NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Submitted electronically via
the Federal eRulemaking Portal at:
http://www.regulations.gov(IRS REG–142695–05)

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CC:PA:LPD:PR (REG–142695–05),
Courier's Desk, Internal Revenue Service,
1111 Constitution Avenue, NW.,
Washington, DC

Re: Proposed Regulations Implementing Section 125 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 125 of the Internal Revenue Code (IRC).

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 plans for retirement, health and other benefits. The NCCMP's 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.

General Observations

Despite rising health care costs, multiemployer plans have been able to offer comprehensive, stable, and cost-efficient health benefits to over 10 million workers and their families. Traditionally health coverage under multiemployer plans has been fully through the negotiated contributions to the plan without additional payments from the covered employees. In recent years, however, rapidly accelerating cost pressures and unprecedented demands on employer contributions to meet increasing pension obligations have compelled some multiemployer funds to impose such additional employee contribution requirements above and beyond such negotiated contributions for either employee or dependent health care coverage. It is important to allow multiemployer plan participants to pay for this coverage on a tax-preferred basis, just like their counterparts in single employer plans.

Overall, we believe the Internal Revenue Service and Treasury Department have done a commendable job consolidating the Section 125 regulations and updating them for recent legislation. We particularly appreciate the fact that you have solicited comments as to whether multiple employers (other than members of a controlled group described in section 125(g)(4)) may sponsor a single cafeteria plan. Noting the recognized difference between multiple and multiemployer plans, however, we respectfully encourage you to confirm in the final regulations that Section 125 permits multiemployer cafeteria plan arrangements. We believe that such arrangements are permissible under the statute, and would promote the national goal of providing access to health coverage on an affordable basis to the greatest extent possible. We are also suggesting some adaptations to the operational rules to address the special logistical challenges of multiemployer plans.

1. Introduction: What is a multiemployer plan?

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 health 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, and 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.

Multiemployer plans are particularly effective for small businesses, especially in those industries that are characterized by large numbers of small employers that cannot afford to create individual employee benefit plans solely for their own employees. The average number of employees of a contributing employer in many such industries, including construction, is fewer than twenty. Participation in a multiemployer plan enables these employers to provide benefit coverage to their employees by doing little more than contributing to the multiemployer plans. The plans administer the benefit programs, thereby relieving the employers of the burden of doing so.
Department of Labor statistics show that there are more than 2200 collectively bargained, multiemployer health benefit plans. As many as 26 million workers, retirees and their dependents receive health coverage under these plans.

Multiemployer health and welfare plans are generally subject to Internal Revenue Code provisions such as Sections 501(c)(9) (regarding voluntary employees beneficiary associations or "VEBAs"). 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.

Multiemployer plan trust agreements generally bar reversions or refunds of plan assets to contributing employers and the union under all circumstances, except perhaps in the case of mistaken contributions (as permitted by ERISA). This bar reflects the fact that "employer contributions" to a multiemployer plan are the covered workers' money; an aspect of their compensation package agreed to through collective bargaining. Also, the Taft-Hartley Act requires that all plan assets be used for the sole and exclusive benefit of the plan's participants and beneficiaries.

This bar on employer reversions, and other multiemployer plan characteristics, removes any motivation for the employer tax abuse that may exist with respect to a single employer plan

whose employer-sponsor usually controls all aspects of plan creation, operation, funding, and termination.

The plan's administrative office is responsible for collecting the contributions and related supporting hours reports. Each plan has procedures for collecting delinquent contributions, which culminate in lawsuits if necessary or appropriate.

The plan's board of trustees has the exclusive right and responsibility to manage the plan's operations. The trustees typically delegate the authority and responsibility for day-to-day administration to an "administrator." The administrator may be an employee of the plan; that is, an in-house administrator. Or, the administrator may be a business organization; that is, a "third-party administrator" or a "contract administrator." The administrator usually is responsible, in the first instance, for the contribution collection procedures, reporting and disclosure compliance, determining benefit eligibility, paying benefits and plan expenses, and record keeping. In performing these functions, the administrator is subject to the board of trustees' supervision. In addition, to assist with plan management and legal compliance, boards of trustees typically employ accountants, actuaries, attorneys, consultants, investment advisors, and other professional advisors.

