NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Proposed Regulations Relating to Multiemployer Plan Funding under Internal Revenue Code § 432 (REG-151135-07)

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (NCCMP) is pleased to have the opportunity to comment on proposed Treas. Reg. § 1.432-1, the proposed regulation on multiemployer funding determinations under §§ 432 of the Internal Revenue Code (IRC) and 305 of ERISA.[1] We also recommend that the Service consider holding a hearing on the proposal, and request the opportunity to appear at it.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer defined benefit pension plans for retirement income security. Our 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 non-partisan, nonprofit organization, with affiliated plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

The NCCMP played a leading role in the Multiemployer Pension Plans Coalition, the bipartisan management-labor group that worked closely with Capitol Hill in developing the special multiemployer funding rules in the Pension Protection Act of 2006 (PPA). Many NCCMP affiliates have just completed the first round of status certifications under § 432, and the rest – whose plan years do not coincide with the calendar year – have the process currently under

[1] For convenience, in referencing the statute this comment will refer to IRC § 432, although the same observations pertain as well to the parallel provisions in ERISA.

way. Accordingly, we are sharing with you a number of the issues encountered in the course of NCCMP affiliates' experience, to help inform your rulemaking on this subject.

We are grateful that the Treasury and IRS have acted carefully and deliberatively in addressing the multiemployer provisions of PPA. The law was designed to make multiemployer plan trustees and stakeholders more clearly accountable for bringing their plans into financial balance and to give them additional flexibility to design industry-appropriate approaches for doing so. Premature regulatory strictures could freeze trustees' and bargaining parties' ability to respond before all of the dimensions of the challenge are fleshed out. NCCMP commends the Treasury and IRS for their caution in avoiding that, while providing guidance on questions for which a clear answer is necessary so that the multiemployer community knows the ground rules within which it must function.

Nonetheless, there is room for improvement before the proposal becomes final. Our comments fall into three categories: those dealing with process-related aspects of the proposal, reactions to the substance of the proposal, and suggestions for additional guidance under § 432. We have not addressed issues where the NCCMP's affiliates hold clear but differing views.

A. Process Issues

1. Estimate of time needed to comply. Although ordinarily we would not review the Paperwork Reduction Act estimates of the compliance burden associated with a proposed regulation, in this case the reported estimate seems to be strikingly at variance from what NCCMP affiliates have encountered. In the Preamble to the proposal, IRS and Treasury report that, on average, compliance should take 45 minutes per plan (specifically, the estimate is 0.75 burden hours). Moreover, the Preamble suggests that this estimate covers the time needed to meet both the certification and the resulting notice requirement for endangered and critical plans.

The proposed regulation itself adds little or nothing to the compliance burden; perhaps the estimate relates only to the estimated incremental burden added by the proposal. But completing the certification process prescribed by the law will consume substantially more than 45 minutes, especially for plans that may be in critical or endangered status and therefore need more intensive services. Among the resources marshaled to accomplish the status certification and notices are:

- Trustees' time reviewing the issues and options with their professional advisors and complying with their requirement to provide projected industry activity to the actuary;
- Fund Office time assembling financial and demographic data and preparing mailings;
- Investment consultants and advisors, and auditors and bookkeepers, gathering and reviewing financial information on an accelerated basis;
- Legal counsel's time analyzing the legal requirements and explaining them to the trustees, and drafting or reviewing notices, and
- The actuary's time analyzing the data and performing, reviewing and communicating the various projections and other tests.

Compounding the time pressure is the fact that all of this work must be performed by no more than 90 days after the start of the plan year, with the notices sent out within 30 days after that – well before the traditional, orderly preparation and completion of the plan audit and valuation.

Depending on the circumstances of the plan, this process could easily consume anywhere from 10 to 40 or more hours, at least in the first few years. So that multiemployer plan fiduciaries, participants and contributing employers, not to mention Congress and relevant government agencies, are not misled into assuming that the status-certification process is a simple and speedy one lifted from otherwise available information, IRS and Treasury should clarify and correct the impression created by the burden-analysis in the proposal's Preamble.

2. Effective date. The proposed regulation was released March 14, 2008, two weeks before the deadline for actuaries to file status certifications for calendar-year plans. It is proposed to be effective for plan years *ending* after March 18, 2008.

