



Pension Analyst

Important Information

Plan Administration and Operation

May 2010

DOL issues additional guidance for multiemployer plans

Who's affected

The guidance regarding disclosure requirements applies to qualified defined benefit and defined contribution multiemployer plans. The final civil penalty regulations apply to sponsors of multiemployer defined benefit pension plans in endangered status or critical status that fail to adopt a funding improvement plan or rehabilitation plan as required by the Pension Protection Act of 2006.

Background and summary

For multiemployer plans, the Pension Protection Act of 2006 (PPA) introduced enhanced disclosure requirements. PPA requires a multiemployer plan administrator to disclose certain documents such as actuarial and financial information to participants, beneficiaries, and certain other individuals. On March 2, 2010, the Department of Labor (DOL) issued final regulations regarding these new disclosure requirements. These requirements affect plan administrators, participants, beneficiaries and contributing employers of multiemployer plans.

In addition, PPA established new funding requirements for multiemployer defined benefit plans. These requirements are intended to ensure that underfunded plans address funding issues. Certain underfunded multiemployer plans must adopt a funding improvement plan or a rehabilitation plan to improve the funding status of the plan. The DOL has authority to assess a civil penalty of up to \$1,100 per day against plan sponsors that fail to adopt a funding improvement plan or rehabilitation plan. Recently the DOL published final regulations that establish procedures for assessing civil penalties against sponsors of multiemployer plans.

This *Pension Analyst* discusses these final regulations in an effort to help multiemployer plan sponsors determine the future actions necessary to keep their plans in compliance with ERISA and the Internal Revenue Code.

Action and next steps

The final regulations affect plan administration. Plan sponsors should carefully read the information contained in this *Pension Analyst* and discuss the impact of these regulations on their plans with their enrolled actuary and legal counsel. The final disclosure regulations are effective April 1, 2010, and apply to plan years beginning on or after January 1, 2008. The final civil penalty rules are effective March 29, 2010, and also apply to plan years beginning on or after January 1, 2008.

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Final PPA disclosure requirements

PPA amended ERISA by adding a new provision that requires the administrator of a multiemployer pension plan, upon written request, to furnish copies of certain actuarial and financial information. This provision was added because more complete disclosures are considered an important element of PPA to strengthen the long-term future of multiemployer pension plans. Providing these documents to participants and beneficiaries and other parties will increase the transparency of multiemployer pension plans and afford all parties the opportunity to monitor the plan's funding and financial status.

Persons entitled to request documents

The final regulations provide that the following individuals are entitled to request actuarial and financial documents:

- Plan participants;
- Any beneficiary receiving benefits under the plan;
- Any labor organization representing participants under the plan (e.g., unions); and
- Any employer that is a party to the collective bargaining agreement to which the plan is maintained or who may be subject to a withdrawal liability.

The final regulations also clarify that a third party, such as an attorney or family member, may request and receive documents on behalf of a participant or beneficiary provided the participant or beneficiary has properly authorized the release of such information to the third party.

Documents to be furnished

Upon written request, plan administrators must provide a copy of any:

- Periodic actuarial reports. A "periodic actuarial report" means any:
 - Actuarial report prepared by the plan's actuary and received by the plan at regularly scheduled, recurring intervals; and
 - Studies, tests, documents, analyses or other information (whether or not called a report) received by the plan from an actuary that demonstrates alternative funding scenarios based on a range of alternative actuarial assumptions, whether or not the information is received by the plan at regularly scheduled, recurring intervals. This also includes any sensitivity testing that a plan may request, such as in response to a certification of critical or endangered status.
- Quarterly, semi-annual or annual financial reports prepared for the plan by any plan investment manager or advisor (without regard to whether the advisor is a fiduciary) or other fiduciary; and
- Applications filed with the IRS requesting an extension of the amortization periods under the multiemployer minimum funding rules.

The plan administrator must provide the requested documents within 30 days after receipt of the written request. The documents must be delivered in written, electronic, or other form that is reasonably accessible.

Limitations and exceptions to disclosure

The final regulations clarify that there are limits to the disclosure requirements. A plan administrator is not required to furnish:

- More than one copy of a document that has been previously provided to the requester within the 12-month period immediately preceding the date on which the plan received the request. However, a plan is not required to impose such a limit.
- Any report or application that has been in the plan's possession for more than six years as of the date the request is received by the plan.
- Any actuarial or financial report that, as of the date on which the plan receives the request, has not been in the plan's possession for at least 30 days. However, the plan administrator must notify the requester, no later than

30 days after the date on which the request was received by the plan, of the existence of the report and the earliest date on which the report will be made available.