A multiemployer plan is a legal entity that must, by law, be separate from the contributing employers and sponsoring union.

Portability is a fundamental feature of multiemployer plans. In essence, all contributing employers in a plan are treated as a single employer for purposes of crediting a covered worker's employment. All of a worker's covered employment with all contributing employers is centralized. The worker can change employment from one contributing employer to another contributing employer within the industry without losing his or her accumulated benefit credit. When the worker applies for benefits from the plan, all of his or her covered employment with all contributing employers is counted, subject to break-in-service rules.

This internal portability means that a worker's benefits are not dependent upon the economic fate of one employer, in contrast to the single employer plan situation. Moreover, portability promotes the mobility of workers within a trade or occupation, and better enables contributing employers to attract and retain trained, competent workers.

2. Why are multiemployer plans interested in sponsoring a single cafeteria plan that could cover people working for multiple contributing employers?

Employees covered by multiemployer plans should have the same opportunity as other employees to make their contributions for employee and dependent health coverage on a pre-tax basis

Multiemployer plans should be able to offer their participants who have health coverage from more than one source the chance to opt-out of a given plan and receive cash or other benefits

Multiemployer plans need to be able to offer cafeteria plans so that contributing employers can comply with State health-reform laws that require employers to enable their employees to pay for health coverage on a pre-tax basis.

Health plan cost trends continue to rise significantly faster than general inflation. Multiemployer plans have not been immune to the general trend toward cost increases. Plan sponsors have taken a variety of approaches to address rising health care costs, including extensive review and renegotiation of the terms of reimbursement with the plans' medical and prescription drug service providers, disease management, wellness programs, and other initiatives.
As noted above, multiemployer health coverage traditionally has been fully funded by the negotiated contributions to the plan without additional monthly payment from the covered employees. In recent years, some boards of trustees have concluded that the collectively bargained employer contributions are not enough to cover the cost of the health coverage the plan participants need. Rather than cutting benefits, they have asked the employees to pay part of the costs. To implement these arrangements, the collective bargaining parties have negotiated contracts that require employee contributions for either employee or dependent health care coverage. If the contributing employer does not already have a cafeteria plan, then the employee or dependent contributions must be made on an after-tax basis. This means either the employee writes the plan a check, or the employer forwards after-tax employee salary deductions to the plan.

Obviously, the coverage would be more affordable for the employees if it could be paid pre-tax, so multiemployer funds have begun to explore how best to collect employee contributions on a pre-tax basis.

Another cost-control approach that some multiemployer plans have considered is to eliminate excessive health coverage by enabling participants who have health coverage available from another source to waive the overlapping coverage. As an incentive, a plan might offer alternative benefits, but to really trim the waste it would be more efficient to offer cash that is not tied to the person's being ill or hospitalized. This, of course, is only feasible from a tax perspective through a section 125 arrangement.

Multiemployer plan sponsors have realized that the previous proposed regulations for pre-tax employee contributions do not fit well with the present-day needs of their contributing employers, unions, and participants. Because the proposed cafeteria plan regulations do not clearly allow a multiemployer fund (as opposed to its individual contributing employers) to create a cafeteria plan, the proposals do not provide a clear path toward the goal of providing pre-tax contributions. As a result, multiemployer plan sponsors that want to pursue this avenue are somewhat stymied.

Accordingly, we recommend that the final regulations make clear that multiemployer plans can establish cafeteria plans. This would enable the plans to take on the compliance and administration responsibility on behalf of the employers, so that the participants and employers can take advantage of the economies of scale achieved by banding together through the multiemployer plan. Contributing employers would have certainty with respect to how

employee salary reduction amounts are treated when forwarded to a multiemployer plan, which does not exist now. These employers would be able to rely on the multiemployer plan for creating and maintaining a Section 125 plan.

