

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Submitted Electronically

CC:PA:LPD:PR (REG 100464-08)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Proposed Amendments to Treasury Regulation § 1.411(b)-1(a)(1)
Defined Benefit Plan Accrual Rules

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to offer these comments on the proposed amendment to Treas. Reg. § 1.411(b)-1(a)(1). 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 benefit 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 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.

We are aware that the deadline for formal comments on this proposal has passed. Nonetheless, we believe that this information is relevant as you proceed to finalize the regulation, following the October 15 hearing. We appreciate your consideration of these observations and suggestions.

Our purpose in writing is to describe the kinds of situations where this might become an issue for multiemployer pension plans, so that the final regulations can accommodate them. In none of these is there likely to be any intent to manipulate the accrual rules to achieve a backloaded result. But these benefit-accrual changes tend to occur when a plan is in difficult or sensitive situations, with the parties focused on trying to resolve complex funding and administrative issues. Accordingly, we strongly recommend a simple rule for multiemployer plans, to avoid making it even more difficult for them to work through these challenging situations. Any violation of the ERISA accrual rules through the use of a general provision aimed at protecting participants' entitlements would be inadvertent.

General Recommendation. Our recommendation is to codify the rule under which the multiemployer community has generally thought it was working since enactment of ERISA: there is no backloading violation if a participant's benefit is defined as the greater of the amount produced under any of two or more accrual formulas, as long as each of the formulas on its own satisfies at least one of the tests in IRC § 411(b). We urge you not to impose the proposed additional criterion that requires that each of the formulas use a different basis to determine the accruals, because it could add unnecessary complexity and uncertainty to transactions undertaken either to strengthen the plans or to comply with legal mandates.

If necessary, you could include a catchall anti-abuse rule, where the use of a combination of formulas would be a subterfuge for, or have the effect of significantly increasing, illegal backloading of benefit accruals.

Plan Mergers. The Treasury, IRS and Congress are aware that benefit anomalies that can occur when employers are restructured as a consequence of corporate transactions. The rules for employee benefit plans frequently include special provisions to accommodate that. For multiemployer plans, the comparable event is a plan merger.

Multiemployer plan mergers, including the merger of single employer plans into multiemployer plans, are rarely linked to corporate transactions. Often they occur when there is a merger of local unions, or as a result of collective bargaining. The other major impetus for multiemployer plan mergers is to strengthen one or more of the merger partners, by expanding the funding base and spreading administrative costs and capabilities over a wider pool. For some large regional or national multiemployer plans, absorbing and thereby stabilizing smaller plans is a routine event.

The energies of all of the parties to these transactions are devoted to appraising the expected financial effect of the merger: how can matters be arranged so that all parties are either better or not noticeably worse off? Trustees may negotiate special provisions, including a temporary curtailment of the benefit formula in the smaller plan, to protect the funding of the financially stronger plan and be sure that the transaction is not adverse to that plan's interest. "Greater-of" provisions are typically appended to the transaction to avoid an unanticipated benefit cutback. While these are usually simple one-time provisions, they come up in so many different situations that it is altogether likely that some include a delayed switch to the new formula, to smooth the transition to a different funding regime or just to protect participants' expectations. Up to now, few if any multiemployer bargaining parties or trustees, or their advisors, would have imagined that this might be a backloading violation.

Benefit Restructuring: PPA. In the past, plan amendments improving plan benefits have been common in multiemployer plans, especially since they typically are not based on participants' pay. Sometimes plan redesigns have entailed changes that might be generally but universally favorable. This might occur, for instance, if an amendment includes both past and future-service increases in the benefit amount per year of service and, at the same time, redefines "year of service".

In recent years, few multiemployer plans have been able to afford such generous benefit increases. Many have reduced future accruals and related benefit features, to deal with the asset losses earlier in this decade. Others will be reducing future accruals and, for critical-status plans, adjustable benefits, pursuant to IRC s. 432 as added by PPA. Participants' benefit rights may change as they change jobs among employers contributing to the plan, if some employers agreed to contribution schedules that preserve benefits while others are operating under bargaining agreements that will only support the default schedule, calling for much deeper reductions. Depending on where the work opportunities flow, how long the different schedules remain in effect and what the plan and the bargaining parties can work out when the plan's financial condition begins to improve, the array of benefit formulas that may go into any one participant's ultimate pension could be dizzying.

Plans can and will take steps to assure that each formula will, on its own, satisfy the ERISA accrual requirements. Controlling how the result will look for each participant when all the pieces are strung together could be a much bigger challenge, if it is even realistically possible.

Minimum Benefits. A few multiemployer plans may provide a minimum benefit, typically to participants who have less than, say, 5 or 10 years of service. These would be defined and payable as a single sum, perhaps a nominal dollar amount or an amount equal to the contributions that employers were required to pay to the fund with respect to the participant. These should meet the different-basis test under the proposed rule.

Other groups in the benefits community have presented legal analyses demonstrating that the Treasury and IRS have the authority to interpret ERISA and the Code to reach the conclusion that we are seeking, so we are not reiterating those points here. It is urgent that you avoid adding this additional and highly counter-intuitive bit of technical complexity to the challenge of managing defined benefit plans through this perilous investment climate. If you conclude that there is no basis under current law for what we are seeking, we urge you to make that clear right away so that we can ask Congress to correct it when it returns to considering proposals to set the economy on a more promising path.

If you have any questions about these comments, or would like further information about the multiemployer plan situation, please do not hesitate to be in touch with me.

Sincerely,
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