

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-151135-07]

RIN 1545-BH39

Multiemployer Plan Funding Guidance

AGENCY: Internal Revenue Service (IRS), Treasury

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 432 of the Internal Revenue Code (Code). These proposed regulations provide additional rules for certain multiemployer defined benefit plans that are in effect on July 16, 2006. These proposed regulations affect sponsors and administrators of, and participants in multiemployer plans that are in either endangered or critical status. These regulations are necessary to implement the new rules set forth in section 432 that are effective for plan years beginning after 2007. The proposed regulations reflect changes made by the Pension Protection Act of 2006.

DATES: Written or electronic comments and requests for public hearing must be received by June 16, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-151135-07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-151135-

07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-151135-07).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Bruce Perlin, (202) 622-6090; concerning submissions and requests for a public hearing, Richard.A.Hurst@irscounsel.treas.gov or at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by May 19, 2008.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this regulation is in §1.432(b)-1(d) and (e). This information is required in order for a qualified multiemployer defined benefit plan's enrolled actuary to provide a timely certification of the plan's funding status. In addition, if it is certified that a plan is or will be in critical or endangered status, the plan sponsor is required to notify the Department of Labor, the Pension Benefit Guaranty Corporation, the bargaining parties, participants, and beneficiaries of the status designation. For plans in critical status, the plan sponsor is required to include in the notice an explanation of the possibility that adjustable benefits may be reduced at a later date and that certain benefits are restricted as of the date the notice is sent. The annual certification by the enrolled actuary for the plan will be used to provide an accurate determination and certification of the plan's funded status and to provide notice to the required parties of the status designation. The collection of information is mandatory. The likely respondents are multiemployer plan sponsors and enrolled actuaries.

Estimated total annual reporting burden: 1,200 hours.

Estimated average annual burden hours per respondent: 0.75 hours.

Estimated number of respondents: 1,600.

Estimated annual frequency of responses: occasional.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed Income Tax Regulations (26 CFR part 1) under section 432, as added to the Internal Revenue Code by the Pension Protection Act of 2006 (PPA '06), Public Law 109-280, 120 Stat 780.

Section 412 contains minimum funding rules that generally apply to pension plans. Section 431 sets forth the funding rules that apply specifically to multiemployer defined benefit plans. Section 432 sets forth additional rules that apply to multiemployer plans in effect on July 16, 2006, that are in endangered or critical status¹.

¹ Section 302 and section 304 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) sets forth funding rules that are parallel to those in section 412 and section 431 of the Code. Section 305 of ERISA sets forth additional rules for multiemployer plans that are parallel to those in section 432 of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 302 of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these proposed regulations for purposes of

Section 432 generally provides for a determination by the enrolled actuary for a multiemployer plan as to whether the plan is in endangered status or in critical status for a plan year. In the first year that the actuary certifies that the plan is in endangered status, section 432(a)(1) requires that the plan sponsor adopt a funding improvement plan. The funding improvement plan must meet the requirements of section 432(c) and the plan must apply the rules of section 432(d) during the period that begins when the plan is certified to be in endangered status and ends when the plan is no longer in that status. In the first year that the actuary certifies that the plan is in critical status, section 432(a)(2) requires that the plan sponsor adopt a rehabilitation plan. The rehabilitation plan must meet the requirements of section 432(e) and the plan must apply the rules of section 432(f) during the period that begins when the plan is certified to be in critical status and ends when the plan is no longer in that status. In addition, section 432(f)(2) requires that the plan suspend certain actions as described more fully in this preamble.

Section 432(b)(3)(A) requires an actuarial certification of whether or not a multiemployer plan is in endangered status, and whether or not a multiemployer plan is or will be in critical status, for each plan year. This certification must be completed by the 90th day of the plan year and must be provided to the Secretary of the Treasury and to the plan sponsor. If the certification is with respect to a plan year that is within the plan's funding improvement period or rehabilitation period arising from a prior certification of endangered or critical

ERISA, as well as the Code. Thus, these Treasury Department regulations issued under section 432 of the Code apply as well for purposes of ERISA section 305.

status, the actuary must also certify whether or not the plan is making scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan. Failure of the plan's actuary to certify the status of the plan is treated as a failure to file the annual report under section 502(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). Thus, a penalty of up to \$1,100 per day applies.

Under section 432(b)(1), a multiemployer plan is in endangered status if the plan is not in critical status and, as of the beginning of the plan year, (1) the plan's funded percentage for the plan year is less than 80 percent, or (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years (taking into account amortization extensions under section 431(d)). Under section 432(i), a plan's funded percentage is the percentage determined by dividing the value of the plan's assets by the accrued liability of the plan.

Under section 432(b)(2), a multiemployer plan is in critical status for a plan year if it meets any of four specified tests. Under section 432(b)(2)(A), a plan is in critical status if, as of the beginning of the plan year: (1) the funded percentage of the plan is less than 65 percent and (2) the sum of (A) the market value of plan assets, plus (B) the present value of reasonably anticipated employer contributions for the current plan year and each of the six succeeding plan years is less than the present value of all nonforfeitable benefits projected to be payable under the plan during the current plan year and each of the six succeeding plan years (plus administrative expenses). For this purpose,

employer contributions are determined assuming that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years.

Under section 432(b)(2)(B), a plan is in critical status if the plan has an accumulated funding deficiency for the current plan year or is projected to have an accumulated funding deficiency for any of the three succeeding plan years. For purposes of this test, the determination of accumulated funding deficiency is made not taking into account any amortization extension under section 431(d). In addition, if a plan has a funded percentage of 65 percent or less, the three-year period for projecting whether the plan will have an accumulated funding deficiency is extended to four years.