Having an efficient mechanism for the employees to share the coverage cost might also make it easier for small employers to join the multiemployer plan. In addition to helping participants and employers, permitting a multiemployer plan to offer a cafeteria plan would aid compliance with the spreading State initiatives to promote health coverage. As of this writing, four states (Massachusetts, Connecticut, Rhode Island, and Missouri) require employers that meet certain requirements to establish and maintain a cafeteria plan in order to permit employees to purchase health coverage on a pre-tax basis. In Massachusetts, the only state with regulations to address this issue, it was necessary to create an exception to the cafeteria plan requirement for contributing employers who provide coverage through a multiemployer plan. To the extent that these laws will become more pervasive in the future (California and Pennsylvania are both considering them) it will be important to offer options for employers that contribute to multiemployer plans to comply by allowing multiemployer plans themselves to provide a cafeteria plan structure for employee contributions.

3. What adaptations in the Section 125 regulations would facilitate the adoption of multiemployer cafeteria plans?

The NCCMP believes that permitting multiemployer plans to establish and maintain cafeteria plans is consistent with the statute. We suggest that the proposed regulations need only minor clarification to establish this principle in the regulation and remove barriers to implementation. The adjustments described below are related to three special features of multiemployer plans:

- They cover people working for more than one employer,
- All aspects of the health and welfare benefit programs to which the cafeteria plan would relate are administered by the multiemployer fund's autonomous board of trustees, which is independent of each of the employers.
- Benefits are funded through a trust, under arrangements designed to provide portable coverage for people who move frequently among contributing employers.

a. <u>Definition of "cafeteria plan": Define "cafeteria plan" to permit cafeteria plans sponsored by multiemployer plans.</u>

The proposed regulations define a cafeteria plan as "a separate written plan that complies with the requirements of section 125 and the regulations, that is maintained by an *employer* for the benefit of its *employees* and that is operated in compliance with the requirements of section 125 and the regulations." Proposed Treas. Reg. § 1.125-1(a)(1). However, IRC Section 125 defines a "cafeteria plan" as a written plan under which (A) all participants are employees, and (B) the participants may choose among two or more benefits consisting of cash and qualified benefits.

It is unclear whether the drafters of the proposed regulations intended to restrict cafeteria plans to those maintained by a single employer. However, there is no reason to read the statute in a manner that restricts cafeteria plans to single employers, because the statute does not contain this limitation.

b. Plan documents: Allow contributing employers to rely on the plan documents adopted by the Trustees of the multiemployer plan for purposes of satisfying the Section 125 written plan document requirement.

A cafeteria plan must be described in a written document. The proposed regulations permit the cafeteria plan written document to be both multiple documents and to cross-reference other documents. Proposed Treas. Reg. § 1.125-1(c)(1) and (c)(4). We support this requirement. For multiemployer groups, the plan document may comprise the formal written cafeteria plan adopted by the trustees and the collective bargaining or related agreement that sets forth the employers' related obligations.

The proposed rules do not preclude employers from relying on the multiemployer plan cafeteria plan as their cafeteria plan. However, the final regulations should specifically list multiemployer trust agreements and plan documents as documents that may create a cafeteria plan on behalf of the employers that agree to contribute pursuant to that plan.

b. Uniform terms. Provide that, in the case of a multiemployer plan, the rule requiring the terms of the plan to "apply uniformly to all participants" (proposed Reg. Section 1.125-1(c)(1)) is applied separately to participants covered by separate collective bargaining agreements.

Many multiemployer plans are supported by employer contributions that are required under numerous collective bargaining agreements between various employers and the union or unions representing plan participants. The larger plans may offer different benefit packages, funded with different employer contribution rates, so that local bargaining groups can fit their coverage to what is affordable under local conditions. It is likely that, as a practical matter, there will be a similar need for variation in the terms under which different groups of participants would contribute on a pre-tax basis. For example, some unions may be able to negotiate high enough employer contributions to obviate the need for supplemental contributions from the employees; in other cases, the employers are unwilling or unable to handle the logistics of the payroll deduction elections.