Most multiemployer pension plans with significant funding problems had been focused on finding solutions since well before passage of the Pension Protection Act (PPA). In many cases where the plan was expected to be in critical status, the trustees and bargaining parties began their PPA compliance deliberations soon after the law was passed. This was especially urgent where major collective bargaining would be taking place in 2007 and 2008, and offered the opportunity for a head start on the Rehabilitation Plan contribution/benefit schedules. By March 14, 2008, the administrative, legal and actuarial analysis for the status certifications for most calendar-year plans was nearing completion and in some cases had been accommodated in collective bargaining agreements.

Of necessity, plans relied on their attorneys' interpretations of the law's requirements and their actuaries' views on how calculations and projections should be performed. While some of the key questions need a yes or no answer, on a number of them it is just as easy – or just as difficult – to decide on one as it is to opt for the other. In other words, reasonable people could study the context, the legislative environment, the goals of the law and the interaction of the words and come to more than one conclusion. Indeed, reasonable people did just that, on more than one point that was essential to the status certification, and some of them were caught short by the release of the proposed rule, given the answers that IRS and Treasury had tentatively settled upon.

Given the inadequate notice for 2008 and the considerable remaining uncertainty about some of the issues, we strongly recommend that, as with the single-employer proposed funding regulations, the effective date of this final rule be postponed to plan years beginning 90 or more days after publication of the final regulation. Along with this, the Treasury and IRS should also state explicitly that (a) plans must comply with a reasonable interpretation of the law prior to the effective date of the regulation, with the proposed regulation serving as a safe-harbor, and (b) if future guidance imposes tighter restrictions on plans and their sponsors it will be prospective only.

B. Substantive Issues

1. Application to terminated plans. Unlike single employer plans, when a multiemployer pension plan terminates under Title IV of ERISA it is not turned over to PBGC or an insurance company. Rather, its trustees continue to administer it in accordance with ERISA requirements, see ERISA

§ 4281, until all of the plan's liabilities can be paid in full. Multiemployer pension plans can terminate either by an amendment under which participants cease to be credited with service for any purpose or by withdrawal of all of the employers.[2] The statutory funding rules continue to apply to a plan that terminates by amendment, but not to one that terminates by mass withdrawal.[3] In lieu of meeting funding rules, a plan that has terminated by mass withdrawal must measure its ability to pay benefits against its assets annually and, if its finances fall out of balance, trim the benefits to an affordable level, ERISA § 4281.

As its caption states, §432 comprises "… funding rules for multiemployer plans in endangered or critical status." It provides tools and standards for plans would otherwise have difficulty satisfying the regular funding rules in § 431. It seems obvious that § 432 only applies to plans that are in fact subject to the § 431 funding rules. That is not the case for a mass-withdrawal terminated plan, where there are no further employer contributions and benefit reductions are prescribed by law. However, as there appears to be some interpretative uncertainty on this point, we suggest that the final § 432 regulation make this clear.

Pending issuance of the final regulation, to make clear that these terminated plans do not need to spend resources on unnecessary § 432 compliance we urge the IRS to publicize this conclusion as promptly as possible, through a Notice, Revenue Ruling or other expeditious means of communicating reliable guidance.

2. Date of emergence from the funding improvement or rehabilitation period – Echoing the statutory language, the proposed regulation confirms that the funding improvement and rehabilitation periods generally extend to the end of the 10th plan year, see subsections (b)(8), (b)(16). To clarify how this fits into the certification schedules, please confirm that this means the Funding Improvement or Rehabilitation Plan must aim to enable the pension plan to emerge on the first day of the immediately following plan year. That is, the certification for the 11th plan year would be based on projections that show that, as of the first day of that plan year, the pension plan is not in endangered or critical status. If this showing were required for the certification for the 10th plan year, the statutory correction period would effectively be shortened by one year.

3. Critical status benefit payment restrictions. If the final regulation continues to require that the notice of status certification identify the payment options that are restricted (see item B.8, below), it will be necessary to clarify which benefits are affected and how they are to be handled. In this connection, we recommend that the final regulation confirm that the restrictions do not apply to death benefits defined as a lump sum and payable under the plan only in that form (e.g., a flat dollar amount, or a "refund" of employer contributions made on the participant's service).[4]

[2] A third type of multiemployer pension plan termination described in ERISA § 4041A, conversion to a defined contribution plan, is conceptually just a variation of a mass withdrawal, as the employers' obligation to fund the defined pensions is switched to an obligation to contribute to participants' individual accounts.

[3] In both cases the trustees remain responsible for plan operations, including benefit payments, management of assets, collection of withdrawal liability, reporting and disclosure, etc., plus special monitoring required of terminated plans.

