

Multiemployer Plan Benefit Suspension Guidance Is Here

The Treasury Department has issued proposed and temporary regulations and a revenue procedure on benefit suspensions newly available to multiemployer plans in critical and declining status. Treasury will now accept applications for suspensions, but will not approve any until the regulations are finalized — which will not occur until after consideration of public comments and holding a public hearing in September 2015.

Background

The Multiemployer Pension Reform Act of 2014 (MPRA), signed into law by President Barack Obama on December 16, 2014, is intended to address an expected insolvency of the PBGC's insurance program for multiemployer pension plans. As explained in our [January 12, 2015 For Your Information](#), one of the main components of MPRA is the allowance of benefit suspensions in certain multiemployer plans.

The **benefit suspension rules** were made effective immediately. Treasury was instructed to provide guidance to implement those suspensions within 180 days of MPRA's enactment. Under MPRA, "critical and declining status" plans are permitted to suspend accrued benefits — including benefits of participants and beneficiaries currently in pay status. A "critical and declining status plan" is defined as a critical status plan that is projected to become insolvent within 15 years, or is projected to become insolvent within 20 years if either the plan's ratio of inactive to active participants is greater than 2 to 1 or the plan is less than 80% funded.

MPRA gives wide latitude to a critical and declining status plan's trustees to design a benefits suspension — allowing for a temporary or permanent reduction of any current or future payment obligation to any participant or beneficiary, whether or not in pay status. Some constraints are placed on the trustees' decision to reduce benefits, including the following:

- The plan's actuary must certify that the plan is projected to avoid insolvency, taking into account the benefit suspension and any proposed plan partition.

Suspension Not Permitted if Ineffective

Not all multiemployer plans can use the MPRA suspension rules. Plans that cut benefits to the level permitted under the rule but still face insolvency would need to cast off liabilities to a successor plan under the new partition rules. If PBGC cannot accept the partition, a suspension is not permitted.

- The plan sponsor determines throughout the benefit suspension period that the plan is projected to become insolvent unless benefits are suspended, even though all reasonable measures to avoid insolvency have been taken.
- The benefit suspension in the aggregate must be reasonably estimated to achieve, but not materially exceed, the amount necessary to avoid insolvency.
- For any participant, benefits may not be reduced below 110% of the PBGC's guarantee for multiemployer plans. Currently, that guarantee is \$12,870 annually for a participant with 30 years of service.
- Benefits may not be reduced for participants older than 80, with a phase-in of reductions for participants between ages 75 and 80. Benefits based on disability (as defined by the plan) may not be suspended.
- An application must be made to Treasury for approval of a benefit suspension.
- Plan participants must be permitted to vote on whether to approve a benefit suspension, and a suspension may not go into effect if a majority votes no. Treasury is required to administer the vote. However, Treasury is permitted to disregard the results of an election in the case of a "systemically important plan" — defined as a plan that the PBGC projects would need more than \$1 billion (indexed) in financial assistance from the agency if the suspension of benefits is not implemented.

In February, Treasury extended a [request for public comment](#) on various questions raised by this portion of MPRA.

Treasury Issues Suspension Guidance

On June 19, 2015, Treasury provided critically needed guidance about the suspension rules in [Revenue Procedure 2015-34](#) as well as [proposed](#) and [temporary](#) regulations. The temporary regulations provide general guidance about the suspension rules, including definitions, conditions and implementation after a participant vote. The proposed regulations provide additional guidance on the suspension rules, including standards for reviewing an application and limitations on suspensions. The revenue procedure explains how to submit a proposed suspension for approval and provides model notices.

Treasury Approval

Treasury, in consultation with the PBGC and DOL, will evaluate applications submitted for approval. Revenue Procedure 2015-34 explains the content and procedural requirements for submitting a request for approval of a suspension plan. The application must be submitted electronically and include the following:

- The effective and expiration (if applicable) date for the suspension
- A description of the groups that would be affected and how those groups are defined along with the formula used to calculate the amount of the proposed benefit suspensions in each group
- A demonstration that the plan is eligible for suspension, including the plan actuary's certification of critical and declining status and specified asset and activity detail

Contemporaneous Guidance from PBGC on Partitions

For plans that require the additional relief available from PBGC through a partition of the plan, [interim final regulations](#) were released by PBGC contemporaneously with the rules described herein. Our companion *For Your Information* from [June 29, 2015](#) discusses that guidance.

- The plan actuary's certification that the plan is projected to avoid insolvency taking into account the proposed benefit suspension (and, if applicable, a proposed partition), including asset projections and cash-flows
- The plan sponsor's documentation of their determination of projected insolvency if the benefits are not suspended
- A demonstration that the plan satisfies statutory requirements, including sample calculations applying the 110% limitation for each group
- A demonstration that the proposed suspension is reasonably estimated to allow the plan to avoid insolvency using a deterministic basis and, if the plan has 10,000 or more participants or independently chooses to provide them, stochastic projections
- A demonstration that the proposed suspension is reasonably estimated to not materially exceed the level necessary to avoid insolvency and that the proposal is distributed equitably
- Information about satisfying the notice and ballot requirements

Applications for a suspension generally will not be accepted unless the proposed effective date is at least nine months after the submission date.

