March 13, 2007

PPA – Multiemployer Issues for Technical Corrections/Legislative History

1. ERISA section 302(c)(1)(A)(i)/IRC section 412(c)(1)(A) (PPA sections 101/111) **(minimum funding waiver)**: Delete "under the plan is) unable" and substitute "under the plan are) unable".

2. PPA sec.114(c) **(cross reference in technical and conforming amendment to IRC section 414(l)(2)(B)(i)(I))**: Delete "the amount determined under section 431(c)(6)(A)(i) in the case of a multiemployer plan", as the last sentence in IRC section 414(l)(1) and 414(l)(2)(E), which were not amended by PPA, provide generally that the merger/spin-off rules do not apply to multiemployer plans.

3. PPA sections 201(b)/211(b) **(automatic use of shortfall method)**:

- In subsection (b)(1), change "… adopt, use, or cease using, the shortfall method and such adoption, use or cessation of use of such method …" to "… adopt or cease using the shortfall method and such adoption or cessation of use of such method …". Inclusion of the word "use" is redundant and therefore confusing.
- In subsection (b)(2)(A), change "the plan has not used the shortfall funding method during the 5-year period …" to "the plan has not adopted or ceased using the shortfall funding method during the 5-year period …". Read literally, the current language would not let a plan stay on the shortfall method for more than one year.
- With regard to subsection (b)(4), confirm in legislative history or otherwise that the benefit increase restrictions only apply to plans that use the new, automatic shortfall method, not to plans that had previously adopted shortfall under conditions that did not include those restrictions, or that adopt it with IRS approval in the future. (Note that the law only applies the restrictions to a plan that "is on the shortfall funding method pursuant to this subsection.")

4. ERISA sections 305(b), 305((c)(3)(A)(ii)/IRC sections 432(b), 432(c)(3)(A)(ii) (PPA sections 202/212) **(amortization extension references in various endangered and critical status determinations)**: Clarify that references to amortization extensions under ERISA section 304(d)/IRC section 431(d) as amended by PPA include extensions under pre-PPA ERISA section 304/IRC section 412(e). (IRS officials have told plans that extensions under ERISA section 304/IRC section 412(e) are *not* picked up by the references in PPA to extensions under ERISA section 304(d)/IRC section 431(d).)

5. ERISA sections 305(b)(2) and (e)(4)(B)/IRC section 432(b) and (e)(4)(B) (PPA sections 202/212) **(critical-status determination/emergence; revolving door)**: PPA provides that an amortization extension is disregarded in determining whether a plan is in critical status under the 3 triggers that involve a projected funding deficiency, but is taken into account in determining whether the plan has emerged from critical status because it is projected not to have a funding deficiency in the next 10 plan years. Under some circumstances, this could put a plan into critical status, exit under the emergence rule, and then go back into critical status the following year. To break the "revolving-door" cycle, we recommend that the critical status determination provision be amended to add a rule of application that provides that any particular amortization extension is disregarded in determining whether a plan enters critical status only the first time that it puts the plan into critical status. In addition, the emergence rule based upon the plan being projected not to have a funding deficiency in the next 10 plan years should be amended to clarify that, subject to the application of the rule in the preceding sentence, a plan cannot emerge if it is still in critical status under any of the other critical status triggers (i.e., one of the insolvency triggers).

6. ERISA section 305(c)(1)(B)(i)/IRC section 432(c)(1)(B)(i) (PPA sections 202/212) **(one required schedule for endangered plans)**: Delete subparagraph (II), to confirm that only one schedule (the default schedule) is required, as reflected in the lead-in language requiring the sponsor to provide the parties with "1 or more" schedules.

7. ERISA sections 305(c)(3)(A)(i)(I), (3)(B), and (4)(B)/IRC sections 432(c)(3)(A)(i)(I), (3)(B), and (4)(B) (PPA sections 202/212) **(endangered plan benchmarks)**:

♦ Clarify that the underfunding percentage on which the benchmarks are based is the percentage as of the beginning of the plan year in which the plan enters endangered status rather than the percentage as of the beginning of the funding improvement period, which may not commence for several years after the deadline for producing the funding improvement plan. Basing the benchmarks on the underfunding percentage as of the beginning of the first year of endangered status provides the trustees with certainty as to what benchmarks the plan must satisfy when they develop the funding improvement plan. More importantly, if the underfunding percentage were based on another date (such as the beginning of the funding improvement period), it would discourage early action by the trustees (because any action taken by the trustees prior to the date on which the underfunding percentage is based would only serve to raise the funding percentage that must be achieved by the end of the funding improvement period).

