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## IRS Explains How Multiemployer Plans Can Elect Special Funding Relief

*The IRS has issued Notice 2010-83 which explains, in the form of 35 questions and answers, how sponsors of multiemployer defined benefit pension plans can take advantage of the special funding relief enacted by PRA10. The relief allows the plan to spread the funding for investment losses incurred in “eligible loss years” over a longer period of time. The multiemployer plan sponsor must make a formal decision to elect the relief by the earliest of (a) the deadline for certification of zone status for a plan year (90 days after the first day of the plan year), (b) the actual certification of plan status, or (c) June 30, 2011.*

### Background

The Pension Protection Act of 2006 (PPA06) revised the funding rules for multiemployer plans including providing special rules for plans that were in an endangered or critical status (i.e., in the “yellow”, “orange” or “red” zone). The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA10), in response to the large equity investment losses suffered by multiemployer plans, amends the PPA06 funding requirements to allow multiemployer plans that satisfy certain solvency conditions to elect to take a longer time to fund for investment losses incurred in either or both of the first two plan years ending after August 31, 2008 (eligible loss years).

PRA 2010 provides three methods for delaying the funding of these eligible losses. The sponsor of a multiemployer may elect to use one, two, or all three of the methods. Subject to the plan’s ability to pass a solvency test, these methods allow the sponsor to:

- Spread out the net investment loss in an eligible loss year over a period ending with the last plan year in the 30-plan-year period beginning with the eligible loss year,
- Determine the actuarial value of assets using a longer smoothing period (up to 10 years), and
- Determine the actuarial value of assets using a wider corridor (a maximum of 130%) around the market value of assets.

## Notice 2010-83

In [Notice 2010-83](#), the IRS describes which plans can make the election and under what circumstances, when the election must be made, and how the election is to be made. The notice is divided into eight sections and this description follows the Notice's sections.

### Extended Amortization Period for Eligible Net Investment Losses

PRA10 allows eligible net investment losses to be funded over a period ending with the last plan year in the 30-plan-year period beginning with the eligible loss year. An eligible loss is a loss incurred in either or both of the plan's eligible loss years (as defined above, the first two plan years ending after August 31, 2008). Thus, for a calendar year plan, the eligible loss years are 2008 and 2009. The plan's actuary determines the amount of the eligible net investment loss by looking at the difference between the actual market value of the plan's assets at the end of the eligible loss year and the expected value of assets at the end of the eligible loss year (based either on market or actuarial value depending on the plan's asset method). New prospective and retrospective methods are described in the Notice for these purposes.

**BUCK COMMENT.** *The IRS is taking the position that adoption by a plan sponsor of one of these methods will comprise a component of the plan's overall funding method that cannot be changed easily or frequently.*

If the plan already has a net experience loss for a year in which the eligible net investment loss is being recognized, then the actuary must split the net experience loss into two parts; one part reflects the eligible net investment loss and the other part reflects the remainder (i.e., gains and losses from demographic or other asset experience). Only the eligible net investment loss is amortized over the special 30-plan-year period; the remainder is amortized over 15 years. The notice provides detailed rules for the amortization bases in a variety of other gain/loss situations and when the plan uses the shortfall funding method.

The special 30-plan-year amortization rule for eligible net investment losses may not be used for a plan that uses a funding method that does not determine experience gains or losses (a "spread-gain" method). However, a plan may change its funding method to a method that does determine gains and losses (an "immediate-gain method"), and such change has automatic IRS approval.

**BUCK COMMENT.** *It appears from informal discussions with IRS staff that (1) automatic approval is available for the year that ends on the day before the asset loss is determined, (2) the automatic change is granted even though the relevant Schedule MB has already been filed, (3) the minimum funding for the year that ended must be revised, thereby changing the opening position for the following year, and (4) when revising, the revision must use an immediate gain method with the same assumptions and contributions shown on the relevant Schedule MB. If that resulted in a closing deficiency for the revised*

*year, the decision would be between accepting the deficiency and excise taxes as the price for extending the asset loss amortization or keeping the old method and not being able to extend the loss amortization.*

If the plan chooses to make the election for both eligible years, each eligible year is treated separately for purposes of creating amortization bases. A multiemployer plan that has elected the special amortization treatment may choose to end that treatment at any time.

## **Asset Valuation Rules**

Generally, a plan may determine the value of its assets on an actuarial basis that smoothes market returns over a period of no more than five years. The resulting actuarial value, however, cannot be less than 80% or more than 120% of the market value. PRA 2010 provides relief on the actuarial value calculation. The plan sponsor may adopt an asset valuation method that spreads the difference between the expected returns and the actual returns in either or both of the eligible loss years over a period of not more than 10 years. The plan has automatic approval for this change if it currently uses a smoothing method or uses market value.

In addition, for the first two years beginning after August 31, 2008 (i.e., 2009 and 2010 for a calendar year plan), the plan sponsor may adopt a method that allows the actuary to determine the actuarial value of assets using a corridor of 80% to 130% of the market value of assets. The Notice provides automatic IRS approval for such a change.

## **Solvency Test**

The relief discussed above is only available to multiemployer plans that satisfy a solvency test. The plan's actuary makes this solvency certification. For a plan wishing to take advantage of the extended amortization period for eligible net investment losses, the solvency certification must cover 30 years; if only the special asset valuation rules are elected, then the solvency certification covers 10 years. The solvency certification must be made before the formal decision to apply any of the relief provisions is made. In certain situations the formal decision will have retroactive effect and the plan is deemed solvent for those years.