Under section 432(b)(2)(C), a plan is in critical status for the plan year if (1) the plan's normal cost for the current plan year, plus interest for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last day of the preceding year, exceeds the present value of the reasonably anticipated employer and employee contributions for the current plan year, (2) the present value of nonforfeitable benefits of inactive participants is greater than the present value of nonforfeitable benefits of active participants, and (3) the plan has an accumulated funding deficiency for the current plan year, or is projected to have an accumulated funding deficiency for any of the four succeeding plan years (not taking into account amortization period extensions under section 431(d)).

Under section 432(b)(2)(D), a plan is in critical status for a plan year if the sum of (A) the market value of plan assets, and (B) the present value of the reasonably anticipated employer contributions for the current plan year and each of the four succeeding plan years is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the four succeeding plan years (plus administrative expenses). For this purpose, employer contributions are determined assuming that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years.

In making the determinations and projections applicable under the endangered and critical status rules, the plan actuary must make projections for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of such year. The actuary's projections must be based on reasonable actuarial estimates, assumptions, and methods that offer the actuary's best estimate of anticipated experience under the plan. An exception to this rule applies in the case of projected industry activity. Any projection of activity in the industry or industries covered by the plan, including future covered employment and contribution levels, must be based on information provided by the plan sponsor, and the plan sponsor must act reasonably and in good faith. The projected present value of liabilities as of the beginning of the year must be based on either the most recent actuarial

statement required with respect to the most recently filed annual report or the actuarial valuation for the preceding plan year.

Under section 432(b)(3)(B)(ii), any actuarial projection of plan assets must assume (1) reasonably anticipated employer contributions for the current and succeeding plan years, assuming that the terms of one or more collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for the succeeding plan years, or (2) that employer contributions for the most recent plan year will continue indefinitely, but only if the plan actuary determines that there have been no significant demographic changes that would make continued application of such terms unreasonable.

The first year that an actuary certifies that a plan is in endangered or critical status establishes a timetable for a number of actions. Under section 432(b)(3)(D), within 30 days after the date of certification, the plan sponsor must notify the participants and beneficiaries, the bargaining parties, the PBGC and the Secretary of Labor of the plan's endangered or critical status. If it is certified that a plan is or will be in critical status, the plan sponsor must include in the notice an explanation of the possibility that (1) adjustable benefits (as defined in section 432(e)(8)) may be reduced and (2) such reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided for the first plan year in which the plan is in critical status.

If a plan is certified to be in critical status, the plan must take certain actions after notifying the plan participants of the critical status. Specifically,

section 432(f)(2) restricts the payment of benefits that are in excess of a single life annuity (plus any social security supplement) effective on the date the notice is sent. Section 432(f)(2)(B) provides that this restriction does not apply to amounts that may be immediately distributed without the consent of the employee under section 411(a)(11) and to any makeup payment in the case of a retroactive annuity starting date or a similar payment of benefits owed with respect to a prior period. In addition, the plan sponsor must refrain from making any payment for the purchase of an irrevocable commitment from an insurer to pay benefits.

Sections 432(c)(1) and 432(e)(1) provide that in the first year that a plan is certified to be in endangered or critical status, the plan sponsor must adopt a funding improvement plan (in the case of a plan that is in endangered status) or a rehabilitation plan (in the case of a plan that is in critical status). The deadline for adoption of the funding improvement plan or rehabilitation plan is 240 days after the deadline for the certification. Accordingly, if the actuarial certification is made after the 90-day deadline, the amount of time for adopting the funding improvement plan or rehabilitation plan is shortened.

Section 432(c)(3) defines a funding improvement plan as a plan which consists of the actions, including options or a range of options, to be proposed to the bargaining parties, formulated to provide, based on reasonably anticipated experience and reasonable actuarial assumptions, for the attainment by the plan of certain requirements. Those requirements are based on a statutorily specified improvement in the plan's funding percentage from the percentage that applied

on the first day of the funding improvement period. The first day of the funding improvement period is defined in section 432(c)(4) as the first day of the first plan year beginning after the earlier of (1) the second anniversary of the date of the adoption of the funding improvement plan or (2) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of endangered status for the initial endangered year and covering, as of such due date, at least 75 percent of the active participants in such multiemployer plan.

Section 432(d)(1) sets forth rules that apply after the certification of endangered status and before the first day of the funding improvement period. After the adoption of the funding improvement plan, section 432(d)(2) prohibits any amendments that are inconsistent with the funding improvement plan. In addition, section 432(d)(2) provides special rules for acceptance of collective bargaining agreements and plan amendments that increase benefits.

A rehabilitation plan is a plan which consists of the actions, including options or a range of options, to be proposed to the bargaining parties, formulated to provide, based on reasonably anticipated experience and reasonable actuarial assumptions, for the attainment by the plan of certain requirements. Generally, the rehabilitation plan should enable the plan to emerge from critical status by the end of a 10-year period that begins after the earlier of (1) the second anniversary of the date of the adoption of the rehabilitation plan or (2) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of critical status for the initial critical year and covering, as of such due date, at least 75 percent of the active

participants in such multiemployer plan. For this purpose a plan emerges from critical status when the plan actuary certifies that the plan is not projected to have an accumulated funding deficiency for the plan year or any of the nine succeeding plan years, without regard to the use of the shortfall method and taking into account amortization period extensions under section 431(d). As an alternative, if the plan sponsor determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan cannot reasonably be expected to emerge from critical status by the end of the 10-year period, the requirements for a rehabilitation plan are that the plan include reasonable measures to emerge from critical status at a later time or to forestall possible insolvency (within the meaning of section 4245 of ERISA).

