NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS
815 16th Street, N.W., Washington, DC 20006 – Phone 202-737-5315 – Fax 202-737-1308

Edward C. Sullivan
Chairman

Randy G. DeFrehn
Executive Director
E-Mail: RDEFREHN@NCCMP.COM

Submitted Electronically

July 22, 2002

CC:ITA:RU (REG-136193-01)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue, NW.
Washington, DC.

Re: Proposed Regulation Under Internal Revenue Code section 4980F and ERISA section 204(h)

Dear Friends,

The National Coordinating Committee for Multiemployer Plans appreciates the opportunity to comment on the proposed regulations under ERISA section 204(h), as amended by the Economic Growth and Tax Relief Reconciliation Act, and IRC section 4980F, added by EGTRRA. We also respectfully request the opportunity to testify at the hearing to be held on this proposal.

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. 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 nonprofit organization, with member plans and plan sponsors in every major segment of the multiemployer plan universe.

Background - Multiemployer plans, as you know, cover people working under collective bargaining agreements for any number of employers. A multiemployer plan can have as few as two and as many as several thousand different contributing employers. Typically the number of contributors ranges from, say, 30 to several hundred. The plans themselves are administered independent of any contributing employer. Multiemployer plans may share office space and facilities with labor unions that represent at least some of the plan participants, but the organizations typically have separate staff and anyone performing services for the plan is accountable to the plan's joint labor-management board of trustees, not the union leadership.[1]

A hallmark of multiemployer plans is the portability that they offer for people who build a career in the covered industry while moving from job to job with different covered employers, often with great frequency. Some multiemployer plans cover people working throughout a region, or nationwide. Some International Unions sponsor reciprocity agreements, under which

[1] Prohibited Transaction Class Exemption 76-1 authorizes these arrangements.

participants can continue earning credit toward benefits under their home plans while working in the jurisdiction of any of the web of plans that have adopted the agreements.[2]

Most often the main retirement income program for multiemployer plan groups is a defined benefit plan. Many groups also have defined contribution plans, commonly called "annuity funds". Those that were established before 1987 were typically set up as money purchase plans, so that there would be no chance that an employer would be prevented from making its bargained-for contributions due to lack of profits. Once that requirement for profit sharing plan contributions was dropped, many annuity funds were converted from money-purchase to profit sharing status, often so that a 401(k) feature could be added. In light of the changes made by EGTRRA, that phenomenon is likely to continue or accelerate.

The Proposed Regulations, In General - There are very few multiemployer cash balance plans. (Those of which we are aware were converted from individual account plans, to protect participants from investment losses.) Conversion from a traditional defined benefit format to a cash balance design is just about unheard-of in the multiemployer community. Except for benefit changes flowing from plan mergers, multiemployer plan amendments that are subject to sections 204(h) and 4980F are, we hope, likely to be rare events, precipitated by severe financial need. The impact of these types of changes, such as a reduction in the benefit multiplier for future service for example, or a cutback on early retirement subsidies, will usually be obvious to the participants. There may also be subtle changes in multiemployer plan rules, such as redefining "year of service" for accrual purposes, which could have the effect of reducing some participants' benefits.

The NCCMP and its affiliates appreciate the approach taken by the proposed regulations, in describing governing principles rather than laying out a detailed checklist of required actions and disclosure items. It would probably have been impossible to come up with a properly calibrated prescriptive list that would be suitable for the whole spectrum of amendments that could trigger these notice requirements. We agree with your judgment that the facts and circumstances of each situation should determine the depth and detail of the notice, and that the plan sponsor should be responsible for making that decision.

There are some points on which we believe the rules should be improved to accommodate multiemployer-plan realities. These suggestions relate to features of the law that were not changed by EGTRRA, and reflect our understanding of how many multiemployer plans have been dealing with the notice requirements all along. To the extent you decide, after considering our presentation, not to modify the rules, we urge you to make it especially clear, perhaps by including an example in the final rule or discussion in its preamble, that the regulation is wholly prospective in operation.