♦ Add a provision applying the seriously-endangered benchmarks and funding improvement period to a plan that goes into endangered status immediately after emerging from critical status. Otherwise, a plan that has climbed out of critical status will be subjected to benchmarks that are much stricter than a plan that is in seriously endangered status.

8. ERISA section 305(c)(4), (5)/IRC section 432(c)(4), (5) (PPA sections 202/212) **(endangered plan benchmarks/funding improvement period)**:

- Rationalize the possible shift back and forth from seriously endangered to non-seriously endangered benchmarks and funding improvement period. A plan that is or becomes seriously endangered (whether when it first enters endangered status or at a later date) should be subject to the 15-year/20% benchmark regardless of its funded ratio and should remain in that status regardless of future funding fluctuations. In addition, a new requirement should be added under which a seriously endangered plan could not leave endangered status until it is projected not to have a funding deficiency for the next 10 years -- the same emergence rule that applies to critical status plans. All of the other requirements (e.g., funding improvement plan, schedules, updates), benefit and other restrictions, and penalties, would continue to apply as long as the plan is in endangered status.

- Alternatively, PPA should be amended to eliminate the 80% trigger and rely solely upon a projected funding deficiency within the next 7 plan years in determining which plans are in endangered status. A projected funding deficiency within 7 years is a much more meaningful marker of financially-troubled status in a multiemployer plan as compared to basing such status solely on the plan's funding percentage. The 15-year/20% benchmark would apply to all plans in endangered status – there would be no seriously and non-seriously endangered distinction. A new requirement could then be added under which a plan could not leave endangered status until it is projected not to have a funding deficiency for the next 10 years -- the same emergence rule that applies to critical status plans. All of the other requirements (e.g., funding improvement plan, schedules, updates), benefit and other restrictions, and penalties, would apply as long as the plan is in endangered status.

9. ERISA section 305(d)(1)(C)/IRC section 432(d)(1)(C) (PPA sections 202/212) **(seriously endangered plans/interim steps)**: Clarify the interim steps the trustees of a seriously endangered plan are required to take pending commencement of the funding improvement period. The current language requires the trustees to take all reasonable actions before the start of the funding improvement period to increase the plan's funded percentage and postpone a projected funding deficiency by at least one additional year, which could be interpreted as forcing precipitous action (e.g., freezing plan accruals) before the start of the funding improvement period. Instead, the language should be revised to clarify that, pending commencement of the funding improvement period, trustees of a seriously endangered plan are required to take all reasonable actions necessary to begin stabilizing the plan's funded position (i.e., to minimize further declines in the plan's funded ratio) in a manner reasonably expected to be consistent with the plan's funding improvement plan.

10. ERISA sections 305(d)(2)(B) and 305(f)(4)(A)/IRC sections 432(d)(2)(B) and 432(f)(4)(A) (PPA sections 202/212) **(endangered status requirements during funding improvement period and critical status requirements during rehabilitation period)**: In the endangered status rules, delete clauses (i) and (ii) of ERISA section

305(d)(2)(B)/IRC section 432(d)(2)(B), which would prohibit any negotiated reduction in contribution rates or funding holidays during the funding improvement period, and provide that clause (iii) of ERISA section 305(d)(2)(B)/IRC section 432(d)(2)(B) (prohibiting the exclusion of new hires or younger employees) applies during the funding improvement period, subject to the limited exception discussed below. In the critical status rules, provide that clause (iii) of ERISA section 305(f)(4)(A)/IRC section 432(f)(4)(A) (prohibiting the exclusion of new hires or younger employees) also applies during the rehabilitation period, subject to the limited exception discussed below.

These changes are needed in order to conform the provisions governing plans in endangered status to the provisions governing plans in critical plans. The PPA contains restrictions that are designed to prevent employers from reducing contributions or excluding employees before the funding improvement or rehabilitation period begins. As currently structured, the PPA continues these restrictions <u>after</u> the funding improvement period has begun, but does not continue these restrictions <u>after</u> the rehabilitation period has begun. Because each schedule of contributions and/or benefits incorporated into a collective bargaining agreement after a funding improvement plan has been adopted must be consistent with the funding improvement plan and must be reasonably expected to allow the plan to achieve the funding improvement benchmarks, the restrictions should not apply once the funding improvement period has begun. The continuation of these restrictions limits the flexibility of the bargaining parties. For example, the bargaining parties may negotiate a two-tier structure with lower contributions and benefits for a class of employees. This type of contribution/benefit structure should be permitted as long as it is consistent with the funding improvement plan.