In making the solvency certification for a plan year, the actuary uses the same actuarial basis (e.g., assumptions, data, trustee input on projected industry activity) used for making the PPA06-required annual zone certification of the plan's benefit security. Any benefit reductions required for plans in reorganization may not be reflected for the solvency tests.

## **Restrictions on Plan Amendments Increasing Benefits**

Multiemployer plans that take advantage of the relief are somewhat limited in increasing benefits. In general, the plan may not be amended to increase benefits in either of the two plan years immediately following any plan year

for which the plan sponsor has elected to take advantage of the relief, unless the actuary can certify that the benefit increase is paid for by additional contributions and the plan's funding percentage and credit balances are reasonably expected to be as high as if the benefits had not been increased (and the additional contributions paying for them not made). The amendment increasing benefits can also be made without additional contributions if the amendment is needed to satisfy IRS qualification requirements.

The restriction on benefit increases is effective on June 25, 2010 (the enactment date of PRA10). Thus, any benefit increase that went into effect before June 25, 2010 is not limited by the restriction. However, all benefit increases that went into effect on or after June 25, 2010, even if the amendment was adopted earlier, are restricted.

### Decision to Apply the Special Funding Rules

The decision to apply the special funding rules must be made by the plan sponsor using its normal procedures for formal decisions. The deadline for a formal decision is the earliest of (a) the deadline for certification of zone status for the first plan year beginning on or after January 1, 2011 (i.e., 90 days after the first day of the plan year), (b) the date that certification is actually made, or (c) June 30, 2011. However, if the plan cannot reach agreement on whether to elect the relief and formally decides to submit the decision to arbitration, the deadline is extended until 30 days after the resolution of the arbitration. A sponsor may decide to stop applying the relief, but again it must be done by a formal decision of the sponsor.

**BUCK COMMENT.** *One formal decision can cover which of the three relief measure are to be adopted and for which of the two available plan years.*

### Notification to Participants, Beneficiaries, and the PBGC

The plan sponsor must provide notice to participants and beneficiaries within 30 days after the deadline for the formal decision. The plan sponsor must only provide the notice once with respect to any formal decision. Generally, the plan sponsor must provide the notice to all participants and beneficiaries. However, the IRS makes an exception for any person who becomes a plan participant or beneficiary after the last day of the last plan year ending before the notice is due and for any person who ceases to be a participant or beneficiary before the notice is due.

**BUCK COMMENT.** *It is unclear whether, if there is more than one formal decision (that is, formal decisions at different times), more than one notice must be given to participants and beneficiaries. However, it is clear that the PBGC is to be notified of each decision.*

*Any person who is an "alternative payee" under a qualified domestic relations order is treated as a participant. The guidance does not define beneficiary; arguably, a person is not a beneficiary until his or her participant-spouse has died.*

The notice must include plan identifying information, an explanation of the special funding rules and the effect of applying the rules, a statement that the plan is limited in increasing benefits, and contact information. The notice must be written in a manner calculated to be understood by the average plan participant or beneficiary and a manner in which the participant or beneficiary can understand the significance of the decision. The notice may include additional information that would be helpful, but cannot include information that would mislead. While the notice must be separate from other notices, the plan may provide the notice along with other notices. The notice must be in writing and the plan may provide it in paper or electronic form. The plan may follow either the IRS's rules on electronic disclosures or the Department of Labor's rules.

The plan must also notify the PBGC by providing PBGC with a copy of the notice provided to participants. The guidance includes specific addresses and e-mail instructions for notifying the PBGC. The plan sponsor must provide the notice to the PBGC by the later of 30 days after the plan sponsor makes a formal decision or January 18, 2011. If the plan sponsor makes separate formal decisions, the plan sponsor must provide the PBGC with more than one notice.

### **Certification of Status under Section 432**

Code Section 432 addresses certification by the plan actuary of the plan's zone status: green, yellow, orange, or red. Once a plan has made a formal decision to apply the funding relief, any contemporaneous or future zone certifications must take that decision into account, as may any contemporaneous or future funding improvement or rehabilitation plan. The plan sponsor may also, if it wishes, update prior funding improvement or rehabilitation plan to reflect the elected relief. The application of the special funding rules is required to be ignored for purposes of the PPA06-required actuarial certification as to zone status and the formulation of rehabilitation and funding improvement plans for the first plan year beginning after August 31, 2008 (e.g., calendar 2009 plan year).

The plan sponsor also may ask the actuary to recertify the zone status for the year of the decision if the actuary had certified the status before the decision; however, the plan sponsor is not required to do so. Further, if the actuary does recertify the zone status, the actuary must provide the revised certification to the plan sponsor and the IRS before the end of the plan year, all parties must be notified within 30 days, any measures previously taken that would not now be permissible must be reversed (e.g., the reduction of adjustable benefits, employer-contribution surcharges), and the plan actuary must certify the reversal would not affect the plan's solvency.

### **Form 5500 Requirements**

The IRS is not requiring an amended Form 5500 or Schedule MB if they have already been filed for a plan year in which the plan sponsor has decided to elect the special rules. This is consistent with the position IRS took in Notice 2010-56, issued shortly after the passage of PRA10. Instead, the Schedule MB for the next year (no later than the 2010 Form 5500) must include an attachment showing how the prior year's Schedule MB would change

because of the election. The plan applies a similar approach if a filed Schedule MB already reflects a relief election but the calculations were inconsistent with this guidance. A plan may, if it wishes, instead amend the prior year's Form 5500 and Schedule MB.

## Conclusion

PRA10 provides multiemployer plans that suffered large losses when the equity markets fell with valuable techniques to spread the full impact of those losses. Whether that relief is worth the price will depend on each plan's circumstances.

Buck's consultants are available to help you with the calculations and the analysis.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*