The NCCMP believes that a multiemployer fund's cafeteria plan should be treated in general as a single plan, like the underlying health and welfare plan. However, variations that sometimes appear in a single plan's benefits and rules reflect the fact that the plan's participants actually work for different employers, often in different job markets and under different economic circumstances. Without sacrificing the principle underlying the uniformity requirement in the

proposed regulation, the best way to reconcile the concept and the reality is to require plans to meet the uniformity standard on a bargaining-agreement-by-bargaining-agreement basis.[1]

c. Prohibited deferral of compensation; Permit multiemployer funds to adopt cafeteria plans even if the underlying health plan includes an "hour bank" or "dollar bank" to maintain the continuity of participants' coverage during intermittent periods of unemployment.

As noted above, multiemployer plans are typically funded by negotiated employer contributions that are payable based on the hours, days or weeks worked by the employees covered by the collective bargaining agreement. For example, the contribution rate may be $2/hour for each hour of covered service. The employer contributes the same per-dollar amount on each covered employee, whether or not they have earned health coverage under the plan at the time the contributions are paid. Coverage is usually earned by working a minimum number of hours in an eligibility period. For instance, 100 hours of covered service in a month may entitle a worker to health coverage for the following month.

When setting the eligibility minimum, the trustees assume that the plan does not necessarily need to collect contributions on each participant equal to the expected average cost. That is because it is likely that the plan will be receiving total contributions above the per-participant cost based on two groups: those who work more hours than the average but receive the same plan of benefits, and those who do not work enough hours to gain eligibility, but whose work nevertheless generates employer contributions.

For political, equitable or other reasons, some plans in industries where work is irregular compensate the participants who work substantially more than the minimum for coverage, and thus generate substantial extra contribution income for the fund, by "banking" some of the excess hours or contributions to use in lieu of new employer contributions to keep coverage in effect if work later drops off. For instance if a participant works 200 hours in a given month under a plan that requires 100 hours/month for eligibility, the plan may credit his hours-bank account with 50 hours. If he does not have the 100 hours of covered service in a later month, the plan would draw down some of the banked hours to maintain his eligibility. A "dollars bank" represents the same concept, denominated in dollars to be applied to meet a future employer contribution requirement rather than hours of covered service.

These are devices to smooth out the peaks and valleys of work patterns in industries like construction, where the availability of work is highly seasonal. Because the employers are only required to pay into the funds when the participants are actively at work, plans must collect most of their funding during those high seasons. The extra amounts then enable the plans to knit together the participants' spurts of covered activity to avoid gaps in their health coverage.

Section 125 of the Internal Revenue Code prohibits the use of cafeteria plans to defer compensation, except under section 401(k) plans. Subsection (o) of proposed Treas. Reg.

[1] The regulations under section 401(k) take a similar approach, see Treas. Reg. s. 1.401(k)-1(b)(4)(iii)(C). See also, Internal Revenue Code section 413(b).

section 1.125-2 elaborates on this requirement, and subsection (p) describes a number of exceptions, including such items as lifetime maximums, carry-over credits against the deductible, long-term disability benefits, etc. The NCCMP recommends that multiemployer plan hour banks and dollar banks be added to the list of items permitted to bridge health coverage for more than one year, provided those banks are used solely to accumulate eligibility credits that must be funded, under the terms of the plan, with employer contributions that are not linked to the employees' salary-reduction elections.

d. Elections: The final regulations should retain the permission for negative elections – automatic enrollment, subject to opt-out.

The proposed regulations permit a cafeteria plan to provide for automatic elections for both new and continuing employees – that is, provide for a default election and salary reduction unless the employee affirmatively elects cash. Proposed Treas. Reg. § 1.125-2(b). The employee would have to receive notice of the election and opt-out process at hire and prior to each subsequent plan year.

