

Election and Notice Procedures for Multiemployer Plans under Sections 204 and 205 of WRERA

Notice 2009-31

I. PURPOSE

This notice provides guidance for sponsors of multiemployer defined benefit plans relating to the elections described in sections 204 and 205 of the Worker, Retiree, and Employer Recovery Act of 2008, P.L. 110-458 (WRERA), and on the notice required to be provided if a plan sponsor makes an election under section 204.

II. BACKGROUND

1. PPA provisions

Section 432 of the Internal Revenue Code (Code), which was added by the Pension Protection Act of 2006, P.L. 109-280 (PPA), provides rules for multiemployer defined benefit plans that are significantly underfunded. In particular, section 432(b)(3) provides that the plan actuary for any such multiemployer plan must, by the 90th day of each plan year, certify to the Secretary of the Treasury and to the plan sponsor as to the plan's "section 432 status" (i.e., whether the plan is in endangered status, critical status, or neither status) for the plan year. If a plan is certified to be in endangered status (including seriously endangered status), the plan sponsor must adopt a funding improvement plan that is reasonably expected to enable the multiemployer plan to achieve certain funding improvements by the end of its 10-year funding improvement period (with a possible substitution of a 15-year funding improvement period for a plan in seriously endangered status). Similarly, the sponsor of a plan that has been certified to be in critical status must adopt a rehabilitation plan that generally is reasonably expected to enable the multiemployer plan to emerge from critical status by the end of its 10-year rehabilitation period (with alternative approaches available if the plan sponsor determines, as described in section 432(e)(3)(A)(ii), that the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period using all reasonable measures). A funding improvement plan or rehabilitation plan must be updated each year after the initial endangered year (referred to in section 432(c)(2) as the initial determination year) or initial critical year.

Section 432(b)(3)(D) provides that the sponsor of a multiemployer plan in endangered or critical status must provide notice of the plan's certified status to participants and beneficiaries, the bargaining parties, the Pension Benefit

Guaranty Corporation, and the Secretary of Labor, not later than 30 days after the date of the certification. If the plan is in critical status, the notice must explain that adjustable benefits, as defined in section 432(e)(8), may be reduced.

Section 4971(a) and (b) imposes an excise tax on an employer responsible for contributing to or under a plan if the plan has an accumulated funding deficiency. PPA added section 4971(g) to the Code, providing new excise tax rules for plans in endangered or critical status. In particular, section 4971(g) imposes new excise taxes with respect to plans in critical or endangered status, and section 4971(g)(1)(A) provides that no excise tax is imposed under section 4971(a) or (b) for a taxable year with respect to a plan in critical status for the plan year that ends with or within the taxable year.

Section 432 applies to plan years beginning on or after January 1, 2008. Section 4971(g) applies to tax years that include the last day of any plan year beginning on or after January 1, 2008.

2. Section 204 of WRERA

Section 204(a) of WRERA provides that a multiemployer plan sponsor may elect, notwithstanding the actuarial certification of the plan's section 432 status under section 432(b)(3) of the Code for the plan year for which the election is made ("election year"), to temporarily freeze the plan's section 432 status so that it is the same as the plan's section 432 status for the plan year immediately prior to the election year ("prior year"). Specifically, section 204(a)(1) of WRERA provides that a multiemployer plan sponsor may elect that the plan's section 432 status for the first plan year beginning on or after October 1, 2008 and not later than September 30, 2009 be the same as the plan's section 432 status for the prior year. If section 432 of the Code did not apply to the plan for the prior year (because the prior year began before January 1, 2008), the actuary must, in order to apply the election, make a certification of the plan's section 432 status for the prior year in the same manner as if section 432 had applied for the prior year.

Section 204(a)(2) of WRERA provides that the sponsor of a multiemployer plan that was in endangered or critical status for the prior year, and for which an election is made under section 204, is not required to update its funding improvement plan, rehabilitation plan, or schedules as otherwise required under section 432(c)(6) or 432(e)(3)(B) of the Code until the plan year following the election year.

Section 204(b) of WRERA provides a special rule for multiemployer plans that would, but for the election to freeze the plan's section 432 status, be in critical status for the election year. In particular, if the plan has, without regard to the election, been certified by the plan actuary to be in critical status for the election

year, then the plan is treated as being in critical status for that year for purposes of applying the excise tax exception under section 4971(g)(1)(A) of the Code.

Section 204(c)(1) of WRERA provides that an election under section 204 must be made at the time and in the manner that the Secretary of the Treasury or the Secretary's delegate may prescribe and, once made, may be revoked only with the consent of the Secretary. If the election is made before the date the annual certification of the plan's section 432 status is submitted to the Secretary, then the election must be included with the certification that is submitted to the Secretary. If the election is made after the date the certification is submitted, then the election must be submitted to the Secretary not later than 30 days after the date of the election.