- Information or data that was the basis for any report or application. For example, while a plan's annual valuation report would be required to be disclosed, the plan's asset statement or documents consisting of participant census data used to create the report is not required to be disclosed.

Individually identifiable and proprietary information

The final regulations also provide that a plan administrator does not have to disclose any information within a report or application that is reasonably determined to be either:

- Individually identifiable information with respect to any plan participant, beneficiary, employee, fiduciary, or contributing employer. However, the exception does not apply to an investment manager or advisor or other individual (other than an employee of the plan) that prepared a financial report; or
- Proprietary information regarding the plan, any contributing employer or entity providing services to the plan. "Proprietary information" means trade secrets and other non-public information (e.g., processes, procedures, formulas, methodologies, techniques, strategies) that, if disclosed by the plan, may cause or increase a reasonable risk of financial harm to the plan, a contributing employer, or entity providing services to the plan. However, the plan administrator may treat information relating to a contributing employer or service provider as though it is not proprietary if the contributing employer or service provider has not identified such information as proprietary.

Charges for documents

The final regulations permit a plan administrator to impose a reasonable charge to cover the costs of furnishing the documents. However, the charge cannot be greater than:

- The lesser of the actual cost to the plan for the least expensive means of reproducing the document, or 25 cents per page; plus
- The cost of mailing or otherwise delivering the document.

Penalties

A plan may be subject to a [civil penalty](#) of not more than \$1,000 per day for each failure to comply with the notice requirement.

Regulations on civil penalties

PPA requires a [multiemployer plan in endangered, seriously endangered or critical status](#) to adopt a funding improvement plan or a rehabilitation plan within 240 days after the due date of the enrolled actuary's certification of its status. The purpose of this requirement is to help a plan emerge from endangered or critical status within a 10-year period. For seriously endangered plans, the period for the funding improvement plan is extended to 15 years. In addition, multiemployer plans that are in endangered status must meet benchmarks which measure progress of funding improvement.

Recently, the DOL issued final regulations that describe the assessment of civil penalties and the procedures for administrative review for the failure to adopt a funding improvement plan or rehabilitation plan or to meet applicable benchmarks.

Assessment of civil penalties

The DOL has authority to assess a civil penalty against the plan sponsor for a failure or refusal (in whole or in part) to:

- Adopt a funding improvement plan or rehabilitation plan; or
- Meet the applicable benchmarks.

The DOL will assess the penalty for each violation, taking into consideration the degree or willfulness of the violation. However, the maximum penalty for each failure cannot exceed \$1,100 per day.

Before a penalty is assessed, the DOL must provide written notice to the plan sponsor indicating the:

- DOL's intent to assess a penalty;
- Amount of the penalty;

- Period to which the penalty applies; and
- Reason(s) for the penalty.

A plan sponsor has 30 days from the date of service of the notice to file a written statement explaining why the penalty should be reduced or waived. The written statement must:

- Provide all the facts that support why the penalty should be reduced or waived; and
- Contain a declaration by the plan sponsor that the statement is made under the penalties of perjury.

A plan sponsor's statement of reasonable cause is considered to be filed upon:

- Mailing, if using U.S. Postal Service certified mail or express mail;
- Receipt by the delivery service, if using a private delivery service;
- Transmittal, if transmitted in a manner specified in the notice of intent; or
- Receipt by the DOL, in the case of any other method of filing.

If a plan sponsor does not file a statement or request a hearing within the 30-day period, the DOL's notice will become a final order 45 days from the date of service.

Liability

If more than one individual is responsible as plan sponsor for the failure, all individuals shall be jointly and severally liable. Therefore, an entire joint board of trustees would be jointly and severally liable for a failure. If a penalty is assessed against an individual, the individual is personally liable for the payment of the penalty. The penalty is not considered a plan liability.

In addition, the DOL has indicated that penalties are not expenses that may be paid from plan assets.

Procedures for administrative review

The final regulations establish procedures for hearings with respect to a civil penalty assessed by the DOL. According to the procedures, proceedings will be conducted as quickly as possible, and every effort will be made to avoid delays.

In addition, other interested parties, such as participants or labor organizations, may participate in the hearings provided a judge finds that:

- The final decision could directly and adversely affect them or the class they represent;
- They may contribute materially to the disposition of the proceedings;
- Their interest is not adequately represented by existing parties; and
- In the discretion of the judge, the participation of such persons or organizations would be appropriate.

Next steps

Plan sponsors should read the guidance contained in this publication to determine the impact on their plans. If you have questions about the guidance discussed in this *Pension Analyst*, you should contact the plan's enrolled actuary or your fund counsel.

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