cassation (Chambre sociale) (Nov. 23, 1999), DR. SOC. 333, 334 (2000).

<sup>286</sup> See Accord du 25 avril 1996 relatif au régime de retraite des cadres AGIRC, art. 3 (noting that the exceptional solidarity contribution will not apply between 1996 and 1999). See also E-mail correspondence from Arnauld d'Yvoire, *supra* note 140 (noting that this contribution has not been used in practice).

ment.<sup>287</sup> Finally, the April 25, 1996, AGIRC accord required workers to make an exceptional temporary contribution to help fund AGIRC.<sup>288</sup> The contribution will gradually increase from .07% in 1997 to .35% in 2001, is divided between the employer and employee in the same manner as contributions on level B wages are divided,<sup>289</sup> and does not give rise to benefits.<sup>290</sup>

#### *D. Reorganization of Basic Structure of System*

Effective January 1, 1999, ARRCO was transformed from an association managing 45 different complementary retirement regimes<sup>291</sup> into a federation managing a single complementary retirement regime with a single set of rules, including a single reference wage and a single value for points.<sup>292</sup> In addition, the financing systems of ARRCO and AGIRC were restructured so that ARRCO (which is currently financially sound)<sup>293</sup> transfers money each year to AGIRC (which is facing serious short-term funding difficulties).<sup>294</sup> This transfer of funds is justified by the fact that AGIRC's short-term funding difficulties are caused in large part<sup>295</sup> by the fact that the general regime ceiling has risen much more rapidly than the average wage in recent years and thus managers (whose wages are covered by ARRCO up to the general regime

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<sup>287</sup> See E-mail correspondence from Arnauld d'Yvoire, *supra* note 140; de Caigny, *supra* note 266, at 323.

<sup>288</sup> See Accord du 25 avril 1996 relatif au regime de retraite des cadres AGIRC, art. 7.

<sup>289</sup> See AGIRC's Funding Provisions section (explaining that contributions on level B wages are divided so that the employer pays 10% of level B wages while the employee pays 6%).

<sup>290</sup> See *id.*

<sup>291</sup> See KESSLER, *supra* note 27, at 386 (noting that prior to January 1, 1999, ARRCO managed 45 different complementary retirement regimes); DUPEYROUX, *supra* note 2, at 986 (same).

<sup>292</sup> See Accord du 25 avril 1996 relatif aux regimes de retraite complémentaire des salaires ARRCO, art. 1; Accord du 25 avril 1996 portant dispositions communes à l'AGIRC et à l'ARRCO, preamble. See also Muller, *supra* note 264, at 649 (discussing single ARRCO regime).

<sup>293</sup> Prior to the 1996 accords, ARRCO faced a 37 billion franc deficit while AGIRC faced a 130 billion franc deficit. See Retraites complémentaires AGIRC-ARRCO, Accords du 25 avril 1996, Liaisons Sociales: Le Quotidien, Supplement au numero 12170 (May 3, 1996); Muller, *supra* note 264, at 648.

<sup>294</sup> See Accord du 25 avril 1996 portant dispositions communes à l'AGIRC et à l'ARRCO, art. 1. The transfer is calculated by comparing ARRCO and AGIRC's respective "rendements" each year and transferring funds to the regime with the weaker "rendements." See *id.*; Caussat, *supra* note 94, at 731. For an explanation of the term "rendements," see [number of footnotes above].

<sup>295</sup> For a discussion of other factors causing AGIRC's funding difficulties, see Caussat, *supra* note 94, at 731.

ceiling) are contributing more and more to ARRCO while they are contributing less and less to AGIRC each year.<sup>296</sup> This financial restructuring may constitute a first step toward fusing ARRCO and AGIRC into a single regime.<sup>297</sup>

#### IV. LESSONS FROM THE RECENT REFORMS

Reform of the French retirement system remains a work-in-progress. Reports continue to be issued and proposals debated.<sup>298</sup> Indeed, both French President Jacques Chirac and Prime Minister Lionel Jospin have expressly discussed the need for additional reform of the French retirement system.<sup>299</sup> Nevertheless, reform thus far offers a number of lessons.