Section 204(c)(2) of WRERA provides special notice rules that apply when an election under section 204 is made to freeze a plan's section 432 status and that modify the otherwise applicable notice requirements under section 432(b)(3)(D) of the Code. If a plan is in neither endangered nor critical status as a result of the election, the plan sponsor must provide the notice described in section 204(c)(2)(A) of WRERA. This notice applies in lieu of the notice that is otherwise required under section 432(b)(3)(D) of the Code in the case of a plan that has been certified to be in endangered or critical status. The notice described in section 204(c)(2)(A)(ii) of WRERA must be provided to the participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor and must contain such information about the election as the Secretary of the Treasury (in consultation with the Secretary of Labor) may require. Pursuant to section 204(c)(2)(A)(ii)(I) of WRERA, if the election is made before the date the annual certification of the plan's section 432 status is submitted to the Secretary of the Treasury, then notice must be provided not later than 30 days after the date of the certification. Under section 204(c)(2)(A)(ii)(II), if the election is made after the date the annual certification is submitted to the Secretary, then notice must be provided not later than 30 days after the date of the election.

Under section 204(c)(2)(B) of WRERA, if the plan is certified to be in critical status for the election year but is in endangered status by reason of an election made under section 204, the notice that must be provided is the notice that would have been provided under section 432(b)(3)(D) of the Code if the plan had been certified to be in endangered status for the election year.

3. Section 205 of WRERA

Section 205 of WRERA provides for an elective extension of the funding improvement period or rehabilitation period for multiemployer plans in endangered or critical status for a plan year beginning in 2008 or 2009.

If the sponsor of a multiemployer plan that is in endangered or critical status for a plan year beginning in 2008 or 2009 (determined after application of section 204 of WRERA) makes an election under section 205 of WRERA, then, for purposes of section 432 of the Code, the plan's 10-year funding improvement period or rehabilitation period, whichever is applicable, is extended to 13 years. Similarly, if the sponsor of a multiemployer plan that is in seriously endangered status for a plan year beginning in 2008 or 2009 (determined after application of section 204 of WRERA) and that is eligible for a 15-year funding improvement period makes an election under section 205 of WRERA, then, for purposes of section 432 of the Code, the plan's funding improvement period is extended to 18 years. An election under section 205 of WRERA must be made at the time, and in the manner and form, as the Secretary of the Treasury or the Secretary's delegate may prescribe (in consultation with the Secretary of Labor).

III. EFFECT OF ELECTION

A multiemployer plan for which an election under section 204 of WRERA has been made must be operated in accordance with its section 432 status, as determined pursuant to the election, rather than the section 432 status to which the actuary certified for the election year. Thus, for example, the sponsor of a multiemployer plan that would have been in critical status for the election year, but for an election under section 204 to freeze the plan's section 432 status as endangered, could not assess employer surcharges under section 432(e)(7) of the Code, reduce adjustable benefits under section 432(e)(8), or restrict lump sum distributions under section 432(f)(2). Such a multiemployer plan would continue to be operated in accordance with its funding improvement plan (rather than a rehabilitation plan), but the funding improvement plan would not be required to be updated for the election year. If the plan's sponsor had not adopted a funding improvement plan based on its endangered status for the prior year (because section 432 did not apply to the plan for the prior year), then the sponsor would need to adopt a funding improvement plan in the election year (the first year for which section 432 applies to the multiemployer plan). However, pursuant to section 204(b) of WRERA, the excise tax exception under section 4971(g)(1)(A) of the Code for a plan in critical status would be available with respect to any accumulated funding deficiency of the plan for the election year, even though the plan, by reason of the election under section 204 of WRERA, is not treated as being in critical status.

A plan sponsor that wishes to take advantage of the rule under section 204(a)(2), under which no updates to a funding improvement plan or rehabilitation plan are required until the year following the election year, must make the election under section 204 even if the plan's section 432 status for the election year would be the same regardless of whether the election is made.

A plan sponsor should take into account the interaction between sections 204 and 205 of WRERA in choosing whether to elect the relief provided under either

section. For example, a plan sponsor may elect under section 204 for the plan year beginning in 2009 to freeze the plan's section 432 status as neither endangered nor critical (rather than operate in accordance with an actuarial certification of endangered status or critical status for that year). If, however, the plan is subsequently certified as being in endangered or critical status for the plan year beginning in 2010, then the section 205 election to extend the funding improvement period or rehabilitation period to 13 years (or 18 years, if applicable) would no longer be available because the initial endangered year or initial critical year for the plan (the year when the plan first enters endangered or critical status) would not be until 2010 (a year as of which no election under section 205 is available). On the other hand, if the plan sponsor does not make an election under section 204 for a year so that it operates in accordance with the plan's endangered or critical status as certified for the year, and elects for that year to extend the funding improvement period or rehabilitation period under section 205, then the funding improvement period or rehabilitation period for the plan as determined in accordance with the 2009 election would continue to be 13 years (or 18 years, if applicable) for as long as the funding improvement plan or rehabilitation plan remains in effect. The same result would apply if the plan sponsor makes an election under section 204 where the plan's section 432 status is unchanged for the election year, in which case no update to the funding improvement plan or rehabilitation plan would be required for the election year.

