

# NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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CC:PA:LPD:PR (REG-130241-04)  
Room 5203  
Internal Revenue Service  
POB 7604, Ben Franklin Station  
Washington, DC 20044

Electronic submission: <http://www.irs.gov/regs>

Re: Proposed Regulations under IRC Section 415

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (NCCMP) is pleased to offer these comments on the proposed restatement of the regulations under IRC section 415. We also request the opportunity to testify at the upcoming hearing on the proposal.

The NCCMP is a non-profit, non-partisan advocacy organization formed in 1974 to protect the interests of plans and their participants following the passage of ERISA and the increasingly complex legislative and regulatory environment that has evolved since then.

Multiemployer plan benefits, supported by and provided for rank-and-file workers covered by collective bargaining agreements, are typically relatively modest. As a result of the EGTRRA changes, the section 415 limits are no longer much of a consideration for the great majority of multiemployer plans. However, times and economic conditions change, and EGTRRA's reforms in the section 415 realm are not yet a permanent part of the law. Accordingly, it is important that the 415 regulatory structure work for multiemployer plans, when and if the time comes once again for many multiemployer plans to implement the limits.

These comments focus on three features of the proposal of special concern to multiemployer plans: the special rules for plans maintained by more than one employer, the exclusion from the definition of compensation of payment for services after the end of direct employment, and the rules on multiple annuity starting dates.

## **1. Employer-by-Employer Application**

The proposed restatement of the regulation would apparently eliminate an important right granted to multiemployer plans under current law: the ability to apply the section 415 limits to individual

participants' benefits on an employer-by-employer basis. This radical change is not even mentioned, much less explained, in the Preamble.

The current regulation grants this right, in section 1.415-2(e)(2). Starting around the mid-1990s, as the 415 limits emerged as a significant issue for multiemployer plans, the dimension of the problem was kept at manageable levels by the ability of plans to divide up the benefits and test them separately.

The policy behind the separate-testing option is evident: participants should not be forced to receive lower benefits because their unions have negotiated to have them provided through a multiemployer plan than the law would allow if each of their employers had sponsored a separate single employer plan. The law does not and should not demand that all workers participating in multiemployer plans accept lower legal limits on their pensions, as if that were some kind of exaction in return for the portability and stability that multiemployer plans afford. For the same reason, the regulations call for multiemployer plans to apply the section 401(a)(17) compensation cap on an employer-by-employer basis, Treas. Reg. section 1.401(a)(17)-1(b)(4).

Wisely, the current section 415 regulation accommodates multiemployer plans' need to minimize administrative complexity, making separate testing optional for multiemployer plans rather than requiring it across the board. It also leaves them with reasonable flexibility to design a workable approach.

We urge the Treasury and IRS to retain this sensible solution and add the existing text of section 1.415-2(e)(2), on employer-by-employer testing by multiemployer plans to section 1.415(a)(1)(e) of the ultimate regulation.

## **2. Residuals as Core Compensation in the Entertainment Industry**

Section 1.415(c)-2(e) of the proposed regulation would disallow payments made more than 2-1/2 months after severance from employment from the definition of compensation under section 415. This could prevent participants in multiemployer plans from receiving defined-contribution plan allocations and making 401(k) deferrals in years when they only earn pay from sponsoring employers for services that they performed in earlier periods. In the entertainment industry – most of which is covered by multiemployer plans – that might mean walling off one of their major sources of industry compensation: residuals.

Pursuant to collective bargaining agreements, residuals are payable to a creative artist (actor, writer, director, musician, designer, etc.) when his or her work is re-used commercially, through rebroadcast, re-release, reproduction on DVD, etc. The long-standing practice in the industry is to count residuals as current pay for benefits purposes. Accordingly, residuals received in a year are treated as pay earned in that year, entitling the individual to continued or restored health coverage as well as retirement-plan credit as an active participant and obligating the employer that makes the payment to contribute for those benefits.