Section 432(e)(8) allows a rehabilitation plan for a plan that is in critical status to provide for a reduction of certain “adjustable” benefits that would otherwise be protected by section 411(d)(6). These adjustable benefits include early retirement benefits and retirement-type subsidies within the meaning of section 411(d)(6)(B)(i). Under section 432(e)(8)(A)(ii), no reduction will apply to a participant whose benefit commencement date is before the date the notice under section 432(b)(3)(D) for the initial critical year is provided. Under section 432(e)(8)(B), except with respect to certain benefit increases described in 432(e)(8)(A)(iv)(III), a plan is not permitted to reduce the level of a participant’s accrued benefit payable at normal retirement age. Furthermore, section 432(e)(8)(C) prohibits any reduction until 30 days after plan participants and

beneficiaries, employers and employee organizations are notified of the reduction.

In years after the initial critical year or initial endangered year, sections 432(c)(6) and 432(e)(3)(B) provide that the plan sponsor must annually update the funding improvement or rehabilitation plan. This includes updating the schedule of contribution rates. Updates are required to be filed with the plan's annual report.

Section 432(f)(4) sets forth rules that apply after the certification of critical status and before the first day of the rehabilitation period. After the adoption of the rehabilitation plan, section 432(f)(1) prohibits any amendments that are inconsistent with the rehabilitation plan.

Section 432(h) provides rules for the treatment of employees who participate in the plan even though they are not covered by a collective bargaining agreement.

Section 432(i) provides a number of definitions that apply for purposes of section 432. For example, under section 432(i)(8), the actuary's determination with respect to a plan's normal cost, actuarial accrued liability, and improvements in a plan's funded percentage must be based on the unit credit funding method (whether or not that method is used for the plan's actuarial valuation).

Section 432 is effective for plan years beginning on or after January 1, 2008. Section 212(e)(2) of PPA '06 provides a special rule permitting a plan to provide the notice described in section 432(b)(3)(D) on an early basis.

Specifically, if the plan actuary certifies that the plan is reasonably expected to be

in critical status for the first plan year beginning after 2007, the plan is permitted to provide the notice described in section 432(b)(3)(D) at any time between the enactment of PPA '06 and the date the notice is otherwise required to be provided.

Explanation of Provisions

Overview

These regulations provide guidance with respect to certain of the provisions of section 432. Specifically, these regulations provide guidance regarding the determination of when a plan is in endangered status or critical status and the associated notices. These regulations do not provide guidance with respect to all issues relating to a multiemployer plan that is in endangered or critical status. For example, no guidance is provided on the parameters for the adoption of a funding improvement plan or rehabilitation plan. Guidance with respect to additional issues will be included in a second set of regulations that are expected to be issued this year.

§1.432(a)-1 General rules relating to section 432

Section 1.432-1 provides general rules relating to section 432, including definitions of certain terms used for purposes of section 432 and the special rules that apply to participants in multiemployer plans who are not participating pursuant to a collective bargaining agreement.

The regulations provide that effective on the date that a notice of critical status for the initial critical year is sent to the plan participants, the plan must not pay any benefit in excess of the monthly amount paid under a single life annuity

(plus any social security supplement) and is not permitted to purchase an irrevocable commitment from an insurer to pay benefits. The restriction does not apply to the small-dollar cash-outs allowed under section 411(a)(11) nor to the make-up payments under a retroactive annuity starting date.

The regulations provide that if the notice described in section 432(b)(3)(D) has been sent and the restrictions provided under section 432(f)(2) have been applied, and it is later determined that the restrictions should not have been applied, then the plan must correct any benefit payments that were restricted in error. The regulations provide two examples of situations requiring this correction, each of which involves an actuary certifying that the plan is reasonably expected to be in critical status for the first plan year beginning after 2007, followed by an early notification of critical status that is made to employees under the rules of section 212(e)(2) of PPA '06. In one example of a plan taking actions that require correction, the plan restricts benefits before the first plan year beginning after 2007 (the effective date of section 432). In the second such example, the plan is not in critical status for the first plan year beginning after 2007 (even though the enrolled actuary for the plan had certified that it is reasonably expected that the plan will be in critical status with respect to that year).

The regulations incorporate a number of definitions listed in section 432(i) along with other definitions that are located in sections 432(c) and (e). The regulations do not include the broad provision under section 432(i)(8) to use the unit credit funding method for purposes of the plan's "normal cost, actuarial

accrued liability, and improvements in a plan's funded percentage." Instead, consistent with the intended scope of section 432(i)(8), the regulations require the use of this funding method solely for purposes of determining a plan's funded percentage and the section 432(b)(2)(C)(i) comparison of contributions with the sum of the plan's normal cost and interest on the amount of unfunded liability. Thus, the determination of whether a plan is projected to have an accumulated funding deficiency in the determination of a plan's status under section 432 is based on the plan's actual funding method, rather than the unit credit funding method. The regulations substitute the term "initial endangered year" for the statutory term "initial determination year."

In addition, the regulations provide guidance for plans that change their status in subsequent years. For example, a plan that is in critical status may emerge from that status and later reenter critical status. In such a circumstance, the year of reentry into critical status is treated as the initial critical year. Similarly, a plan that is in endangered status may have a status change and at a later date reenter endangered status. In such a circumstance, the year of reentry into endangered status is treated as the initial endangered year.

