NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS
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Submitted electronically via
the Federal eRulemaking Portal at:
**http://www.regulations.gov(IRS REG–136701-07)**

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CC:PA:LPD:PR (REG–136701-07),
Courier's Desk, Internal Revenue Service,
1111 Constitution Avenue, NW.,
Washington, DC

Re: Proposed Regulations Implementing Section 401(a)(35) of the Internal Revenue Code

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to provide these comments on the proposed regulations implementing Section 401(a)(35) of the Internal Revenue Code (IRC).

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million active and retired workers, who rely on multiemployer plans for pension benefits, and the twenty- six million health actives, retirees, and their families who receive health and other benefits from multiemployer plans. Its purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans, and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries.

**Introduction**

IRC section 401(a)(35) establishes diversification requirements for certain defined contribution plans invested in employer securities. Congress added this provision to the Code in section 901 of the Pension Protection Act of 2006, Public Law 109-280, 120 Stat. 780 ) (PPA-06), following several highly publicized instances in which employees lost much of their retirement savings because of a "stock drop." In those cases, employees were required to hold employer securities in their plan accounts, and they lost money when the value of the employer stocks dropped precipitously. The NCCMP fully supports protections for employees whose employers have control over investments in employer securities, and we believe that the proposed regulations are effective in implementing the intent behind section 401(a)(35). Noting the significant differences between single employer and multiemployer plans, however, we respectfully encourage you to make it clear in the final regulations that the diversification requirements do not apply to multiemployer plans under circumstances in which contributing employers have no control over investments in employer securities.

Specifically, we recommend that the final regulations exempt from the diversification requirements of section 401(a)(35) employer securities held by investment managers for multiemployer pension plans, where the following two conditions are met: (A) the multiemployer plan board of trustees has delegated the authority to buy and sell securities to an investment manager described in section 3(38) of ERISA; and (B) the investment manager has made an independent determination to purchase and/or hold the employer securities.

**1. Multiemployer plans differ in structure and administration from single employer plans.**

Multiemployer plans are distinctive in ways that may necessitate accommodation under the regulations, as is common under other income tax regulations. Under federal law, a multiemployer plan is an employee pension, health or welfare benefit plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more labor organizations and more than one employer. Multiemployer plans are often the sole vehicle by which small employers can provide defined benefit pension and comprehensive health coverage to their employees in a cost effective manner. Providing these benefits helps small employers recruit and retain good employees.

Multiemployer plans are unique in providing benefit coverage that is portable between different employers. These plans are the only practical means for providing employee benefits in industries characterized by large numbers of small employers with mobile workforces who work for a variety of different employers within their industry over the course of their working careers. For example, in the building and construction industry, it is common for a worker to be employed by scores of different contractors during his or her working life. A construction worker's employment with a particular contractor may last only a day, a week, a month, or a year or more, depending upon the duration of the project and other considerations. The same contractor may employ the worker for several different periods.

Absent central trust funds to which the worker's various employers must contribute on his or her behalf and through which he or she can accumulate benefit credit for all of his or her covered employment, many such mobile workers would never qualify for pension, health, or welfare benefits. In addition, all participating employers, as well as the plan participants and beneficiaries, benefit from the economies-of-scale cost savings realized through central administration and pooling of resources. Less money spent on administration is more money for benefits and less pressure for increased employer contributions.

Almost all currently operational multiemployer plans were developed after the passage of the Taft-Hartley Act of 1947. Typically, through collective bargaining, a labor union and employers whose employees are represented by the union agree to establish a multiemployer plan to provide pension, health, and/or welfare benefit coverage for active and retired employees and their families. The union, the employers, and the designated trustees enter into a trust agreement, which creates the trust fund and defines the authority and responsibilities of the joint labor-management trustees. The employers agree in their collective bargaining agreements with the union to contribute to the trust fund at certain rates that are typically based upon hours worked by the covered employees.

Over the years that follow, the employers and union periodically renew their collective bargaining agreements requiring employer contributions to the trust fund. Additional employers may be negotiated into the multiemployer trust fund by the union under the same or different collective bargaining agreements requiring employer contributions and binding the employers to the trust agreement. They are especially common in the building and construction, clothing and textiles, food and commercial, bakery and confectionary, trucking, maritime, hotel and restaurant, entertainment, light manufacturing, mining, service, longshore, healthcare, graphics design, news service, manufacturing, retail sales and communications industries.