Compensation in the form of residuals is an organic element of employment relations in the entertainment industry. Its purpose is not to defer compensation, but to recognize that the talent in this industry earns their pay when their work is displayed, not just when it is created. Much (sometimes even most) of the value of their service is determined by the market's willingness to continue paying to see or hear it, so their compensation is only payable as those payments continue or resume.

We recommend that residuals payable in the entertainment industry be recognized as compensation under section 415(c), regardless of how the regulations treat other types of compensation payable after the conclusion of the individual's on-site services.

### 3. Multiple Annuity Starting Dates

As other commentators have pointed out the dramatic effect that the proposed approach would have on the ability of early retirees to receive future benefit increases, we are not repeating their analyses and demonstrations here. Under present conditions those problems are unlikely to restrict many multiemployer-plan benefits directly. However, as noted at the outset of these comments, we are concerned about the possible future impact of these rules, and we urge you to pay particular attention to the concerns raised about the proposed need to adjust benefit payments actuarially for the period between ages 62 and 65, when there is no comparable adjustment in the section 415 dollar limit.

Of more current concern for multiemployer plans is the requirement for complex data-retrieval and analysis under situations where there is virtually no danger of a knowing section 415 violation and little chance of an inadvertent one.

Unlike single employer plans of comparable size, multiemployer plans have in the past upgraded retirees' benefits rather frequently. We expect that the current financial constraints facing multiemployer plans will pass in due time, and that once prosperity is restored plan trustees will again be in a position to update retirees' benefits to help them maintain decent living standards. We urge you to streamline the ability of multiemployer plans to provide those improvements, especially for the oldest of their retirees who are probably in the greatest need.

**Thirteenth Checks.** In many multiemployer plans there is a tradition of sharing the benefits of good returns with retirees through what is called a "13<sup>th</sup> check", that is, a one-time additional cash payment made to people on the benefit rolls that year. We urge you to provide a safe harbor that dispenses with retrospective 415 testing for this type of payment. To avoid overloading a small benefit increase of this type with costly administration, they are already excluded from the concept of an eligible rollover distribution, see Treas. Reg. section 1.402(c)-2, Q&A(6)(b)(2). We recommend that the section 415 safe harbor be defined in the same way, either by cross-reference or incorporation of the same text.

In this connection, the NCCMP recommends one update to the relevant section 402 regulation. The cited provision states that a supplemental payment will be treated as part of a series of periodic payments if, among other things, the amount is no more than 10% of the annual pension or, if higher, \$750. The regulation was adopted in 1995. With indexing, the dollar cap should by now be roughly \$1200. We recommend raising the figure to \$1500, as it is likely to be several years before many multiemployer plans will again be considering retiree benefit increases, by which time today's \$1200 will be out of date.

**Broad-Based Increases in Modest Benefits.** We also recommend a second safe harbor to ease the way administratively for permanent retiree benefit increases in multiemployer plans, when they are once again affordable. We suggest that individualized testing be dispensed with for benefits that are, after the increase, no more than 60% of the currently applicable dollar limit based on the recipient's current age and without regard to payment form, or 75% of the current limit based on the person's age at retirement.

This safe harbor could be made available beyond multiemployer plans based on criteria requiring that they be fairly broad-based, perhaps borrowing from concepts used for IRC section 401(a)(26).

**Other Approaches.** Doubtless there are other combinations of factors that could be assembled to simplify the application of section 415 when retiree benefits are being updated for broad-based groups such as those covered by multiemployer plans, which we would be happy to discuss with you at greater length. For example, another consideration that argues for a relatively generous approach to multiemployer-plan retiree benefit updates is the fact that so many of those plans were compelled to adopt

retroactive benefit increases in the 1990s in order to preserve the employers' tax deductions and shelter them from excise tax penalties.

Since 2001 both Congress and the IRS have modified the application of the deduction limits to multiemployer plans going forward so this problem is unlikely to recur, but it would be regrettable if long-term retirees are precluded from receiving pension adjustments because of what happened in the past.

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On behalf of the multiemployer-plan community, we appreciate your attention to these concerns, and will be happy to provide any further information or analysis on any of these points that you might find helpful.

Sincerely,

***Randy G. DeFrehn***

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