First, the United States is not alone. The French retirement system, and indeed the retirement systems throughout the industrialized world, face serious funding difficulties. In fact, if anything, considering reform of the French retirement system should give American policymakers comfort because the French retirement system faces more serious funding difficulties than does the American retirement system.<sup>300</sup>

<sup>296</sup> See DUPEYROUX, *supra* note 2, at 980; Caussat, *supra* note 94, at 731; Muller, *supra* note 264, at 854. Coverage for wages up to the general regime ceiling was transferred from AGIRC to ARRCO in 1973 to help ARRCO with funding difficulties it faced at that time. See DUPEYROUX, *supra* note 2, at 981; Muller, *supra* note 264, at 648.

<sup>297</sup> See Caussat, *supra* note 94, at 731 (noting that an impartial observer could not help but think that the 1996 accords which simultaneously negotiated changes in ARRCO and AGIRC constitute a first breach in the social wall which separates managers from non-managers, a wall that only exists in France). See also DUPEYROUX, *supra* note 2, at 981 (noting that transfer of funds from ARRCO to AGIRC only justified if it constitutes first step in fusion of ARRCO and AGIRC).

<sup>298</sup> See, e.g., *L'avenir des systemes de retraite*, *supra* note 32; Vasselle, *supra* note 92; *L'avenir de nos retraites*, *supra* note 14.

<sup>299</sup> See *L'avenir des systemes de retraite*, *supra* note 32, at 3.

<sup>300</sup> See Thomas Daschle, *Administration Urge Early Talks, Action on Entitlements*, 23 PENS. & BEN. REP. (BNA) 2785 (Dec. 2, 1996) (noting that among the Group of Seven industrial powers, the net present value of the U.S. public pension liability is the second lowest while that of France is the highest). See also *Lessons*, *supra* note 7, at 113-14 (statement of Eric Kingdon), stating:

One lesson that comes from the foreign experience is that we're really not alone, and that we're really not that bad off either. Most industrialized nations are experiencing population aging, . . . and in fact, their rates of population aging are much greater than our own. They anticipate higher rates of so-called age dependency rates in 2030.

The French retirement system faces more serious funding difficulties for two principle reasons. First, the elderly dependency ratio<sup>301</sup> is currently greater and is projected to remain greater in France than in the United States through the year 2050.<sup>302</sup> Second, the entire French retirement system is funded almost exclusively on a pay-as-you-go basis<sup>303</sup> while only the American social security system is funded principally on a pay-as-you go basis.<sup>304</sup> Unlike ARRCO and AGIRC, employer-sponsored retirement benefits in the United States are almost entirely prefunded<sup>305</sup> and employer-sponsored pension plans held over 3 trillion dollars in assets in 1996.<sup>306</sup>

The second lesson reform of the French retirement system teaches is that there is no magic solution, no costless remedy to the impending financial difficulties the American social security system faces as a result of the aging of its population.<sup>307</sup> Reform of the French retirement system has taken four basic forms: (1) increases in the contribution rate; (2) reductions in benefits; (3) creation of new sources of funding; and (4) reorganization of the basic structure of the system. As discussed below, however, none of these types of reform offers a costless remedy to the American social security system's long-term funding deficit.

First, raising the American social security payroll tax rate (for employees and employers combined) by 2.2 percentage points in 2000 could resolve more

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<sup>301</sup> For a discussion of the elderly dependency ratio, see *infra* p. 474.

<sup>302</sup> See Weaver, *supra* note 7, at 198 Table 5-5. Specifically, the elderly dependency ratio in France was about 23.6 in 2000 and is projected to be 24.6 in 2010, 32.3 in 2020, 39.1 in 2030, and 43.5 in 2050. In the United States, in contrast, the elderly dependency ratio was about 19.0 in 2000 and is projected to be 20.4 in 2010, 27.6 in 2020, 36.8 in 2030, and 2050. *Id.* See also BONOLI, *supra* note 7, at 15 Table 1.2 (showing that population over 65 as percentage of total population currently higher and projected to remain higher in France than in the U.S. through 2035).