Like single employer plans, multiemployer defined benefit and defined contribution retirement plans are subject to the rules of the Internal Revenue Code and ERISA. The Code contains several special multiemployer plan provisions, reflecting the distinct nature of these plans as compared with single employer plans that are unilaterally controlled by their employer-sponsors.

**A. Employer sponsors of multiemployer plans lack control over and even concurrent knowledge of plan investments in employer securities.**

A multiemployer plan is a legal entity that must, by law, be separate from the contributing employers and sponsoring union. Unlike single employer plans, contributing employers to multiemployer plans are generally not involved in plan administration or investments. An employer may be involved in the selection of a employer trustee, and an employee of the employer may serve as a trustee, but the employer's involvement ends there. The plan's board of trustees has the exclusive right and responsibility to manage the plan's operations, and is the "plan sponsor" under section 3(16)(B)(iii) of ERISA. The trustees typically delegate the authority and responsibility for day-to-day administration to an administrator, and some of their authority regarding investments to one or more investment managers.

Investment managers are appointed under section 402(c)(3) of ERISA, and must meet the requirements described in section 3(38), including those of the Investment Advisers Act of 1940. The trustees provide the investment managers with investment guidelines they have developed, often with the assistance of an ongoing investment adviser. Investment advisers do not have to be investment managers within the meaning of section 3(38) of ERISA; their duties are generally limited to advising boards of trustees regarding asset allocation decisions, investment guidelines, standards for evaluating managers, manager performance, and searches for new managers. Neither the board of trustees nor the investment advisor will decide upon or make an actual investment. Further, they do not have advance notice of a manager's stock picks, and learn the details of the manager's holdings only when they receive the investment advisor's periodic reports.

Investment managers are given set amounts to invest, and they do the actual stock or bond selection and purchase. In many cases, a plan will select a manager for its expertise in a particular area of the market, such as domestic large-cap equities, or fixed-income. Managers report to and are subject to review by the board, but they retain sole authority for investment decisions with respect to the money allocated to them. As long as trustees act prudently in selecting and monitoring an investment manager, they will not be liable for losses resulting from that manager's investment decisions. *See* section 405(c)(2) of ERISA.

This investment structure is found in both defined benefit and defined contribution multiemployer plans. There are many multiemployer defined contribution plans that are not 401(k) plans and that give no authority to participants to direct their own investments. Just as they do for defined benefit plans, trustees for those plans hire investment advisors and managers, leaving individual investment decisions to the experts.

**B. Circumstances surrounding multiemployer plan investments do not present the policy concerns the proposed regulations seek to address.**

When the decision to invest in the securities of a contributing employer is made by a professional investment manager independent of the sponsoring employer, and when statutory limits on employer stock investments apply, the policy behind the diversification rules is absent. The PPA's employer securities diversification provisions arose out of Congressional concern for the plight of employees who had been required to invest their retirement assets in employer stock and whose retirement savings were then wiped out by sudden bankruptcies. Congress was concerned about two things: (1) the heavy concentration of pension plan investments in employer securities; and (2) the inherent conflicts of interest that exist when sponsoring employers play a role in plan design, administration, and investment. *See* September 2002 Report to the Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, "Private Pensions: Participants Need Information on the Risks of Investing in Employer Securities and the Benefits of Diversification," Letter of Barbara D. Bovbjerg, Director, Education, Workforce, and Income Security Issues and Richard J. Hillman, Director, Financial Markets and Community Investments to the Honorable Paul S. Sarbanes (GAO-02-943).

Neither concern is present when multiemployer plans invest in employer securities. First, sections 406(a)(2) and 407(a) of ERISA prohibit multiemployer plans from holding employer securities exceeding 10 percent of the fair market value of plan assets. We do not suggest that this restriction be eased for these plans.[*] Second, employers play no role in selecting a plan's investments; that function belongs exclusively to the legally distinct board of trustees and the independent experts that they retain.

Many multiemployer plans make an extra effort to assure the professionalism of their investment managers by requiring all of them, not just real estate managers, to be Qualified Professional

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[*] For multiemployer plans, we would interpret the restriction to apply separately with respect to the securities of each contributing employer. For example, if a multiemployer plan held a total of 11 percent of employer stock, made up of three percent of each of two different employers, and four percent of a third employer, the plan would not violate section 406(a)(2) of ERISA.