[4] This would be consistent with the comparable restrictions imposed on terminated multiemployer plans under ERISA § 4041A(f)(1). The differences between the two sets of constraints aimed at conserving plans' cash-flow

If the front-loaded payment restriction does apply to death benefits that, under the plan, are payable only in a single sum, guidance is needed to specify the alternative payment form. Clearly the law does not mandate that they be eliminated entirely, as post-retirement death benefits are among those in the list of adjustable benefits that trustees can choose to reduce or eliminate in the Rehabilitation Plan benefit/contribution schedules, § 432(f)(8)(A)(iv)(I). If one is needed, we suggest a rule requiring lump-sum death benefits, in this circumstance, be paid in monthly installments equal to the deceased employee's accrued monthly benefit payable at normal retirement age, with appropriate adjustment for interest.

4. Funding method used in applying status tests. As the Preamble explains, the proposed regulation limits the statutory direction to use the unit credit funding method for certain of the tests (§ 432(i)(8)). Thus, in projecting whether a plan is expected to incur a funding deficiency, the actuary would use the plan's actual funding method. We agree that this is a sensible clarification.

5. Methodology for projecting contributions. The law describes two methods for projecting contributions for purposes of the status tests: use the prior year's contributions[5] or assume the rates prescribed in the current bargaining agreements remain in effect for the full projection period. The proposed regulation largely restates the statutory descriptions. This leaves open some important questions.

a) Sensible clarifications. As with the funding-method item noted in item 4, there are several points at which the literal words of the statute fall short. Below are several where we recommend that the final regulation could add clarity simply by deleting problematic references.

1) The Preamble to the proposed regulation says that, if the projection of contributions assumes continuation of current collective bargaining agreements, the plan sponsor must provide a projection of covered activity. But the covered-activity projection is needed regardless of the basis on which contributions are projected, as the text of the proposal seems to recognize. This should be acknowledged in the Preamble to the final regulation.

2) The proposal says that plan actuaries cannot use continuation of contributions approach to project contributions for purposes of applying the demographic/solvency red zone tests. We believe the general language of the statute should be interpreted to allow use of that approach for those purposes.

3) The proposal restates the two contribution-projection options identified in § 432(b)(3)(ii), with the lead-in that they apply for "any actuarial projection of plan assets". But in fact, as acknowledged in the Preamble to the proposal, contributions need to be projected for many purposes in applying the tests, including whether and when a funding deficiency is expected, what the benefits will be when the formula links them to contributions and how the plan measures up under the demographic tests. The final regulation should confirm that the § 432(b)(3)(ii) projection methods

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are due to the fact that § 432(e) takes into account changes in the rules under § 411(a)(11) since the enactment of ERISA § 4041A in 1980 .

[5] This is not permitted if there have been significant demographic changes that make it unreasonable. The continuation-of-contributions approach is a simplified test that enables the actuary to streamline the calculations where the likely result is clear.

can be used for all of the calculations required for the tests. Otherwise, it is difficult to see how the tests could be applied.

b) Filling gaps. Repeating the specific words of the statute, the proposed regulation could be viewed as describing a black-or-white, on-or-off choice of approaches for projecting contributions: either assume continuation of the terms of existing collective bargaining agreements (CBAs) or use the prior year's contributions. But without elaboration these choices would be inadequate for many multiemployer plans, often because the bases on which employers contribute is not fully laid out in CBAs and simply carrying forward last year's contributions would produce unreasonable results. Here are some suggested solutions.

1) If a CBA calls for contributions as a percentage of salary, the regulation should confirm that the actuary can assume payroll growth beyond the expiration of the agreement, for projecting contributions as well as benefit liabilities (if benefits are a function of contributions or salary). Freezing salary levels for contribution projection purposes only would be unreasonable, and inconsistent with actuarial principles.

2) For some or all of the participants, the contribution basis may be set out in a binding document that is not technically a CBA. For example, contribution rates mandated in a participation agreement serve the same function in funding a multiemployer plan as negotiated contribution rates – they allocate the required funding among the contributing employers in a rational and enforceable manner. The final regulation should confirm that the actuary can rely on participation agreements or other comparable binding documents as if they were CBAs, in projecting contributions in order to apply the status tests under § 432. This is particularly important since plans with significant demographic changes would have no prescribed basis for projecting contributions if there technically is no CBA.