§1.432(b)-1 Determination of status and adoption of a plan

The regulations provide rules for the determination of whether a plan is in endangered status or critical status within the meaning of section 432(b)(1) and (2). These rules reflect the different ways a plan can be in endangered status under section 432(b)(1)(A) or (B) and in critical status under section 432(b)(2)(A), (B), (C), or (D). The regulations also provide that a plan is in critical status for a

plan year if it was in critical status in the immediately preceding year and the plan does not meet the emergence from critical status rule of section 432(e)(4)(B). Thus, a plan that was in critical status for the prior year will remain in critical status if the enrolled actuary for the plan certifies that the plan is projected to have an accumulated funding deficiency for the plan year or any of the 9 succeeding plan years, without regard to the use of the shortfall funding method, but taking into account any extensions of the amortization periods under section 431(d).

The regulations provide limited guidance on the actuarial projections that are used for purposes of the certification of status by the enrolled actuary for the plan. The projections must generally be based on reasonable actuarial assumptions and methods that, as under section 431(c)(3), offer the actuary's best estimate of anticipated experience under the plan. The actuarial projection of future contributions and assets must assume either that the terms of the one or more collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years, or that the dollar amount of employer contributions for the most recent plan year will continue indefinitely. If the actuarial projections assume the continued maintenance of the collective bargaining agreements, the plan sponsor must provide a projection of activity in the industry, including future covered employment, to the plan actuary, and the actuary is permitted to rely on those projections. In making these projections, the plan sponsor must act reasonably and in good faith. The alternative assumption that the dollar amount of

contributions remains unchanged into the future is only available if the enrolled actuary for the plan determines there have been no significant demographic changes that would make such assumption unreasonable. In addition, the regulations provide that the alternative assumption is not available for purposes of determining whether the plan is in critical status under the tests in section 432(b)(2)(A) and (D).

The projected present value of liabilities as of the beginning of such year is determined based on the most recent information reported on the most recent of either the actuarial statement required under section 103(d) of ERISA that has been filed with respect to the most recent year, or the actuarial valuation for the preceding plan year.

The regulations provide that, for purposes of section 432, if the plan received an extension of any amortization period under section 412(e), the extension is treated the same as an extension under section 431(d). Thus, such an extension is taken into account in determining endangered status under section 432(b)(1)(B) and emergence from critical status under section 432(e)(4)(B). In contrast, such an extension is not taken into account in determining whether a plan has or will have an accumulated funding deficiency for purposes of determining critical status under section 432(b)(2)(B) and (C).

The regulations describe the content of the annual certification required under section 432(b)(3) that must be sent to the plan sponsor and the IRS. The annual certification must be provided regardless of whether the plan is in endangered or critical status. If the plan is certified to be in endangered or

critical status, then the certification must identify the plan, the plan sponsor, and the enrolled actuary who signs the certification; provide contact information for the plan sponsor and actuary; state whether or not the plan is in endangered or critical status for the plan year; and, if the certification is for a year other than the initial endangered year or the initial critical year, whether the plan is making the scheduled progress described in the plan's funding improvement plan or rehabilitation plan. The regulations also provide an IRS address to which the certification is to be mailed.

The regulations also provide that the content of the annual certification and the IRS address to which it is mailed may be added to or modified in guidance of general applicability to be published in the Internal Revenue Bulletin. Such additional information may include, for instance, which endangered status or critical status standard(s) applies to the plan; supporting information for the classification; a description of the actuarial assumptions used in making the certification; and a projection of the plan's funded percentage for future years. The guidance may also require additional supporting information for certifications made prior to the issuance of the guidance.

The regulations provide guidance on the notice required under section 432(b)(3)(D).² In particular the regulations require that, in the case of a plan that is in critical status and which provides for benefits that would be restricted under section 432(f)(2), the notice for the initial critical year must tell participants about the restriction. A plan sponsor that sends the model notice provided by the

² Under section 432(b)(3)(D)(ii), the Secretary of Labor is to prescribe a model notice that a multiemployer plan may use to satisfy this notice requirement.

Secretary of Labor pursuant to section 432(b)(3)(D)(iii) satisfies this requirement.

If a section 432(b)(3)(D) notice for such a plan was sent prior to the deadline in that section and the notice did not contain the disclosure regarding the immediate restriction on benefits under section 432(f)(2), then the regulations provide that the notice does not satisfy the requirements for notice under section 432(b)(3)(D). Accordingly, the restrictions under section 432(f)(2) do not apply as a result of the issuance of such a notice and the plan will not be treated as having issued the notice for purposes of the section 432(e)(8)(A)(ii) restriction on reducing adjustable benefits for participants whose benefit commencement dates are prior to the issuance of that notice. However, if additional notice that includes all of the information required under the regulations is provided prior to the required date for notice for the initial critical year under section 432(b)(3)(D) (that is, 30 days after the certification for the plan year), then the notice requirements of section 432(b)(3)(D) are satisfied as of the date of the later notice. In such a case, if the earlier notice contained the information described in section 432(b)(3)(D)(ii), then the date of that earlier notice will apply for purposes of the section 432(e)(8)(A)(ii) restriction.

The regulations reflect the rules of section 212(e)(2) of PPA under which a plan sponsor is permitted to send an early notice to plan participants. This early notice, which applies solely to the first plan year beginning after 2007, is only available if the plan actuary certifies to the plan sponsor that the plan is reasonably expected to be in critical status for that initial plan year. This preliminary certification that the plan is reasonably expected to be in critical

status is different from the annual certification that the plan actuary must make; accordingly, the plan actuary must still certify whether the plan is in critical or endangered status (or in neither critical nor endangered status) for that plan year by the normal 90-day deadline for the certification.