Within two days of submission, Treasury will certify that the application is complete. Within 30 days of submission, the application will be published on Treasury's website and comments will be solicited via Federal Register publication. The application will be deemed approved unless Treasury provides notice of a defect within 225 days of the submission.

Comment: Plans with 10,000 or more participants must select a retiree representative — a plan participant in pay status — at least 60 days before the application is submitted. The retiree representative advocates for the interests of the retired and deferred vested participants and beneficiaries of the plan throughout the suspension approval process.

Requirements for Benefit Suspension. The temporary regulation confirms that the plan's actuary needs to certify that the plan is projected to avoid insolvency in light of the proposed suspension of benefits. No specific criteria are set for this determination in either the proposed or temporary regulation.

However, the revenue procedure requires disclosure of the assumptions used, including information on contribution base units and average contribution rates. In addition, the proposed regulations require that the plan sponsor make initial and annual (by the last day of the plan year) determinations that, although all reasonable measures to avoid insolvency have been made, the plan is projected to become insolvent unless benefits are suspended. For this purpose, the projection of the plan's insolvency must be made using the standards used for the aggregate requirement, described below, that the suspension is sufficient to avoid insolvency and not materially in excess of the level needed to avoid insolvency.

Limits on Benefit Reductions. The temporary regulation presents basic information about permitted reductions; detailed rules are covered in the proposed regulation. Under the proposed regulation, the reduction threshold



based on 110% of the participant's guaranteed benefit considers the individual participant's years of credited service and, for active participants, assumes full vesting.

For disability benefits, which are not permitted to be suspended, the proposed rule would consider the participant's benefit to be a disability benefit even after the plan's normal retirement date when the retirement benefit in a selected optional form becomes payable. If the retirement benefit is larger than the disability benefit, the difference would be suspendable.

MPRA requires that any suspension must be equitably distributed across the participant and beneficiary population, however, it is acceptable to have different suspensions based on groups identified by the plan sponsor. The proposed regulation would require consistent treatment within each group and would require that differences across groups be based on reasonably selected relevant factors. For example, there could be a difference in reductions based on previous post-retirement COLAs, a thirteenth check, or unwinding benefit increases.

In addition to limits on individual reductions, MPRA requires that the aggregate reductions be reasonably estimated to achieve, but not materially exceed, the level necessary to avoid insolvency. The proposed regulation calls for an actuarial evaluation on a deterministic basis involving projections for each plan year that support a finding that the suspensions will result in solvency throughout an extended period of at least 30 years (or five years after the expiration of any temporary suspension, if later). The proposed regulation also calls for testing whether a smaller level of suspension would avoid insolvency by evaluating projections at 95% of the proposed suspension level.

Notice of Proposed Suspension. Notice of proposed suspension must be provided, via written or electronic delivery, to all participants, beneficiaries, alternate payees, each employer with an obligation to contribute, and each employee organization representing plan participants for collective bargaining purposes no earlier than four business days prior to application for suspension and no later than two days after the plan sponsor receives notification that it has submitted a complete application.

Comment The temporary regulation recommends that plan sponsors send the Notice of Proposed Suspension after receiving notification that the benefit suspension application is complete (which is due within two business days of the submission). This will avoid having to send multiple notices in the event the submitted application is found not to be complete.

The temporary regulations describe the content of the notice, reasonable efforts required to reach missing participants, and the distribution effort that must be made to assure actual delivery. Revenue Procedure 2015-34 includes a model notice that a plan sponsor may use for this purpose.

Key items of information that must be included in these notices include:

- Sufficient information for a participant or beneficiary to understand the effect of suspensions including an individualized estimate on an annual or monthly basis — if providing individual estimates is not possible, the notice must provide a narrative description of effects
- A description of factors considered by the plan sponsor in designing the benefit suspension
- Information on the rights and remedies of plan participants and beneficiaries
- Information about the retiree representative, if applicable

- Information on how to contact the Department of Treasury for information and assistance
- A statement of the plan sponsor's determination of projected insolvency if the suspension does not take effect
- A statement that insolvency could require lower benefits than the suspension, including a description of the insolvency level of benefits
- A description of the proposed suspension and how different groups of participants will be affected
- A description of how the proposed suspension will impact the plan's projected insolvency
- Information on the duration of the suspension
- A statement that the application for suspension will be available on Treasury's website and on the right to comment and vote on the suspension application

The temporary regulation allows inclusion of additional information, but prohibits false or misleading information.