3) The Preamble to the proposed regulation (although not the text of either the law or the proposed regulation itself) says that the fallback position absent a CBA is to assume the same *dollar amount* of contributions as the previous year. This implication that plans are bound to assume that future contributions would equal a frozen dollar amount should be dropped. Following the statutory direction, the final regulation should allow the actuary to project contributions assuming they will be made indefinitely on the same *basis* as was used in the previous year, applied to reasonably anticipated industry activity (plan participation, payroll, e.g.) for relevant future years, provided there are no significant demographic changes that would make such assumption unreasonable.

6. Content of the certification. The proposal lays out only bare-bones specifications for the content of the actuary's status certification, but warns that IRS and Treasury intend to ask for more information and invites recommendations on what should be added. We recommend that anything that is added to the certification requirement should be based upon the American Academy of Actuaries' standards for actuarial communications in connection with a statement of actuarial opinion, but no more than that should be required. The back-up information should be permitted to reference other documents that more completely provide specific information (e.g., summary of plan provisions contained in an actuarial valuation report).

The Preamble suggests that one possible add-on to the required certification might be a projection of the plan's future funded percentage. We submit that that would not be an

appropriate item to be reported on the actuary's status certification for a plan year, as a future funded percentage is not an element of any of the tests for either critical or endangered status. Significant additional effort and both financial and time resources would be needed to perform those projections, especially if they need to be certified as the actuary's best estimate. Unless trustees request that projection for their own planning purposes, actuaries will not otherwise be performing those calculations.

Any expanded list of items to be reported in the certification should only apply to certifications that are due for plan years beginning at least 90 days after publication of the new requirements. If the IRS/Treasury decide to require supplemental submissions with respect to certifications that have already been filed, actuaries should be given at least 90 days from the publication of the new requirements to prepare and submit the additional information.

7. Notice of status determination. The proposal restates the statutory requirement that notice be given to stakeholders, the Labor Department and the PBGC when a plan is certified as being in endangered or critical status. It offers little guidance on the content of the notices, other than saying that a plan that uses the DOL model critical-status notice will be deemed to be complying with this requirement.

a. We appreciate the ability to use the DOL model as a safe harbor. However, as drafted its usefulness is limited. The NCCMP has submitted substantial comments on the DOL's proposed model notice (copy attached). These include a number of recommendations for further guidance that are probably more within the jurisdiction of the IRS and Treasury, rather than the Labor Department, and we urge you to consider them. For example, the following suggestion from our comment to the Labor Department comments should be addressed in the final version of the proposed Treasury regulation at issue here:

> The Preamble to the proposed regulation says that the IRS and Treasury will treat the DOL model notice as meeting the notice requirement for critical-status plans. Given the wide range of plan circumstances that these notices will be addressing, including a wide and varied range of audiences, some modification of the model is likely to be necessary in almost all cases. The regulation should confirm that it is a model, not a prescribed form, and that plans can meet the statutory notice requirement by clearly communicating the basic information covered in the notice to the parties entitled to receive it, although the advance approval granted by IRS and Treasury only applies to the approved model.
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> It would be especially useful if the DOL and/or IRS-Treasury could publish a list of items that must be covered in the zone-certification notice, if they are relevant for the particular plan. It should also confirm that plans may present additional information in or with the notice if the trustees believe it would help the audience understand the plan's financial situation, the steps being taken to stabilize or improve it, and/or the potential impact on those to whom the notice is addressed. However, a self-designed notice (or notification package, if the information is presented in more than one document) would not be adequate if it had the effect of concealing the required information about the plan's status-certification.

8. Notice of Status Determination – 2. IRC § 432(f)(2) imposes restrictions on lump sum and similar distributions from critical-status plans, effective on the date the notice of status-certification is sent to stakeholders. However, in contrast with the notice of adjustable benefit

cuts that the statute demands (see § 432(b)(3)(D), (e)(8)(C)), the law does not prescribe a specific notification requirement in connection with the benefit payment restrictions. To fill that gap, the proposed regulation requires that the status-certification notice include an explanation of the distribution restrictions. The discussion of this in the Preamble says that a status-certification notice would not be valid if it does not contain an explanation of the distribution restrictions, and therefore would not be treated as providing adequate notice to retiring participants that their benefits might be cut.

The NCCMP certainly agrees that participants need prompt notice of the distribution restrictions. We would not oppose a reasonable rule requiring that those restrictions be described in the initial notice of the actuary's certification that the plan is in critical status. However, we submit that making timely satisfaction of that new notice requirement a condition of the plans' ability to reduce adjustable benefits is inappropriate. This is particularly so given the lack of clarity on what payment forms are restricted (see item B.3, above).