While the prohibitions on any negotiated reduction in contribution rates or funding holidays should not apply once a funding improvement period or rehabilitation period has begun, the prohibition against the exclusion of new hires or younger employees should continue for as long as a plan is in either endangered or critical status, with one exception. If there is an agreement to close and terminate the plan under ERISA section 4041A(a)(2) as of a specified date that is within 5 years from the date the agreement is reached to close and terminate the plan, the bargaining parties should be able to agree to "close" the plan to new entrants and allow current participants to continue to accrue benefits until such specified termination date, provided that any such plan of termination and closure must be consistent with the funding improvement or rehabilitation plan (and the plan's timely emergence from endangered or critical status).

11. ERISA section 305(e)(3)(A)/IRC section 432(e)(3)(A), first sentence of flush language (PPA sections 202/212); IRC section 4971(g)(3)(B)(ii) (PPA section 212) **(annual standards for meeting rehabilitation plan requirements; excise tax for failures)**: Confirm in legislative history or in the statute that the progress toward recovery under the rehabilitation plan does not need to be linear and there may be short-term fluctuations/deteriorations, as long as the actuary certifies that, based on reasonable assumptions, the rehabilitation plan (as updated from time to time) is expected to allow the plan to emerge from critical status (or delay insolvency). Confirm that what is required is that (i) the trustees are required to update and modify the rehabilitation plan

based on plan performance, and (ii) the trustees and bargaining parties are required to follow the steps prescribed in the rehabilitation plan (as updated from time to time).

12. ERISA section 305(e)(3)(C)/IRC section 432(e)(3)(C) (PPA sections 202/212) **(critical status default schedule)**:

- In subparagraph (i)(II), delete "fail to adopt a contribution or benefit schedules with terms consistent with the rehabilitation plan and the schedule from the plan sponsor …" and substitute "fail to adopt a contribution schedule with terms consistent with the rehabilitation plan and a schedule from the plan sponsor …". [Make same change under endangered status rules at ERISA section 305(c)(7)(A)(ii)/IRC section 432(c)(7)(A)(ii).]

- Confirm (here and with regard to the endangered status default schedule) that the requirement to pay contributions in accordance with the default schedule is enforceable under ERISA section 515 as if it were an obligation to contribute under a collective bargaining agreement. (Such language is included in the surcharge rules.)

- Confirm in the statute that application of the default schedule terminates as of the effective date of a subsequent collective bargaining agreement with terms consistent with the rehabilitation plan and a schedule from the sponsor.

- Remove subclause (I) in (e)(3)(C)(ii) regarding the default schedule being implemented upon the date on which DOL certifies that the parties are at impasse – thus requiring the trustees to implement the default schedule 180 days after the expiration date of the collective bargaining agreement -- and clarify that notwithstanding implementation of the default schedule, this provision does not change current law regarding when an impasse or employer withdrawal occurs. As currently drafted, the DOL would be tasked with determining whether/when an impasse occurs -- a role that it does not currently play or have resources to carry out. Even more significantly, the provision could be construed as changing settled law under ERISA section 4212 and the labor laws.

13. ERISA section 305(e)(4)(A)(ii)/IRC section 432(e)(4)(A)(ii) (PPA sections 202/212) **(rehabilitation period)**: Delete "in effect on the date of the due date for the actuarial certification …" and substitute "in effect on the due date for the actuarial certification …".

14. ERISA section 305(e)(4)(B)/IRC section 432(e)(4)(B) (PPA sections 202/212) **(emergence from critical status)**: Delete "without regard to the use of the shortfall method *and* taking into account any" amortization extension, and substitute "without regard to the use of the shortfall method *but* taking into account any …".

15. ERISA section 305(e)(7)/IRC section 432(e)(7) (PPA sections 202/212) **(surcharges paid by employers with already-compliant collective bargaining agreement)**: Add a new paragraph (F) providing that surcharges paid by an employer may be credited against the employer's contribution requirements under the rehabilitation plan if the trustees later

determine that the applicable collective bargaining agreement in place at the time the plan is certified as being in critical status conforms to a schedule under the rehabilitation plan, and that the surcharges are no longer required after the trustees make that determination. Without this change, employers whose collective bargaining agreement expires before the rehabilitation plan is adopted and/or rehabilitation period has begun will have no incentive to agree to contribution increases in the next agreement because any such contribution increase will simply increase the surcharge and will not count toward the rehabilitation plan/schedules until a subsequent agreement is negotiated during the rehabilitation period.