Asset Managers (QPAMs). Multiemployer plan systems and structure all work to insure that investment managers are not weighed down with the employers' potential for conflicts of interest. The manager's job is to evaluate an investment on its individual merits, treating each as it would the securities of any other corporation. To permit individual participants to direct the sale of some of these securities, when the participant has no authority to direct investments under any other circumstances, would add a significant burden to the manager's investment decisions and administrative processes. That burden would inevitably lead to a manager's disinclination to invest in employer stock, thus potentially depriving plan participants of access to valuable investments. Nothing in the PPA or its legislative history suggests that the diversification rules were intended to lead to this result.

**C. Many multiemployer plans would find it difficult, if not impossible, to comply with the proposed regulations.**

Unlike single employer plans, many multiemployer plans do not have the administrative systems necessary to give participants the ability to direct the sale of employer securities. As its name suggests, a single employer plan has no difficulty identifying its plan sponsor – there is only one. Multiemployer plans, on the other hand, can have hundreds of contributing employers, and the list changes frequently. In fact, plan administrators may not even be able to identify all of the publicly-held employers. For example, when a wholly-owned subsidiary company signs a collective bargaining agreement and begins contributing to a plan, the plan may not know that a publicly-held parent even exists. In the complex world of labor relations, plan administrators can be the last to learn all of the potentially relevant details of a union-employer relationship.

Administrators would also face serious obstacles in trying to determine which participants should have the authority to direct the sale of securities. As noted in part 1, above, multiemployer plan participants move from employer to employer, often on a weekly or daily basis. Administrators do not receive specific notice of these moves, and can only try to identify them by parsing through monthly contribution reports of contributing employers. Even that would be a difficult task, because contribution reports generally do not include the specifics about the exact days of the month on which a particular participant worked. By the time an administrator determines the facts necessary to pass on a sell direction to an investment manager, the participant may have moved on to a different employer.

In the case of some multiemployer plans, participants do not even work for particular employers. One example is that of longshoremen, who are assigned work through a union hiring hall. During their time on the docks, they will load and unload cargo for many different companies. Employers make their contributions through an employer association, and report hours to the association. At some point during the year, the actuary advises the association of the required contribution amount, and the association then sends the contribution and reports the hours to the plan. Although some of the details may vary depending upon the port and the local union, administrators of plans in the longshore industry would find it nearly impossible to match individual participants to particular employers on any type of current basis. It is no understatement to say that multiemployer plan administrators face recordkeeping complexities that single employer plan administrators have never imagined.

**D. Exempting employer securities held by multiemployer plans is consistent with the exemptions the Internal Revenue Service has already proposed.**

The proposed regulations already exempt securities held under circumstances obviating the need for participant diversification rights. These include securities held a plan to the extent they are held indirectly through--

> (1) An investment company registered under the Investment Company Act of 1940;
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> (2) A common or collective trust fund or pooled investment fund maintained by a bank or trust company supervised by a State or a Federal agency;
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> (3) A pooled investment fund of an insurance company that is qualified to do business in a State; or
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> (4) Any other investment fund designated by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin.
>
> (B) Investment must be independent. The exception set forth in paragraph (f)(3)(ii)(A) of this section applies only if the investment in the employer securities are held in a fund under which--
>
>> (1) There are stated investment objectives of the fund; and
>>
>> (2) The investment is independent of the employer and any affiliate thereof.

1.401(a)(35)-1(f)(iv)(B)(3)(ii)(A).

Securities managed by a multiemployer plan's investment manager meeting the requirements of section 3(38) of ERISA would provide the same protections as the investments described above. The investment manager would be required to comply with the stated investment objectives of the plan, and the investment would be independent of the employer and any affiliate of the employer. As described above, investment managers are given exclusive authority to make investment decisions regarding the amounts allocated to them. The board of trustees retains only oversight authority, and plays no role in the selection of particular securities.

**2. Multiemployer plans should be required to meet certain conditions for an exemption for employer securities held by investment managers.**

The NCCMP recommends that the final regulations exempt from the diversification requirements of section 401(a)(35) certain securities held by investment managers for multiemployer pension plans. The exemption should be limited to those situations in which (A) a board of trustees has delegated the authority to buy and sell securities to an investment manager described in section 3(38) of ERISA; and (B) the investment manager has made an independent determination to purchase and/or hold the employer securities.

Thank you for the opportunity to provide comments on this important issue. We will be pleased to provide any additional information that you might find useful.

Respectfully submitted,

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