Automatic or default elections will be important to multiemployer plans because the funds ordinarily do not have direct contact with their participants at their worksites. We support the continuation of the automatic election rule in the final regulations, subject to the special enrollment-timing modification discussed in item f, below. We also recommend that the final regulations specify a process by which an employee who was automatically enrolled in a cafeteria plan can terminate enrollment, perhaps by notifying the plan administrator within 30 days after receiving enrollment materials.

e. Retrospective administration of eligibility: Add limited retrospective enrollment and refund procedures and deadlines to enable multiemployer plans to administer participants' section 125 enrollments in tandem with their established health and welfare fund enrollment process.

As discussed earlier, employer contributions to a multiemployer plan are almost always made with respect to all people working under the collective bargaining agreement, whether or not they are currently – or ever – actually eligible for benefits. The contributions are made at the end of the negotiated remittance period, often monthly. Until the employer reports come in showing who worked under the agreement for the prior month, the multiemployer fund does not know how much service credit each participant earned during that period and, accordingly, who earned or retained eligibility for another month.

To deal with this, many multiemployer plans have built a lag period into their eligibility procedures. For example, if 100 hours of covered service in a month is needed for eligibility, a plan may provide that a person who works 100 hours in January will be eligible in March; conversely, someone who was previously covered but failed to earn 100 hours in January will retain coverage through February but lose it in March.

Note that this is not tied to a person's hire and termination dates with any given contributing employer. A participant may have worked 30 hours in January for Employer A, 27 for Employer

B, 12 for Employer C and 46 for Employer D. The employers do not necessarily know the person's total employment history under the fund, and the fund does not especially care how many separate jobs it took to earn the needed 100 hours.

Recommended Accommodation (1): **Modify the 30-day enrollment rule to permit multiemployer plans, if they so choose, to provide the election (or notice of automatic enrollment) within 30 days from the date as of which eligibility for coverage commences, not 30 days from date of hire.**

The proposed regulations allow a cafeteria plan to give new employees 30 days after their hire date to make elections between cash and qualified benefits. Proposed Treas. Reg. § 1.125-2(d). Currently, enrollment procedures in multiemployer plans may occur at a variety of times – when the employee is hired, when the fund first receives reports that the employee is performing covered employment, or when the fund determines that the employee has attained eligibility under the plan's eligibility rules, and sends the person the enrollment package, SPD, etc.
While the proposed regulations appropriately permit employers to allow new employees 30 days in which to make a benefit election, with the results being prospective only, the rule may not provide enough flexibility for multiemployer plans. A more elastic approach that would be more practical for multiemployer plans would enable them to permit participants to make an election, or to opt out, within 30 days of the date they receive notice from the plan that they have become eligible for employer-funded coverage. Both parts of their coverage would be effective at the same time. Subject to the plan's adoption of change-in-status rules, the election could only be terminated once a year or at termination of coverage under the plan, whether or not that coincides with termination of employment with contributing employers.

Recommended Accommodation 2: **Permit multiemployer plans to collect pretax employee contributions before the employees attain eligibility, and to refund those contributions if the individual never obtains eligibility under the plan, and therefore never made an effective election.**

As noted, multiemployer plans collect employer contributions on the hours worked by everyone in covered service, without regard to their current plan eligibility. In the majority of multiemployer cases, the most practical way to administer salary-reduction elections without generating undue paperwork for employers (and sowing the seeds of confusion and error) would be collect the salary-reduction contributions on the same schedule as they collect the regular employer contributions. Among other things, that would keep the same coverage in effect without interruption as an employee moves from job to job with contributing employers.

Also, multiemployer plans should then be able to refund (on an after-tax basis) any salary-reduction contributions that were paid to the plan on behalf of an employee who did not attain eligibility under the plan. This would not enable participants to change their minds and get a refund. Rather, the rationale could be that both the participant and the employer proceeded under the mistaken assumption that the participant would become entitled to coverage under the health fund, but it did not materialize.

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Thank you for the opportunity to provide comments on these important issues. We will be pleased to provide any additional information that you might find useful in exploring the ways that cafeteria plans can be offered in a multiemployer environment.

Respectfully submitted,

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