16. ERISA section 305(e)(8)(C)/IRC section 432(e)(8)(C) (PPA sections 202/212) **(notice of critical status cuts in adjustable benefits)**:

- Amend clauses (i)(I) and (i)(II) so that the 30-day notice only has to be provided to *affected* participants and beneficiaries and their employers, if any, and clarify that this notice satisfies ERISA section 204(h) if it meets the applicable requirements under that section.

- Amend clause (ii) to add a new subparagraph giving the plan sponsor discretion to add any other information that is reasonably related to the notice, in addition to the content prescribed in this clause.

- Amend the last sentence in subparagraph (ii) to delete "The Secretary shall … establish a model notice" and substitute "The Secretary shall … publish a model notice".

17. ERISA section 305(e)(9)/IRC section 432(e)(9) (PPA sections 202/212) **(critical status changes and withdrawal liability)**: Amend paragraph (B) to delete "disregarded in determining an employer's withdrawal liability under section 4211" and substitute "disregarded in determining the allocation of unfunded vested benefits to an employer under section 4211".

18. ERISA section 305(f)(2)(A)/IRC section 432(f)(2)(A) (PPA sections 202/212) **(restriction on payment of lump sums while in critical status)**: Amend provision to provide (consistent with the comparable single-employer plan limit in PPA and the liquidity shortfall rules under quarterly contribution requirements) that this restriction applies only to participants whose benefit commencement date is after the date the notice is provided. Otherwise, the provision would restrict payments to a participant who commenced receiving Social Security level income payments before the notice was provided.

19. ERISA section 305(f)(3)/IRC section 432(f)(3) (PPA sections 202/212) **(critical status cuts disregarded for withdrawal liability calculations)**: Delete because is redundant with subsection (e)(9).

20. ERISA section 305(i)(2)/IRC section 432(i)(2) (PPA sections 202/212) **(cross reference in definition of "funded percentage")**: Clarify that references to section

304(c) include prior law section 302(c). (Note, it may be worth considering adding a general provision that treats references to the funding provisions in PPA as including the comparable funding provisions pre-PPA, unless otherwise stated.)

21. ERISA section 302(b)(3)/IRC section 412(b)(3) (PPA sections 202(d)/212(c)) **(relief from minimum-funding penalties for compliant critical status plans)**: Revise second sentence so that the relief is contingent on the *plan sponsor's* adopting and complying with its responsibilities under a rehabilitation plan, not with the *plan's* adopting and complying with it.

22. IRC section 4971(g) (PPA section 212(b)) **(excise taxes for failures)**:

- ♦ Delete IRC section 4971(g)(4) (excise tax on trustees of critical status plan for failure to adopt timely rehabilitation plan), as there already is a $1,100/day civil penalty that DOL may impose on the trustees for such a failure (ERISA section 502(c)(8); PPA section 202(b)).

- ♦ In IRC section 4971(g)(5) (waiver of excise taxes), change "may" to "shall" and change "unanticipated and material market fluctuations …" to "unanticipated market fluctuations".

- ♦ Revise IRC section 4971(g)(2) (excise tax on employer that fails to make contribution required by funding improvement or rehabilitation plan, equal to 100% of the delinquency) to apply solely to contributions required by the default schedule in the absence of a compliant collective bargaining agreement (which may have been the intent since the statute refers to contributions required by a funding improvement or rehabilitation plan). As currently written, the provision could be read to impose an excise tax in the case of and interfere with routine plan efforts to collect contributions required under the applicable collective bargaining agreement. Many multiemployer plans have audit programs in place to ensure that owed contributions are being made, a right that has been upheld by the U.S. Supreme Court. Moreover, plan fiduciaries have the duty to collect all amounts due the plan, standards for which have been set out by DOL.

23. ERISA section 502(c)(8) (PPA section 202(b)) **(ERISA penalties)**:

- ♦ Amend subparagraph (A) by deleting "with respect to a multiemployer which is in …" and substitute "with respect to a multiemployer *plan* which is in …".

- ♦ Confirm, in legislative history or statutory language, that the DOL is not to impose the $1,100/day civil penalty on the trustees under subparagraph (B) (for a non-seriously endangered plan's failure to meet the benchmarks) if the failure is for reasonable cause and not willful neglect, with appropriate illustrations. Alternatively, if the waiver of excise taxes provision (IRC section 4971(g)(5)) is amended as described above, replace the DOL civil penalty provision with the excise tax on contributing employers that applies to seriously endangered plans for failure to meet the benchmarks (IRC section 4971(g)(3)).