Proposed legislation

As of the date of the issuance of these proposed regulations, bills have been introduced in the House of Representatives and the Senate that would exclude from the section 432(f)(2) limitation on accelerated benefits a distribution with an annuity starting date that is before the date that the notice under section 432(b)(3)(D) is provided.³ Section 1.432(a)-1(a)(3)(iii)(C) has been reserved in order to accommodate any enacted changes.

Effective/Applicability Dates

These regulations apply to plan years ending after March 18, 2008, but only with respect to plan years that begin on or after January 1, 2008. These regulations do not address the sunset provision provided by PPA '06 section 221(c).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information imposed

³ See H.R. 3361 (August 3, 2007) and S. 1974 (August 2, 2007) at sections 3(b)(1)(E) and 3(b)(2)(E)(ii). However, S. 1974, as amended and passed by the Senate on December 19, 2007, did not include this provision.

by these proposed regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. The estimated burden imposed by the collection of information contained in these proposed regulations is 0.75 hours per respondent.

Moreover, most of this burden is attributable to the requirement for a qualified multiemployer defined benefit plan's enrolled actuary to provide a timely certification of the plan's funding status. In addition, if a plan is certified that it is or will be in critical or endangered status, the plan sponsor is required to notify the Department of Labor, the Pension Benefit Guaranty Corporation, the bargaining parties, participants, and beneficiaries of the status designation. For plans in critical status, the plan sponsor is required to include an explanation of the possibility that adjustable benefits may be reduced and that certain benefits are restricted as of the date the notice is sent. Pursuant to section 7805(f) of the Internal Revenue Code, this regulations has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (one signed and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in

writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of this regulation is Bruce Perlin, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 29 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.432(a)-1 is added to read as follows:

§1.432(a)-1 General rules relating to section 432.

(a) In general--(1) Overview. This section provides rules relating to multiemployer plans (within the meaning of section 414(f)) that are in endangered status or critical status under section 432. Section 432 and this section only apply to multiemployer plans that are in effect on July 16, 2006. Paragraph (b) of this section sets forth definitions of terms that apply for purposes of section 432.

Paragraph (c) of this section sets forth special rules for plans described in section 404(c) and for the treatment of nonbargained participation.

(2) Plans in endangered status--(i) Plan sponsor must adopt funding improvement plan. If a plan is in endangered status, the plan sponsor must adopt and implement a funding improvement plan that satisfies the requirements of section 432(c).

(ii) Restrictions applicable to plans in endangered status. If a plan is in endangered status, the plan and plan sponsor must satisfy the requirements of section 432(d)(1) during the funding plan adoption period specified in section 432(c)(8).

(iii) Restrictions applicable after the adoption of funding improvement plan. In the case of a plan that is in endangered status after adoption of the funding improvement plan, the plan and the plan sponsor must satisfy the requirements of section 432(d)(2) until the end of the funding improvement period.

(3) Plans in critical status--(i) Plan sponsor must adopt rehabilitation plan. If a plan is in critical status, the plan sponsor must adopt and implement a rehabilitation plan that satisfies the requirements of section 432(e).

(ii) Restrictions applicable to plans in critical status. If a plan is in critical status, the plan and the plan sponsor must satisfy the requirements of section 432(f)(4) during the rehabilitation plan adoption period as defined in section 432(e)(5). The plan must also apply the restrictions on single sum and other accelerated benefits set forth in paragraph (a)(3)(iii) of this section.

(iii) Restrictions on single sums and other accelerated benefits--(A) In

general. A plan in critical status is required to provide that, effective on the date the notice of certification of the plan's critical status for the initial critical year under §1.432(b)-1(e) is sent, no payment in excess of the monthly amount payable under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)), and no payment for the purchase of an irrevocable commitment from an insurer to pay benefits, may be made except as provided in section 432(f)(2). A plan amendment that provides for these restrictions does not violate section 411(d)(6).

(B) Exceptions. Pursuant to section 432(f)(2)(B), the restrictions under this paragraph (a)(3)(iii) do not apply to a benefit which under section 411(a)(11) may be immediately distributed without the consent of the participant or to any makeup payment in the case of a retroactive annuity starting date or any similar payment of benefits owed with respect to a prior period.

(C) [Reserved.]

(D) Correction of erroneous restrictions. If the notice described in §1.432(b)-1(e) has been sent and the restrictions provided under this paragraph (a)(3)(iii) have been applied, and it is later determined that the restrictions should not have been applied, then the plan must correct any benefit payments that were restricted in error. Thus, for example, if pursuant to section 212(e)(2) of the Pension Protection Act of 2006, Public Law 109-280, 120 Stat. 780 the enrolled actuary for the plan certified that it was reasonably expected that the plan would be in critical status with respect to the first plan year beginning after 2007, and the notice described in §1.432(b)-1(e)(3)(i) was sent, but the plan is not later

certified to be in critical status for that plan year, then the plan must correct any benefit payments that were restricted after the notice was sent. Similarly, if the enrolled actuary for the plan certified that it was reasonably expected that the plan would be in critical status with respect to the first plan year beginning after 2007, and the notice described in §1.432(b)-1(e)(3)(i) was sent before the first day of that plan year, the restriction on benefits under section 432(f)(2) first applies beginning on the first day of the first plan year beginning after 2007. If the plan restricts benefits before that date, then the plan must correct any improperly restricted benefits.

(iv) Restrictions applicable after the adoption of rehabilitation plan. In the case of a plan that is in critical status after the adoption of the rehabilitation plan, the plan and the plan sponsor must satisfy the requirements of section 432(f)(1) until the end of the rehabilitation period.