A. Benefit Changes Made by Collective Bargaining Agreements

[2] While reciprocity arrangements are typically structured and supported by the parent Union, each board of trustees of an eligible plan makes an independent decision whether their plan will participate.

A section 204(h) notice is required when there is a *plan amendment* reducing the rate of future benefit accruals, etc. Notice is not required when the reduction is caused by something other than an amendment, such as, for example, reclassification of an employee to a position covered by a different benefit formula under the plan.

In a number of multiemployer plans the benefit formula incorporates provisions of the collective bargaining agreements by reference. In these situations participants' future benefit accruals automatically change when a change is agreed to in the collective bargaining agreement. By offering these choices, plans can accommodate the different economic packages that different groups of employees and employers may negotiate.

In one common pattern, large defined benefit plans covering people working under a number of bargaining agreements typically offer a menu of accrual rates that correspond to different negotiated contribution rates. For example, the plan may state that the benefit accrual rate is $60 a month for each year of service under a collective bargaining agreement requiring contributions of $2.00/hour, $65 if the required hourly contribution rate is $2.25, $55 for a $1.75 contribution rate, etc. When a participant moves from an employer contributing $2.25/hour to a job covered by a bargaining agreement requiring $2/hour contributions, that person's future benefit accrual rate automatically goes down; the same is true if the person stays at the same job but the parties agree to a lower pension contribution rate at the next round of collective bargaining.

Another approach that is not uncommon among multiemployer defined plans aims at matching benefit levels to the intensity of an individual's covered work and the level of employer contributions that work generates for the fund, by defining benefits as a percentage of those contributions. For example, the plan may provide that a participant's monthly benefit is 3% of the total of employer contributions required to be made on the worker's behalf, throughout the person's career. A participant's benefit accrual rate is self-adjusting, a direct function of the amount of covered work performed and of the rates at which his or her various employers have agreed, in collective bargaining, to contribute to the plan. As with the benefit-menu design, either a transfer to an employer contributing at a lower rate or a negotiated reduction in the current employer's contribution rate could cause the person's future rate of accruals to drop, in either case without the intervention of a plan amendment.

Q&A 16 of the proposed regulation addresses corporate transactions, giving examples that illustrate the difference between a reduction in future accruals that occurs automatically because the transferred employees shift from one plan to another and one that occurs as a result of a plan amendment, such as a plan merger. The proposal points out that a 204(h) notice is not required in the first situation but it is required in the second.

The multiemployer-plan benefit changes that occur automatically when a bargaining agreement changes employer contribution obligations are comparable to the automatic benefit change that occurs when a group of acquired employees begins participating in the new owner's plan. Since no plan amendment causes the change, no 204(h) notice is required. This is especially sensible in the case of benefit changes triggered by collective bargaining, since, in a large regional or national plan, the multiemployer plan trustees might not even know of the change in required contribution rates before it takes effect under the new collective bargaining agreement. Indeed, the affected participants are likely to know about it well before the trustees do, because they will have been presented with the new labor contract and may have voted to approve it.

It would be possible, under either multiemployer-plan design discussed here, that future benefits could also be reduced by a plan amendment. In the first example, the trustees could change the benefit-menu going forward, so that a $2 hourly contribution would only buy a $57 monthly benefit. In the second, they could change the plan to specify that, for contributions due after a certain date, the corresponding benefit percentage will be 2.75% rather than 3%. The law would require a 204(h) advance notice in these situations, because the operative event is a plan amendment. A 204(h) notice would also be required if, in response to a negotiated reduction in employer contributions, the trustees amended the plan to reduce future benefit accruals.

To avoid any confusion about the two different situations, we recommend that the final regulation include a multiemployer-plan example showing the difference between an automatic benefit change linked to a collective bargaining agreement and a plan amendment changing the benefit formula, whether or not in response to a collectively bargained reduction in contribution rates.

B. Former Participants

One point on which more specificity would be useful in clarifying the obligations of multiemployer plans is in identifying participants entitled to a 204(h) notice. Notice is to be sent to participants whose rate of future benefit accruals is reasonably expected to be reduced as a result of the amendment. Determining which participants are in that category is a matter to be decided on the basis of the particular facts and circumstances.

