

Pension ANALYST

Important Information

Plan Administration and Operation

June 2008



Federal Agencies Provide Guidance Affecting Multiemployer Defined Benefit Pension Plans

WHO'S AFFECTED These developments affect sponsors of and participants in qualified multiemployer defined benefit pension plans.

BACKGROUND AND SUMMARY The Pension Protection Act of 2006 (PPA) established new funding requirements for multiemployer defined benefit pension plans covered by ERISA. PPA also created additional funding rules for underfunded plans that are in endangered or critical status. The IRS recently issued proposed regulations that provide guidance to multiemployer plans in determining whether they are in endangered or critical status.

PPA requires a plan's enrolled actuary to certify to the IRS and the plan sponsor, within 90 days of the beginning of each plan year, whether the plan is in endangered or critical status. Within 30 days of the actuarial certification that a plan is in endangered or critical status, the plan sponsor must notify participants, beneficiaries, collective bargaining parties, the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor (DOL) of the plan's funding status. The DOL recently issued proposed regulations containing a model notice that multiemployer plans in critical status may use to satisfy the notice requirements.

The PBGC also issued proposed regulations that reflect PPA changes made to the withdrawal liability provisions for multiemployer plans. For example, PPA allows multiemployer plans in critical status to reduce benefits but also imposes surcharges on the plan's contributing employers. The PBGC guidance confirms that reductions in adjustable benefits and employer contribution surcharges for plans in critical status are not reflected in determining a plan's unfunded vested benefits.

ACTION AND NEXT STEPS The guidance discussed in this newsletter affects plan funding, design and administration. Plan sponsors should carefully read the information contained in this *Pension Analyst* and discuss the impact on their plans with their enrolled actuary and legal counsel. Prudential Retirement's enrolled actuaries are well prepared to respond to your inquiries regarding the effect of this most recent guidance on your plan.

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IRS Guidance

PPA imposes additional funding and notice requirements for multiemployer plans in endangered or critical status. These requirements are intended to improve their financial status. Each year, a plan's enrolled actuary must certify to the plan's funding status within a specified timeframe. Sponsors of plans that are in endangered, seriously endangered, or critical status must notify interested parties of the situation and adopt either a funding improvement plan or a rehabilitation plan.

Recently, the IRS published proposed regulations that provide guidance regarding the annual actuarial certification and the determination of when a plan is in endangered or critical status. The proposed regulations only apply to multiemployer plans in effect on July 16, 2006. The regulations are applicable to plan years ending after March 18, 2008, but only with respect to plan years that begin on or after January 1, 2008.

Annual Actuarial Certification

Within 90 days of the beginning of each plan year, the plan's enrolled actuary must certify to the IRS and to the plan sponsor whether the plan:

- Is or will be in [endangered](#) or [critical](#) status for the plan year; and
- Is making progress in meeting the requirements of the [funding improvement plan](#) or [rehabilitation plan](#), if the plan is already in endangered or critical status.

If the actuary fails to certify the plan's status by the required date, the plan is subject to a penalty of up to \$1,100 per day. It is important that sponsors submit plan information as soon as possible in order for the plan's enrolled actuary to complete the plan valuation and actuarial certification.

The proposed rules require the actuarial certification to contain the following information:

- Plan identification information that includes the name of the plan, the plan number, the plan sponsor's name, address and telephone number, and the plan year for which the certification is made;
- Enrolled actuary information such as the enrolled actuary's name, address and telephone number, the actuary's enrollment identification number, the actuary's signature and the date of the signature;
- Plan status information such as whether or not the plan is in endangered, seriously endangered or critical status; and
- Whether or not the plan is making scheduled progress in meeting the requirements of its funding improvement plan or rehabilitation plan, if applicable.

In determining the value of assets and liabilities, the actuary must use reasonable actuarial estimates, assumptions and methods that offer the actuary's best estimate of anticipated experience under the plan. However, there is an exception that requires that any projection of industry activity or industries covered by the plan, including future covered employment and contribution levels, must be based on information provided by the plan sponsor, and the plan sponsor must act reasonably and in good faith.

Endangered Status

A multiemployer plan is in “endangered status” if the plan is not in critical status and the:

- Plan’s funded percentage is less than 80%; or
- Plan has an accumulated funding deficiency for the current plan year or a projected accumulated funding deficiency for any of the next six plan years.

A plan is in “seriously endangered status” if both of the above situations exist.

A plan in endangered or seriously endangered status must adopt a funding improvement plan within 240 days after the deadline for the actuarial certification. A funding improvement plan is a plan that consists of the actions, including options, to be proposed to bargaining parties to improve the funding status of the plan.

Critical Status

A multiemployer plan is in critical status if it meets any one of the following criteria:

- The plan is less than 65% funded and the sum of (1) the market value of plan assets, plus (2) the present value of reasonably anticipated employer contributions for the current plan year and each of the six succeeding plan years is less than the present value of all nonforfeitable benefits projected to be payable under the plan during the current plan year and each of the six succeeding plan years, plus administrative expenses;
- The plan is projected to have a funding deficiency for the current or next three succeeding plan years;
- The plan’s normal cost for the current plan year, plus interest for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last day of the preceding plan year exceeds the present value of the reasonably anticipated employer and employee contributions for the current plan year, and (1) the present value of nonforfeitable benefits of inactive participants is greater than the present value of nonforfeitable benefits of active participants and (2) the plan has an accumulated funding deficiency for the current plan year, or is projected to have an accumulated funding deficiency for any of the four succeeding plan years; or
- The sum of the market value of plan assets plus the present value of the reasonably anticipated employer contributions for the current plan year and each of the four succeeding plan years is less than the present value of all projected benefits and expenses payable under the plan during the current plan year and each of the four succeeding plan years.