(b) Definitions. The following definitions apply for purposes of section 432 and the regulations:

(1) Accumulated funding deficiency. The term accumulated funding deficiency has the same meaning as the term accumulated funding deficiency under section 431(a).

(2) Active participant. The term active participant means a participant who is in covered service under the plan.

(3) Bargaining party. Except as provided in paragraph (c)(1) of this section, the term bargaining party means an employer who has an obligation to contribute under the plan and an employee organization which, for purposes of

collective bargaining, represents plan participants employed by an employer which has an obligation to contribute under the plan.

(4) Benefit commencement date. The term benefit commencement date means the annuity starting date (or in the case of a retroactive annuity starting date, the date on which benefit payments begin).

(5) Critical status. A multiemployer plan is in critical status if the plan meets one of the tests set forth in §1.432(b)-1(c).

(6) Endangered status. A plan is in endangered status if the plan meets one of the tests set forth in §1.432(b)-1(b).

(7) Funded percentage. The term funded percentage means a fraction (expressed as a percentage) the numerator of which is the actuarial value of the plan's assets as determined under section 431(c)(2) and the denominator of which is the accrued liability of the plan, determined using the actuarial assumptions described in section 431(c)(3) and the unit credit funding method.

(8) Funding improvement period for endangered or seriously endangered plans. The term funding improvement period means the period that begins on the first day of the first plan year beginning after the earlier of the second anniversary of the date of the adoption of the funding improvement plan, or the expiration of the collective bargaining agreements that are in effect on the due date for the actuarial certification of endangered status for the initial endangered year and which cover, as of such due date, at least 75 percent of the active participants in the plan. The funding improvement period ends on the last day of the 10th year (15 years for seriously endangered plans, except as provided in

section 432(c)(5)) after it begins or, if earlier, the date of the change in status described in section 432(c)(4)(C).

(9) Funding plan adoption period. The term funding plan adoption period means the period that begins on the date of the actuarial certification for the initial endangered year and ends on the day before the first day of the funding improvement period.

(10) Inactive participant. The term inactive participant means --

- (i) A participant who is not an active participant,
- (ii) A beneficiary under the plan, or
- (iii) An alternate payee under the plan.

(11) Initial critical year. The term initial critical year means the first year for which the enrolled actuary for the plan has certified that the plan is or will be in critical status. If a plan is in critical status in one year, emerges from critical status in a subsequent year and then returns to critical status, the year of reentry into critical status is treated as the initial critical year with respect to subsequent years.

(12) Initial endangered year. The term initial endangered year means the first year for which the enrolled actuary for the plan has certified that the plan is in endangered status. If a plan is in endangered status in one year, changes from endangered status in a subsequent year and then returns to endangered status, the year of reentry into endangered status is treated as the initial endangered year with respect to subsequent years.

(13) Nonbargained participant. The term nonbargained participant means a participant in the plan whose participation is other than pursuant to a collective bargaining agreement within the meaning of section 7701(a)(46). A participant will not be treated as a nonbargained participant merely because the participant is no longer covered by the collective bargaining agreement solely as a result of retirement or severance from employment.

(14) Obligation to contribute. The term obligation to contribute means an obligation to contribute arising under one or more collective bargaining (or related) agreements or as a result of a duty under applicable labor-management relations law.

(15) Plan sponsor. Except as provided in paragraph (c)(1) of this section, the term plan sponsor means the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(16) Rehabilitation period. The term rehabilitation period means the period that begins on the first day of the first plan year beginning after the earlier of the second anniversary of the date of the adoption of the rehabilitation plan, or the expiration of the collective bargaining agreements that are in effect on the due date for the actuarial certification of critical status for the initial critical year and which cover, as of such due date, at least 75 percent of the active participants in the plan. The rehabilitation period ends on the last day of the 10th year after it begins or, if earlier, the plan year preceding the plan year in which the plan has emerged from critical status as described in section 432(e)(4)(B).

(17) Rehabilitation plan adoption period. The term rehabilitation plan adoption period means the period that begins on the date of the actuarial certification for the initial critical year and ends on the day before the first day of the rehabilitation period.

(18) Seriously endangered status. A plan is in seriously endangered status if the plan is in endangered status and is described in both §1.432(b)-1(b)(2) and (3).

(c) Special rules--(1) Plan described in section 404(c). In the case of a plan described in section 404(c), or a continuation of such a plan, the association of employers that is the employer settlor of the plan is treated as a bargaining party and is treated as the plan sponsor for purposes of section 432.

(2) Plans covering both bargained and nonbargained participants. In the case of an employer that contributes to a plan with respect to both employees who are covered by one or more collective bargaining agreements and employees who are nonbargained participants, if the plan is in endangered status or critical status, benefits of and contributions for the nonbargained participants (including surcharges on those contributions) are determined as if those nonbargained participants were covered under the employer's collective bargaining agreement in effect when the plan entered endangered or critical status that is the first to expire.

(3) Plans covering nonbargained participants only. In the case of an employer that contributes to a multiemployer plan only with respect to employees who are not covered by a collective bargaining agreement, section 432 and the

regulations thereunder are applied as if the employer were the bargaining party, and its participation agreement with the plan were a collective bargaining agreement with a term ending on the first day of the plan year beginning after the employer is provided the schedules described in sections 432(c) and (e).

(d) Effective/applicability date. These regulations apply to plan years ending after March 18, 2008, but only with respect to plan years that begin on or after January 1, 2008.

Par. 3. Section 1.432(b)-1 is added to read as follows:

§1.432(b)-1 Determination of status and adoption of a plan.