Almost by definition, multiemployer plans cover people who move in and out of covered service from time to time. Traditionally, multiemployer defined benefit plans do not make distributions when a participant's covered service ceases, even in the case of small benefits. It is always possible that the participant will return to the industry in that jurisdiction at some future point, or earn greater benefit rights as a result of service elsewhere that is covered by a reciprocity agreement. Accordingly, people who have accrued benefits under a multiemployer plan remain "participants" in an ERISA sense until they have a permanent break in service (if they were not yet vested when their covered service terminated) or until they retire.

While terminated multiemployer plan participants, as a class, may return to covered service at some time, that does not necessarily mean that it is reasonable to assume that each of them will do so. At any given time, some inactive participants may be actively seeking work in a jurisdiction covered by the plan while others may have left the trade entirely. In its capacity as sponsor of the plan, the Board of Trustees is not likely to know any given former participant's re-employment prospects, even if individual contributing employers and local union officials do happen to be familiar with what some people may be planning.

Example 3 in Q&A 10(f) of the proposed regulation says, "Based on the facts and circumstances, it is reasonable to expect that the amendment will not reduce the rate of future benefit accrual of former employees …", so they do not need to be given the notice. In Example 5, the plan covers both hourly and salaried employees and is being amended to reduce accrual rates for the salaried group. Since, under the facts, "it is reasonable to expect that only a small percentage of hourly employees will become salaried in the future", no notice has to be given to the hourly workers. Similar examples cover changes applying to people in one of two divisions – in one case, movement between the divisions is not expected, so notice to the non-affected group is not required, while in another case such movement is planned, so both have to be given notice.

Leaving open the question of multiemployer trustees' obligation to give a 204(h) notice to former employees could give rise to confusion, distraction and inefficiencies. To allay those concerns, we suggest that the final regulation clarify that what matters in deciding to whom a notice is to be given are the reasonable expectations of the plan sponsor. To illustrate this point, it would be useful to add an example involving a multiemployer plan, which distinguishes between what it is reasonable for the trustees, as a group, to expect regarding individuals' possible return to covered service and what individual contributing employers or local union officials might have reason to expect.

C. Egregious Violations

In the case of an egregious violation, all "applicable individuals" get the better of the old benefit or the new one. An "egregious violation" is defined as one that is under the control of the plan sponsor and is either

- Intentional, or
- Fails to give most of the information to most of the people who should receive it.

There is a danger that a failure to give notice might be considered "intentional" for this purpose if the trustees or administrator sought advice on whether it was required and based their decision on a mistaken interpretation of the legal requirements in a given set of circumstances. That could be the case, for example, with a decision not to send a 204(h) notice to inactive participants, as discussed above. If one set of trustees were aware that there might be an issue but decided (erroneously, in retrospect) that the notice was not required, that might be considered "intentional". By contrast, for a group that did not think to inquire, a failure to send it out would more likely be viewed as negligent, at worst.

The word "egregious" implies a deliberate flouting of the rules, which is more than a conscious but mistaken decision about what the rules require.[3] It would be better to expand on the term "intentional" to make clear that it means an action resulting from a "deliberate choice, where the

[3] That is the tone in Rev. Rul. 2002-45 and its predecessors, which make egregious violations of the plan qualification requirements ineligible for most of the IRS voluntary correction programs:

> For example, if an employer has consistently and improperly covered only highly compensated employees or if a contribution to a defined contribution plan for a highly compensated individual is several times greater than the dollar limit set forth in § 415, the failure would be considered egregious. (Rev. Rul. 2002-45, Section 4.09.)

plan sponsor knew or reasonably should have known" that a notice, or more complete notice, would have been required.

Also, or alternatively, in the case of an intentional failure that is egregious, the "applicable individuals" who are, as a result of the violation, entitled to the higher of the old or new benefit should be defined as the people who were affected by the violation. A deliberate decision not to notify some small group should not put the higher benefit accrual rate into effect across the board.