A plan in critical status must implement a rehabilitation plan, which allows the plan to emerge from critical status within a 10-year period or at a later date if that is not possible. The rehabilitation plan must be adopted no later than 240 days after the due date of the enrolled actuary’s certification that it is in critical status. The rehabilitation plan may include reductions in plan expenditures, reductions in future benefit accruals, and increases in contributions. Reductions in adjustable benefits may also be implemented.

Plans in critical status may not:

- Make accelerated payments. In general, an “accelerated payment” is any payment to a participant or beneficiary that exceeds the monthly amount payable under a single life annuity (plus any social security supplement). The most common example of an accelerated payment is a lump sum payment.
- Purchase annuities from an insurer to pay benefits.

However, the proposed rules do allow for the payment of:

- Mandatory cash-out payments; and
- Makeup payments in the case of a retroactive annuity starting date or any similar payment owed to a participant with respect to a prior period.

Correction of Erroneous Restrictions

The regulations provide that if the [notice](#) has been sent to participants and it is later determined that benefit restrictions should not have been applied, the plan must correct any benefit payments that were restricted in error. *For example: If the plan's enrolled actuary reasonably expects the plan to be in critical status with respect to the first plan year beginning after 2007, and the notice to participants is sent, but the plan is not later certified to be in critical status for that plan year, then the plan must correct any benefit payments that were restricted after the notice was sent.*

Additional Guidance

The proposed regulations do not address all issues relating to multiemployer plans. For example, the regulations do not provide guidance on the adoption of a funding improvement plan or a rehabilitation plan. They also do not address the sunset provision provided by PPA, which indicates that the funding rules for plans in endangered or critical status will sunset after December 31, 2014. The IRS has indicated that additional guidance will be included in a second set of regulations that are expected to be issued this year.

DOL Model Notice

Effective for plan years beginning after 2007, PPA requires sponsors of multiemployer defined benefit pension plans that are or will be in endangered or critical status for a plan year to provide a notice of this status to:

- Participants;
- Beneficiaries;
- The collective bargaining parties;
- The Pension Benefit Guaranty Corporation; and
- The Department of Labor

within 30 days of the actuarial certification that a plan is in endangered or critical status.

The notice must include an explanation of the possibility that:

- [Adjustable benefits](#) may be reduced; and
- Reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided for the first plan year in which the plan is in critical status.

“Adjustable benefits” include benefits that would otherwise be protected under the IRS [anti-cutback rules](#), such as early retirement benefits and retirement-type subsidies and disability benefits not in pay status.

The DOL has issued proposed regulations containing a model notice, entitled “[Notice of Critical Status](#)” that a multiemployer plan may use. The IRS has indicated that it will consider the sponsor of a multiemployer plan in critical status who uses the model notice to satisfy the PPA requirements. While the model notice specifically relates to a plan in critical status, the DOL has indicated that the model notice may also be useful in preparing notices that must be furnished by plans in endangered status.

Plan sponsors are not required to use the model notice. However, plan sponsors that do use the model notice before the final regulations are issued are assured that they have satisfied the notice and content requirements as long as the notice is accurately completed and timely furnished.

Plan sponsors may mail the notice to the DOL at:

U.S. Department of Labor
Employee Benefits Security Administration
Public Disclosure Room, N-1513
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Alternatively, plan sponsors may e-mail the notices to criticalstatusnotice@dol.gov.

To satisfy the PBGC notification requirement, plans may mail notices to:

Multiemployer Program Division
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Suite 930
Washington, D.C. 20005

Plan sponsors may also e-mail the notices to multiemployerprogram@pbgc.gov.

The proposed IRS regulations provide that if the notice has been sent to participants before the required date but did not include all of the information, benefit restrictions will not apply. However, if an additional notice that includes all of the necessary information is provided before the required date, then the notice requirements are satisfied as of the date of the additional notice and any benefit payment restrictions will apply beginning on that date.

PBGC Guidance

The PBGC recently issued guidance to apply the PPA provisions that require changes in the allocation of unfunded vested benefits to employers that withdraw from a multiemployer plan in critical status.

To encourage employers to negotiate with bargaining units to adopt a schedule of benefits and contributions consistent with the rehabilitation plan, PPA requires employers with collective bargaining agreements that are inconsistent with the rehabilitation plan to pay a surcharge equal to:

- 5% of the required contribution for the first year that a plan is in critical status; and
- 10% of the required contribution for each subsequent year that a plan is in critical status.

The proposed PBGC rules provide that [adjustable benefits](#) and employer surcharges are disregarded in determining a plan's unfunded vested benefits and allocation for purposes of determining an employer's withdrawal liability.

This guidance is effective for plan years beginning on or after January 1, 2008.

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 new rules pertaining to benefit restrictions or actuarial certifications relating to benefit restrictions, you should contact your plan's enrolled actuary.

Pension Analyst by Prudential Retirement

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