The temporary regulation also provides that the proposed suspension notice can do double duty as a notice of significant reduction in benefits (a "204(h) notice"). If other reductions are contemplated, such as a reduction in future accruals, the required notice for those changes can be included in the suspension notice. Notice delivery should be timed to meet the deadlines applicable to each notice.

Participant Approval. After Treasury approves the proposed plan, participants will have the opportunity to vote. The plan will go into effect unless a majority of all eligible voters vote to reject the suspension — that is, all non-votes count as "yes." If the plan is a systemically important plan (more than \$1.0 billion present value of projected PBGC financial assistance), Treasury can approve or modify the suspension despite a vote by participants to reject it.

The proposed regulation would require that the ballot for the vote include a copy of the individualized estimate that was provided as part of the earlier notice (or, if that individualized estimate is no longer accurate, a corrected version of that estimate). In addition, the following information would need to be included in the ballot:

A description of:

- The proposed suspension and its effect, including the effect on each category or group of individuals
- The factors considered by the plan sponsor in designing the benefit suspension
- Whether the suspension will remain in effect indefinitely or if and when it will expire by its own terms
- The voting procedures, including the deadline for voting

Statements:

- From the plan sponsor in support of the proposed suspension
- In opposition to the proposed suspension compiled from comments received in response to the solicitation of comments in the **Federal Register** notice
- That the proposed suspension has been approved by the Secretary of the Treasury, in consultation with the PBGC and the Secretary of Labor

- That the plan sponsor has determined that the plan will become insolvent unless the proposed suspension takes effect (including the year insolvency is projected to occur), and a statement that this determination is subject to uncertainty
- That insolvency of the plan could result in benefits lower than benefits paid under the proposed suspension and a description of the projected benefit payments in the event of plan insolvency
- That insolvency of the PBGC would result in benefits lower than benefits otherwise paid in the case of plan insolvency
- That the plan's actuary has certified that the plan is projected to avoid insolvency and that the actuary's projection is subject to uncertainty
- That the suspension will go into effect unless a majority of eligible voters vote to reject the suspension and that, therefore, a failure to vote has the same effect as a vote in favor of the suspension

Ongoing Plan Sponsor Determinations. Initial and ongoing plan sponsor determinations on the need for benefit suspensions are required. The temporary regulation says the initial determination is satisfied only if the plan sponsor determines that all reasonable measures to avoid insolvency have been taken and that the plan is projected to become insolvent if the proposed suspension is not implemented. To make this determination, the plan sponsor considers factors such as contribution levels, levels of benefit accruals, prior suspensions and adjustable benefits reductions, industry compensation comparisons, and competitive factors such as the impact of reductions on retaining active participants and bargaining groups. The plan sponsor may rely on the actuary's certification that the plan is in critical and declining status for the plan year as part of this determination.

Guidance for annual plan sponsor determinations are addressed in the proposed regulation and would require the plan sponsor to determine that all reasonable measures to avoid insolvency have been taken and that the plan is projected to become insolvent without the continued suspension. If favorable actuarial experience indicates that a reduced level of suspension would still avoid insolvency, the plan sponsor may adopt a benefit increase to partially restore the suspended benefits. If favorable actuarial experience points to avoiding insolvency with the suspension eliminated entirely, the proposed regulation would require that the suspension be eliminated. Plan sponsors are required to establish a written record demonstrating compliance with this annual review requirement.

Cessation of Benefit Suspensions. Suspensions will remain in effect until their predefined expiration (temporary suspension); otherwise, benefit suspensions will continue indefinitely. Benefit suspensions can also be partially or fully removed through the adoption of a plan amendment allowing for benefit improvements that meet special criteria including equitable distribution of improvements and demonstration of continued solvency. In addition, the proposed regulations would halt the suspension as of the first day of the plan year after a plan sponsor fails to perform timely annual determinations and maintain a written record. The written record would need to be included in an update to the plan's rehabilitation plan whether or not there is otherwise an update (or some other plan document if the plan is no longer in critical status).

Effective Date

The temporary regulations and the revenue procedure are effective as of June 19, 2015. The proposed regulations will not be effective until released in final form and may not be relied upon until that time. No application proposing a benefit suspension will be approved prior to the issuance of final regulations. Plan sponsors that choose to submit an application currently using the process in Revenue Procedure 2015-34 may need to revise their proposed

suspension and provide new notices to participants depending on the differences between the proposed and final rules.

Final Regulations. Final regulations will be issued after review of comments. Comments are requested on both regulations and Revenue Procedure 2015-34; specifically on demonstrations of avoidance of insolvency and that suspensions are not materially in excess of the level necessary to avoid insolvency. Comments must be received by August 18, 2015. There will be a public hearing on September 10, 2015.

In Closing

With this guidance in hand, critical status plans can begin to evaluate their options and determine whether a MPRA suspension is a possible solution for long-term survival.

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