C. Suggestions for Future Guidance

In response to the invitation in the Preamble to the proposed regulation, here are a few suggestions of items for future guidance that IRS and Treasury should address as a priority.

1. Funding Improvement and Rehabilitation Periods – The need to determine the commencement of the Funding Improvement and Rehabilitation Periods presents one of the first sets of questions that needs to be resolved. To create an appropriate recovery program, endangered and critical-status plans and their stakeholders need to know when the recovery period starts. To do that, they need to know how to identify the "expiration" of a collective bargaining agreement.

   a. The NCCMP believes that the answer to this question will often be a matter of labor law, and recommends that the IRS and Treasury confirm that the determination of when a CBA is considered to expire is primarily a matter for the reasonable judgment of the plan's trustees, based on labor-law principles. That will avoid possible IRS and Treasury pronouncements that may clash with the operation of labor law, while guiding the parties to find their own answers to the following types of questions:[6]

   - What changes in a CBA can be treated as causing them to expire? Is a consensus reopener or termination of the prior agreement enough? An amendment?
   - What if the agreement stays in effect generally, but the terms relating to pension contributions are reopened and renegotiated?
   - Do new or renewed agreements under which employers agree to contribution rates provided in a schedule, which have the effect of eliminating the critical-status surcharges, have any effect on the start date of the Rehabilitation Period?
   - What is the expiration date of a CBA with an "evergreen" clause that states that the bargaining agreement remains in effect from year to year but either side can terminate it by, say, giving 60 days notice?

[6] Since the law sets the 3d plan year following the actuary's status certification as the outside limit for commencement of the correction period, the answers given in individual cases are not likely to have much collective impact on the security of the multiemployer system, in any event.

b. Some questions on this topic do hinge on an interpretation of § 432, and therefore should be answered by IRS and Treasury.

- If an amendment to, or reopener of, the pension provisions of a CBA is tantamount to an expiration of the CBA, does it matter for this purpose whether the new or renewed agreement occurs before or after the due date for the actuary's status certification?
- How are the active plan participants who are not union-represented taken into account in this calculus? We suggest that § 432(h) provides a clear guide to the answer. Following the principles of that subsection, the participation agreements that govern these employees' plan participation employees should be treated here as if they are CBAs that are scheduled to expire as of the dates indicated in § 432(h).

On the other hand, a different answer would be appropriate in the case of union-represented participants working under CBAs that expired before the due date for the actuary's status determination but have not yet been renewed. As the 75% concept is designed to enable trustees to launch a corrective program at a point when it would not disrupt the current bargaining cycle, we suggest it would not be reasonable to try to construct an expiration date for a CBA or related agreement that does not exist. Rather, the law says that the period starts after the expiration of CBAs covering 75% of the active participants. If CBAs or comparable agreements cover a lower percentage than that on the certification due date, the determination is governed by the default rule that starts the correction period on the first day of the plan year following the second anniversary of adoption of the corrective program. So, the percentage of active participants covered by CBAs would be determined by excluding those whose CBAs have expired from the numerator but not from the denominator of the fraction used to apply the 75% test.

2. Benchmarks and progress. Starting with the plan year after the Funding Improvement or Rehabilitation Plan is adopted, the actuary must certify whether the pension plan is making scheduled progress against its corrective program. IRS/Treasury should confirm that "progress" does not have to be linear, that is, it does not have to move in a consistently improving direction. Indeed it would be unreasonable to expect nothing but improvement until the end of the correction period, since often the reason the plan will be endangered or critical is that its funding position is projected to decline. Rather, future guidance should make clear that this calls on the actuary to determine and certify whether the plan is meeting the steps spelled out in its corrective plan, including the annual benchmarks required of critical status plans. Similarly, it should point out that the benchmarks can consist of actions the trustees or the bargaining parties will take, quantitative measures the plan will achieve, or both.

3. Critical-status surcharges. The IRS and Treasury could choose to give an answer to the question whether the surcharges are payable on contributions due 30 days after the employers are notified of their obligation to pay them, or on contributions due on work performed 30 days after that notice. Alternatively, you could assign that decision to the trustees in each case, to be answered based on their assessment of the best interests of the participants. If you do opt for one answer, it is imperative that you make it effective for surcharges payable no less than 60 days after publication of the final regulation, and that either of the two possible answers will be treated as a reasonable interpretation prior to that date.

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We appreciate your attention and consideration, and will be happy to provide any additional information on these matters that you would find useful.

Sincerely,

Randy G. DeFrehn
Executive Director