<sup>303</sup> See p. 471 (noting that only 1% of French retirement benefits are prefunded).

<sup>304</sup> *Cf. id.* (noting that 17% of American retirement benefits are prefunded).

<sup>305</sup> Certain nonqualified benefits for executives may be unfunded. See, e.g., JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 249-58 (3d ed. 2000) (discussing unfunded nonqualified plans).

<sup>306</sup> See Overview of French Retirement System, *infra* p. 445.

<sup>307</sup> *Cf. Weaver, supra* note 7, at 223-24 ("A second lesson is that the repertoire of incremental pension retrenchment possibilities is limited. . . . expecting any politically viable 'magic bullets' to come out of foreign experience is unrealistic.").

than 100% of social security's long-term funding deficit.<sup>308</sup> Raising the payroll tax rate, however, involves obvious costs.

Second, social security benefits could be reduced in a number of ways to reduce social security's long-term deficit. For example, reducing the cost of living adjustment (COLA) by 0.5 percentage points below the consumer price index (CPI) annually could resolve 36% of the long-term deficit while reducing the COLA by 1 percentage point below the CPI annually could resolve 69% of the long-term deficit.<sup>309</sup> Increasing the number of years used to calculate benefits from 35 to 38<sup>310</sup> could resolve 11% of the long-term deficit while increasing the number of years to 40 could resolve 17% of the long-term deficit.<sup>311</sup> Reducing benefits across the board by 3% could resolve 18% of the long-term deficit while reducing benefits across the board by 5% could resolve 30% of the long-term deficit.<sup>312</sup> Finally, eliminating the hiatus in the currently scheduled increase in the normal retirement age and then gradually increasing the normal retirement age to 68 could resolve 20% of the long-term deficit while further increasing the normal retirement age to 70 could resolve 26% of the long-term deficit.<sup>313</sup> Again, however, each and every one of these possible reforms involves obvious costs.<sup>314</sup>

Third, there are no costless new sources of funding for the American social security system. The American social security system is already building up a temporary reserve which will be used to fund retirement benefits for the babyboom generation;<sup>315</sup> this temporary reserve could be increased, for example, by increasing the payroll tax rate, but the money would still have to come from somewhere, such as higher payroll taxes. Future benefits could be

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<sup>308</sup> Keith Fontenot, *Information on the Distributional Effects of Various Social Security Solvency Options by Gender and Income*, Memorandum to Jane Ross Table 1 & Appendix 1 (May 18, 1999) (101% of the long-term funding deficit could also be resolved by raising the payroll tax rates (for employees and employers combined) by 2.75 percentage points in 2020 and an additional 2.75 percentage points in 2050).

<sup>309</sup> See *id.* at Table 1.

<sup>310</sup> For a discussion of the way in which social security benefits are calculated, see Moore, *supra* note 20, at 986-87.

<sup>311</sup> See *id.*

<sup>312</sup> See *id.*

<sup>313</sup> See *id.*

<sup>314</sup> For a detailed discussion of the costs and benefits of raising the social security retirement ages, see Moore, *supra* note 1. For a discussion of the distributional effect of a variety of proposed changes in the American social security system, see Julia Lynn Coronado et al., *Distributional Impacts of Proposed Changes to the Social Security*, in 13 *TAX POLICY AND THE ECONOMY* 149 (1999).

<sup>315</sup> See Moore, *supra* note 20, at 985.

funded, in part, by other sources, such as by general revenues.<sup>316</sup> Nevertheless, any new source of funding would impose costs on someone somewhere.