(a) In general. This section provides rules relating to multiemployer plans (within the meaning of section 414(f)) that are in endangered status or critical status under section 432. Section 432 and this section only apply to multiemployer plans that are in effect on July 16, 2006. Paragraph (b) of this section sets forth the factors for determining whether a plan is in endangered status. Paragraph (c) of this section sets forth the factors for determining whether a plan is in critical status. Paragraph (d) sets forth the requirements for the annual certification by the plan's enrolled actuary. Paragraph (e) of this section describes the notice to employees that is required for plans that are in endangered or critical status.

(b) Determination of endangered status--(1) In general. A plan is in endangered status for a plan year if, as determined by the enrolled actuary for the plan, the plan is not in critical status for the plan year and if, as of the beginning of the plan year, the plan is described either in paragraph (b)(2) of this

section or paragraph (b)(3) of this section. The enrolled actuary's determination of whether a plan is in endangered status is made under the rules of paragraph (d)(5) of this section.

(2) Endangered status based on funding percentage. A plan is described in this paragraph (b)(2) for a plan year if the plan's funded percentage for such plan year is less than 80 percent.

(3) Endangered status based on projection of funding deficiency. A plan is described in this paragraph (b)(3) for a plan year if the plan has an accumulated funding deficiency for such plan year (or is projected to have such an accumulated funding deficiency for any of the 6 succeeding plan years), taking into account any extension of amortization periods under section 431(d).

(c) Critical Status--(1) In general. A multiemployer plan is in critical status for a plan year if, as determined by the enrolled actuary for the plan, the plan is described in one or more of paragraphs (c)(2) through (c)(6) of this section as of the beginning of the plan year. The enrolled actuary's determination of critical status must be made in accordance with the rules of paragraph (d)(5) of this section. Notwithstanding paragraph (d)(5)(iii) of this section, for purposes of applying the critical status tests described in paragraphs (c)(2) and (c)(5) of this section, the actuary must assume that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years.

(2) Critical status based on 6-year projection of benefit payments. A plan is described in this paragraph (c)(2) if the funded percentage of the plan is less

than 65 percent, and the present value of all nonforfeitable benefits projected to be payable under the plan during the current plan year and each of the 6 succeeding plan years (plus administrative expenses for such plan years) is greater than the sum of--

(i) The fair market value of plan assets, plus

(ii) The present value of the reasonably anticipated employer contributions for the current plan year and the 6 succeeding plan years.

(3) Critical status based on short term funding deficiency. A plan is described in this paragraph (c)(3) if--

(i) The plan has an accumulated funding deficiency for the current plan year, not taking into account any extension of amortization periods under section 431(d), or

(ii) The plan is projected to have an accumulated funding deficiency for any of the 3 succeeding plan years (4 succeeding plan years if the funded percentage of the plan is 65 percent or less), not taking into account any extension of amortization periods under section 431(d).

(4) Critical status based on contributions less than normal cost plus interest. A plan is described in this paragraph (c)(4) if--

(i) The present value of the reasonably anticipated employer and employee contributions for the current plan year is less than the sum of--

(A) The plan's normal cost (determined under the unit credit funding method), and

(B) Interest (determined at the rate used for determining costs under the

plan) on the excess if any of--

(1) The accrued liability of the plan (determined using the actuarial assumptions described in section 431(c)(3) and the unit credit funding method) over

(2) The actuarial value of assets determined under section 431(c)(2),

(ii) The present value, as of the beginning of the current plan year, of nonforfeitable benefits of inactive participants is greater than the present value of nonforfeitable benefits of active participants, and

(iii) The plan has an accumulated funding deficiency for the current plan year (or is projected to have such a deficiency for any of the 4 succeeding plan years), not taking into account any extension of amortization periods under section 431(d).

(5) Critical status based on 4-year projection of benefit payments. A plan is described in this paragraph (c)(5) if the present value of all benefits projected to be payable under the plan during the current plan year or any of the 4 succeeding plan years (plus administrative expenses for such plan years) is greater than the sum of--

(i) The fair market value of plan assets, plus

(ii) The present value of the reasonably anticipated employer contributions for the current plan year and each of the 4 succeeding plan years.

(6) Critical status based on failure to meet emergence criteria. A plan is described in this paragraph (c)(6) if--

(i) The plan was in critical status for the immediately preceding plan year,

and

(ii) The enrolled actuary for the plan has certified that the plan is projected to have an accumulated funding deficiency for the plan year or any of the 9 succeeding plan years, without regard to the use of the shortfall funding method but taking into account any extensions of the amortization periods under section 431(d).

(d) Annual certification by the plan's enrolled actuary--(1) In general. Not later than the 90th day of each plan year of a multiemployer plan, the enrolled actuary for the plan must certify to the Secretary of the Treasury and to the plan sponsor--

(i) Whether or not the plan is in endangered status for such plan year;

(ii) Whether or not the plan is or will be in critical status for such plan year, and

(iii) In the case of a plan which is in a funding improvement or rehabilitation period, whether or not the plan is making the scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.

(2) Transmittal of certification--(i) Transmittal to the plan sponsor. The certification of plan status described in paragraph (d)(1) must be submitted to the plan sponsor at the address stated by the plan sponsor on their Annual Report (Form 5500) or such other address as the plan sponsor may designate in writing for receipt of this certification.

(ii) Transmittal to the Secretary of the Treasury. Except as provided in guidance of general applicability to be published in the Internal Revenue Bulletin,

the annual certification of plan status described in paragraph (d)(1) must be transmitted to the Secretary of the Treasury by mailing the certification to:

Internal Revenue Service
Employee Plans Compliance Unit
Group 7602 (SE:TEGE:EP)
Room 1700 - 17th Floor
230 S. Dearborn Street
Chicago, IL 60604

(3) Content of annual certification--(i) In general. The annual certification must contain the information described in this paragraph (d)(3). The Secretary may add to or otherwise modify the requirements in this paragraph (d)(3) in guidance of general applicability to be published in the Internal Revenue Bulletin.