D. Mailing to last-known address

The excise tax under section 4980F, for failure to give an appropriate, timely notice, can be waived if, among other things, the person responsible for giving it "exercised reasonable diligence, but did not know that the failure existed". Q&A 15(b)(2) says, in effect, that an excise tax waiver is only available if, as of the deadline for giving the notice, the person who sent it "reasonably believes" that the notice was actually delivered to the right people.[4]

In multiemployer plans, as has been noted, the trustees and administrator are not in the kind of direct, day-to-day communication with the participants – even the active participants – that the employer-plan sponsor has in a single employer case. As a prime example, the trustees do not distribute paychecks. In some cases a multiemployer pension plan's trustees also administer a health plan covering most of the same active workers, so they would have up-to-date addresses for participants who have recently submitted claims. Otherwise, given the mobility of so many of the covered workers, it is often difficult for the trustees to reach them. The trustees must rely on the participants themselves to provide updated addresses, which they often do not see the need to do promptly until they approach the time of retirement.

Accordingly, at the time they send out a 204(h) notice the trustees of a multiemployer plan may already have had mail sent to some participants' "last-known-address" returned marked "Addressee Unknown." In those cases it appears that the language of the proposed rule would make them ineligible for an excise tax waiver. It would be useful to have the regulation set reasonable limits on the steps that multiemployer plan fiduciaries must take to locate people in order to give them the notice. The difficulty is likely to be greatest with former participants. If the final regulation requires that they be sent the notice the regulation should make a last-known-address standard conclusive for attempting to communicate with them.

E. Conversion of a money purchase plan to a profit sharing plan.

In Revenue Ruling 2002-42, the IRS took the position that a conversion from money purchase to profit sharing is an event for which a 204(h) notice must be given, because the participants will

---

[4] This provision also seems to be inconsistent with Q&A 13(a), which says, "When notice is delivered by first class mail, the notice is considered provided as of the date of the United States postmark" on the envelope. Yet Q&A 15(b)(2) says an excise tax waiver is not available unless "at the latest date permitted for delivery of section 204(h) notice, the person [responsible for giving it] reasonably believes that … [the] notice was actually delivered to each applicable individual *by that date."* That seems to call for mailing the notice before the deadline, so that it could be received by the deadline.

be earning profit sharing benefits, not money purchase benefits, in the future. We believe that is not appropriate as a blanket rule that would have to be followed even if no other changes are made in the rights of participants (or their spouses) under the plan.

As noted earlier, the great majority of multiemployer defined contribution plans started as money purchase plans. While many have already been converted to profit sharing status, virtually all of those remaining are likely to follow suit as a result of EGTRRA's equalization of the deduction limits applicable to the two types of plans. The main reasons for converting to profit sharing status have been to have a base on which to add a 401(k) feature and to avoid having an employer delinquency be treated as a minimum funding violation.[5] To avoid having to administer the "profit sharing" assets separately from the "money purchase" assets, they typically changed nothing else about the plan. Indeed, since the switch to profit sharing status involved no changes that affected participants or their families, they may not even have been told about it.

We submit that, where a multiemployer defined contribution plan provides for allocation to participants' accounts of the amounts required to be contributed on their behalf under a collective bargaining agreement, a change in the label of the plan from "money purchase" to "profit sharing" is not an amendment that is reasonably expected to result in a significant reduction in any participant's rate of future accruals. Given the unique role of the collective bargaining agreement in setting the contribution rate, the fact that the amount of profit sharing contributions can, theoretically, be subject to employer discretion is irrelevant. We recommend that the final regulation make clear that a 204(h) notice is not required in these particular circumstances, notwithstanding Rev. Rul. 2002-42.

*****

Thank you for your consideration. If you believe any further information on these points would be helpful, please do not hesitate to contact me, at (202) 756-4644 or by email at rdefrehn@nccmp.org.

Sincerely,

Randy G. DeFrehn

Randy G. DeFrehn
Executive Director

[5] As fiduciaries, a multiemployer plan's trustees have a duty to collect all amounts owed to the plan, whether it is labeled money purchase or profit sharing, so this change will not diminish the vigor with which the trustees pursue late or unpaid employer contributions due under a collective bargaining agreement.