Finally, restructuring the American social security system does not offer a costless remedy to social security's long-term funding deficit. The French retirement system is extremely complex and the recent restructuring and streamlining of the second tier may significantly reduce administrative costs.<sup>317</sup> The American social security system, in contrast, is already a single regime with extremely low administrative costs.<sup>318</sup> Restructuring the American social security system to reduce administrative costs simply is not a viable option.<sup>319</sup>

There are many who contend that the American social security system should be restructured to meet its impending funding deficit.<sup>320</sup> In this context, restructuring typically means privatizing or partially privatizing the system, that is, creating individual accounts to fund all or some retirement benefits.<sup>321</sup> Since the French retirement system has been and remains funded almost

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<sup>316</sup> Indeed, the 1935 Committee on Economic Security proposed that general revenues be used to fund future benefits. See Report of the Committee on Economic Security, reprinted in THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935 AND OTHER BASIC DOCUMENTS RELATING TO THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 50 (50th Anniv. Ed. 1985), stating:

We suggest that the Federal Government make no contribution from general tax revenues to the fund during the years in which income exceeds payment from the funds, but that it guarantee to make contributions, when the level of payment exceeds income from contributions and interest, sufficient to maintain the reserve at the level of the last year in which income exceeded payments.

For the role general revenues currently play in funding social security benefits, see *infra* note 333.

<sup>317</sup> See Reorganization of Basic Structure of System, *supra* p. 482.

<sup>318</sup> In 2000, the cost of administering the OASI program was \$2.1 billion, or about .6 percent of OASI benefits paid that year. See 2001 ANN. REP., *supra* p. 436, at 3. The cost of administering the OASDI program was \$3.8 billion, or about .9 percent of OASDI benefits that year. See *id.* For additional discussion of the administrative efficiency of the American social security system, see Moore, *supra* note 2, at 136 n.29 and authorities cited therein.

<sup>319</sup> Indeed, restructuring the American social security system to include individual accounts is likely only to increase administrative costs. See, e.g., Lessons, *supra* note 7, at 119-20, and authorities cited therein.

<sup>320</sup> For a discussion of a number of the recent partial privatization proposals, see Moore, *supra* note 191, at 346-47.

<sup>321</sup> Cf. American Academy of Actuaries, *supra* note 5, at 26, stating:

The first task for Social Security is to determine whether to make fundamental changes in the underlying philosophy of the program or to preserve the system in its current form. In the context of the current debate, fundamental reform means providing all or part of benefits through individual accounts that are pre-funded through the use of market-based securities.



exclusively on a pay-as-you-go basis, recent reforms of the French retirement system offer little direct guidance for the current debate regarding privatization or partial privatization of the American social security system. The arguments offered by opponents to expanding third tier prefunded retirement benefits in France today and the failure of French prefunded retirement plans to provide adequate retirement benefits in times of high inflation in the early to mid-20th century, however, suggest that partial privatization is not the costless panacea that its proponents contend.<sup>322</sup>

The third lesson offered by reform of the French retirement system is that reform is politically difficult.<sup>323</sup> Reform of the general regime took 10 years of discussion and governmental reports.<sup>324</sup> Indeed, according to one commentator, reform was only made possible by the unique combination of a government that was recently installed with a strong majority and an economic crisis without precedent.<sup>325</sup> Reform of the third tier of the French retirement system, in contrast, arguably cost the majority government its power in 1997.<sup>326</sup> In running for office in 1995, President Jacques Chirac pledged to put

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<sup>322</sup> For additional arguments as to why partial privatization of social security is not a costless solution to the American social security system's long-term funding deficit, see Moore, *supra* note 191; Moore, *supra* note 5; Moore, *supra* note 2. See also THE ERISA INDUSTRY COMMITTEE, *THE VITAL CONNECTION: AN ANALYSIS OF THE IMPACT OF SOCIAL SECURITY REFORM ON EMPLOYER-SPONSORED RETIREMENT PLANS* 35 (1998), stating:

In order to restore the Social Security program to actuarial balance, Congress must enact amendments to law that increase income to the Trust fund and/or reduce benefits paid by the program. There are no other solutions. *Contrary to popular conception, creation of individual Social Security accounts does not by itself solve the financial imbalance in Social Security.* (emphasis in original).

<sup>323</sup> For a detailed study of the politics of pension reform in France in the 1980s and 1990s, see BONOLI, *supra* note 7, at 118-49.

<sup>324</sup> See Francis Kessler, *Les reformes de la protection sociale et les personnes agees*, 32 *REVUE DE DROIT SANITAIRE ET SOCIALE* 781, 782 (1996) (noting that in introducing the 1995 proposed reform of the special regimes, Alain Juppé declared that it took ten years of reports and "white books" to make the necessary choice to safeguard to the general regime in 1993).