(ii) Plan identification. The annual certification must include the name of the plan; the plan number; the name, address, and telephone number of the plan sponsor; and the plan year for which the certification is being made.

(iii) Enrolled actuary identification. The annual certification must include the name, address and telephone number of the enrolled actuary signing the certification; the actuary's enrollment identification number; the actuary's signature, and the date of the signature.

(iv) Information on plan status. The annual certification must state whether the plan is in endangered status (which includes seriously endangered status); critical status, or neither endangered nor critical status.

(v) Information on scheduled progress. If the annual certification is made with respect to a plan year that is within the plan's funding improvement period or rehabilitation period arising from a prior certification of endangered or critical status, the actuary must also certify whether or not the plan is making scheduled

progress in meeting the requirements of its funding improvement or rehabilitation plan.

(4) Penalty for failure to secure timely actuarial certification. A failure of a plan's actuary to certify the plan's status under this paragraph (d) by the date specified in paragraph (d)(1) of this section is treated as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary of Labor under section 101(b)(4) of the Employee Retirement Income Security Act of 1974.

(5) Actuarial projections of assets and liabilities--(i) In general. In making the determinations and projections under section 432(b) and this section, the enrolled actuary for the plan must make projections required for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of such year. These projections must be based on reasonable actuarial estimates, assumptions, and methods in accordance with section 431(c)(3) and that offer the actuary's best estimate of anticipated experience under the plan. Notwithstanding the previous sentence, the actuary is permitted to rely on the plan sponsor's projection of activity in the industry provided under paragraph (d)(5)(iii) of this section. The projected present value of liabilities as of the beginning of such year must be determined based on the most recent information reported on the most recent of either--

(A) The actuarial statement required under section 103(d) of the Employee Retirement Income Security Act of 1974 that has been filed with respect to the

most recent year, or

(B) The actuarial valuation for the preceding plan year.

(ii) Determinations of future contributions. Any actuarial projection of plan assets shall assume either--

(A) Reasonably anticipated employer contributions for the current and succeeding plan years, assuming that the terms of the one or more collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years, or

(B) That employer contributions for the most recent plan year will continue indefinitely, but only if the enrolled actuary for the plan determines there have been no significant demographic changes that would make such assumption unreasonable.

(iii) Projected industry activity. The plan sponsor shall provide any necessary projection of activity in the industry, including future covered employment, to the plan actuary. For this purpose, the plan sponsor must act reasonably and in good faith.

(6) Treatment of amortization extensions under section 412(e). For purposes of section 432, if the plan received an extension of any amortization period under section 412(e), the extension is treated the same as an extension under section 431(d). Thus, such an extension is not taken into account in determining whether a plan has or will have an accumulated funding deficiency under paragraph (c)(3) and (c)(4) of this section, but it is taken into account in determining whether a plan has or will have an accumulated funding deficiency

under paragraph (b)(3) of this section.

(e) Notice of endangered or critical status--(1) In general. In any case in which the enrolled actuary for the plan certifies that a multiemployer plan is or will be in endangered or critical status for a plan year, the plan sponsor must, not later than 30 days after the date of the certification, provide notification of the endangered or critical status to the participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor.

(2) Plans in critical status. If it is certified that a multiemployer plan is or will be in critical status for a plan year, the plan sponsor must include in the notice an explanation of the possibility that adjustable benefits (as defined in section 432(e)(8)) may be reduced, and such reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided for the first plan year in which the plan is in critical status. If the plan provides benefits that are restricted under section 432(f)(2), the notice must also include an explanation that the plan cannot pay single sums and similar benefits described in section 432(f)(2) that are greater than the monthly amount due under a single life annuity. A plan sponsor that sends the model notice issued by the Secretary of Labor pursuant to section 432(b)(3)(D)(iii) satisfies this requirement.

(3) Transition rules--(i) Early notice permitted. If, after August 17, 2006, the enrolled actuary for the plan certifies that a plan is reasonably expected to be in critical status with respect to the first plan year beginning after 2007, then the notice described in this paragraph (e) may be provided before the date the

actuary certifies the plan is in critical status for that plan year. The ability to provide early notice does not extend the otherwise applicable deadline for providing the notice under paragraph (e)(1) of this section.

(ii) Reformation of prior notice. If notice has been provided prior to the date required under paragraph (e)(1) of this section, but the notice did not include all of the information described in paragraph (e)(2) of this section, then that notice will not satisfy the requirements for notice under section 432(b)(3)(D). Accordingly, the restrictions under section 432(f)(2) will not apply as a result of the issuance of such a notice. However, if prior to the date notice is required to be provided under paragraph (e)(1) of this section additional notice is provided that includes all of the information required under paragraph (e)(2) of this section, then the notice requirements of section 432(b)(3)(D) are satisfied as of the date of that additional notice and the restrictions of section 432(f)(2) will apply beginning on that date. In such a case, the date of the earlier notice will still

apply for purposes of section 432(e)(8)(A)(ii) provided that the earlier notice included all of the information required under section 432(b)(3)(D)(ii).

(f) Effective/applicability date. These regulations apply to plan years ending after March 18, 2008, but only with respect to plan years that begin on or after January 1, 2008.

Deputy Commissioner for Services and Enforcement.

Linda E. Stiff