<sup>325</sup> See Ruellan, *supra* note 96, at 916. See also BONOLI, *supra* note 7, at 138 (contending that successful 1993 reform attributable to both strong new government and fact that Prime Minister Balladur took unusual nonconfrontational stance with trade unions and negotiated content of reform with trade unions).

<sup>326</sup> See *France Franks Pension Reform*, *ECONOMIST*, Mar. 25, 2000, at 23, stating:

When his conservative predecessor, Alain Juppé, passed a law in 1995 favouring individual pension plans, the trade unions took to the streets. That law, never implemented, was part of a range of social-security reforms that led to two years of civil unrest and Mr. Juppé's humiliation in the general election of 1997.

into place private pension funds similar to American 401(k) plans.<sup>327</sup> Shortly following the enactment of the legislation creating retirement savings plans, which implemented this campaign promise, Chirac's center-right government was replaced with a left-wing government whose campaign promises included a promise to derail that legislation.<sup>328</sup> Similarly, then-Prime Minister Alain Juppé's plan to reform the special regimes in 1995 was scrapped as a result of massive public opposition.<sup>329</sup>

The fourth and final lesson reform of the French retirement system teaches is that funding for social security reform need not be limited to payroll taxes. The recently created "fonds de solidarité vieillesse" (FSV) and the reserve to fund future retirement benefits are not financed by dedicated payroll taxes; instead, they are financed from a variety of sources, including a tax on alcoholic and non-alcoholic beverages,<sup>330</sup> 1.3 of the proceeds of the "Contribution Sociale Généralisée" (CSG) or general social contribution,<sup>331</sup> and capital gains from transforming the government-run credit unions to private sector financial institutions.<sup>332</sup> The American social security system is currently

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<sup>327</sup> See *Parliament Approves France's First Private Pension System*, 24 PENS. & BEN. REP. (BNA) 559 (Mar. 3, 1997); *French Assembly Votes to Create Country's First Private Pension System*, 23 PENS. & BEN. REP. (BNA) 2793 (Dec. 2, 1996).

<sup>328</sup> Lawrence J. Speer, *New Prime Minister Rejects Proposed Private Pension Funds*, 24 PENS. & BEN. REP. (BNA) 1474 (June 23, 1997).

<sup>329</sup> See *Other Base Regimes*, *infra* p. 456.

<sup>330</sup> See Soc. Sec. Code art. L. 135-3(3).

<sup>331</sup> See Soc. Sec. Code art. L. 135-3(1).

<sup>332</sup> See Speer, *supra* note 92, stating:

The government has announced plans to place all surplus revenues from the state-run social welfare system, which includes health, retirement and unemployment insurance elements, into the pension reserve fund. Revenues from France's wealth tax; capital gains from the transformation of government-run credit unions to private sector financial institutions; and dividends from government holdings in listed companies, such as France Telecom, Renault, or Thompson Multimedia, also will feed the pension reserve fund, Jospin said.

funded almost exclusively by payroll taxes,<sup>333</sup> and expanding the source of funding beyond the payroll tax has received limited support.<sup>334</sup>

## V. CONCLUSION

The most important lesson that reform of the French retirement system teaches is that there is no easy answer, no costless remedy to the American social security system's long-term funding deficit. Social security's long-term funding difficulties are the inevitable result of the facts that the system has been funded principally on a pay-as-you go basis and the population is aging.<sup>335</sup> Had the American social security system been prefunded from the

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<sup>333</sup> The OASI program currently receive about ten percent of its income from other sources. Because social security is currently running a surplus, and that surplus is invested in special-issue Treasury securities, interest on those securities provides about 8.4% of the OASI program income. In addition, a portion of social security benefits may be subject to federal income tax. See 26 U.S.C. § 86(a), (c) (1994). Revenues from that tax are transferred into the social security trust fund and represent about 1.4% of the program's total income. See CONSTANTJIN W.A. PANIS & LEE A. LILLARD, *SOCIAL SECURITY: EQUITY, ADEQUACY, REFORMS 4* (Rand Documented Briefing: Labor and Population 1996). In addition, in 1983, Congress directed that a lump sum representing the present value of certain military service wage credits for past service be transferred from general revenues to the social security trust funds. See Social Security Amendments of 1983, Public L. No. 98-21, § 151, 97 Stat. 65, 103-05 (1983). See also DIFFERENT APPROACHES, *supra* note 3, at 37 n.39; Myers, *supra* note 24, at 322-23.

<sup>334</sup> For example, all but three members of the 1994-1996 Social Security Advisory Council categorically rejected the idea that social security should be financed with general revenues or tax sources other than the dedicated payroll tax. See I Advisory Council Report, at 18 & n.6. *But see Bush Reserving \$1 Trillion for Social Security; Recognizes Privatization Transition Costs*, 28 PENS. & BEN. REP. (BNA) 791, 791 (2001) (noting that President Bush has proposed to carve out a \$1 trillion reserve from budget surplus over the next 10 years that could be used to fund Social Security reform"); Andrew W. Samwick, *The Effects of Social Security on Private Pensions*, Stanford Institute for Economic Policy Research Discussion Paper No. 00-17 10 (Dec. 2000) (noting that many of the partial privatization proposals would use the federal budget surplus to partially fund the individual accounts); Andrew B. Lyon & John L. Stell, *Analysis of Current Social Security Reform Proposals*, 53 NAT'L TAX J. 473, 478 (describing transfers from general revenues proposed in three recent reform plans); Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 STAN. L. & POL'Y REV. 311, (1998) (offering general revenues as possible source of funding for social security and rejecting argument that use of general revenues would stigmatize the program as welfare and thus erode its wide base of popular support).

<sup>335</sup> I Advisory Council Report, at 12, stating:

[F]rom now on many young workers and workers of future generations under present law will be paying over their working lifetimes employee and employer taxes that add to considerably more than the present value of their of their anticipated benefits. This is the inevitable result of a pay-as-you-go system such as the United States has had, and an aging population.

outset, the system would not face a long-term funding deficit as the result of the current aging of the population: current and future retiree benefits would not depend on current and future worker contributions. The current system, however, is a mature pay-as-you go system, and there is no costless or magical way to eliminate the current deficit. Reform is difficult and requires that hard choices be made.<sup>336</sup>

The United States cannot sit back and wait for an easy solution to social security's long-term funding difficulties. There is none. Instead, the United States must make hard choices, and the sooner the better.<sup>337</sup>

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<sup>336</sup> See also DIFFERENT APPROACHES, *supra* note 3, at 9. U.S. Gen. Acc. Off., Social Security: Restoring Long-Term Solvency Will Require Difficult Choices (GAO/T-HEHS-98-95 Feb. 1998) ("No matter what shape Social Security reform takes, restoring long-term solvency will require some combination of benefit reductions and revenue increases.").

<sup>337</sup> See *id.* U.S. Gen. Acc. Off., Social Security: Different Approaches for Addressing Program Solvency 23 (GAO/HEHS-98-33 July 1998), stating:

most analysts believe that early action to reduce the actuarial imbalance is important for a number of reasons. First, the longer action to address the program's financing problem is delayed, the larger the per-year cost of the solution because the shortfall in revenues will still have to be addressed, but over a shorter period of time. Second, some of the possible solutions to the solvency problem—such as raising the program's NRA, reducing benefits for future beneficiaries, or increasing the program's advance funding—will take time to implement or phase in, once enacted. Third, if certain changes, especially those that reduce benefits, are made, workers will need time to adjust their saving and retirement goals to help mitigate the personal impacts of these changes. Thus, the sooner the changes are made, the less disruptive they are likely to be.

THE ERISA INDUSTRY COMMITTEE, *supra* note 322, at 24, stating:

Indeed, the greatest risk to the current system would be the failure of Congress to act soon to address the program's financial difficulties, since as time passes the tax increases and/or benefit reductions required to bring the Social Security program into balance are expected to get larger. Moreover, many workers and the voluntary employer-sponsored plans in which they participate will require long lead times to adjust to significant changes in the Social Security program.