As another example, a plan sponsor may elect for the plan year beginning in 2009 both to freeze the plan's section 432 status as endangered, as permitted under section 204 (rather than operate in accordance with an actuarial certification of critical status for that year), and to extend the funding improvement period to 13 years as permitted under section 205. If, however, the plan is subsequently certified as being in critical status for the plan year beginning in 2010, then the section 205 election to extend the funding improvement period to 13 years (or 18 years, if applicable) would no longer be applicable because the funding improvement plan would have to be replaced by a rehabilitation plan. Moreover, the sponsor could not then elect to extend the rehabilitation period to 13 years because the initial critical year for the plan would not be until 2010 (a year as of which no election under section 205 is available).

IV. ELECTION PROCEDURES

1. Timing of elections

Pursuant to the authority granted to the Secretary and his delegate under section 204(c)(1)(A) of WRERA to prescribe the time and manner for making an election, an election under section 204 must be made by the later of April 30, 2009 and the date that is 30 days after the due date of the annual certification of section 432 status for the election year. For example, the sponsor of a plan with a plan year beginning July 1 whose actuary certifies on September 23, 2009 as to the plan's status for the plan year beginning July 1, 2009, and who wishes to make

an election under section 204, must do so by October 28, 2009 (the 30th day after September 28, 2009, the due date of the certification of section 432 status for the election year). As another example, the sponsor of a plan with a plan year beginning October 1, 2008 who wishes to make an election under section 204 must do so by April 30, 2009 (which is the later of the two dates for that plan).

Pursuant to the authority granted to the Secretary and his delegate under section 205(b)(1) to prescribe the time and manner for making an election under section 205, such an election must be made by the last day of the plan year as of which the election is being made, or, if earlier, by the date a funding improvement plan, rehabilitation plan, or update is adopted that takes into account the election. However, in no event is the election required to be made earlier than April 30, 2009.

2. Submission of election to the Service

The sponsor must submit any election under section 204 or 205 to the Internal Revenue Service. If the election is made on or before the date the annual certification of section 432 status for the election year is submitted to the Secretary, the election must be included with the certification. If the election is made after the date the annual certification of section 432 status for the election year is submitted to the Secretary, the election must be submitted by the date that is 30 days following the date of the election.

Elections should be sent to the Employee Plans Compliance Unit (EPCU), which is the same office as to which annual certifications are submitted. Instructions for filing WRERA elections electronically with the EPCU may be found at

<http://www.irs.gov/retirement/article/0,,id=171015,00.html>

Alternatively, WRERA elections may be mailed to the following address:

Internal Revenue Service
EPCU
Group 7602
SE:TEGE:EP
Room 1700 – 17th Floor
230 Dearborn Street
Chicago, IL 60604

3. Content of election

An election under section 204 or 205 of WRERA must be signed by an authorized trustee who is a current member of the board of trustees that is the plan sponsor and contain each of the following items of information, as applicable:

- (a) Name, address, telephone number, and EIN of the plan sponsor.
- (b) Name, plan EIN (if different from sponsor EIN), and plan number of the plan for which the election is being made.
- (c) A statement that the election is intended to be an election under section 204, section 205, or both sections 204 and 205.
- (d) If the election is under section 204 (or under both sections 204 and 205):
 - (i) A statement of the plan year for which the election (or elections) is being made.
 - (ii) The section 432 status of the plan for the election year taking the section 204 election into account (this is the same as the section 432 status of the plan for the prior year).
 - (iii) If section 432 of the Code did not apply to the plan for the prior year (because the prior year began before January 1, 2008), an attachment of an actuarial certification of what would have been the plan's section 432 status for the prior year had section 432 applied to the plan for the prior year.
- (e) If the election is under section 205 of WRERA, and no election under section 204 of WRERA applies for the year, a statement of the plan year as of which the section 205 election is being made.

V. SPECIAL NOTICE REQUIREMENT FOR PLANS IN NEITHER ENDANGERED NOR CRITICAL STATUS AS A RESULT OF FREEZE ELECTION

1. General notice requirements

As described above, if the plan sponsor elects to freeze the plan's section 432 status for the election year as neither endangered nor critical, despite an actuarial certification of endangered or critical status for the election year, then the sponsor must provide a special notice. The notice must be provided to participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor.

As described in section 204(c)(2)(A)(ii) of WRERA, the notice must be provided no later than 30 days after the later of, 1) the actuarial certification for the election year, or 2) the date of the election. The notice must be provided either in the form of a paper document or in an electronic form that satisfies the requirements of § 1.401(a)-21 of the Treasury regulations.

2. Content of notice

The notice provided pursuant to section 204(c)(2)(A)(ii) of WRERA must be written in a manner calculated to be understood by the average employee to whom the notice applies, and must contain each of the following items of information, as applicable:

- (a) The name of the plan, the EIN of the plan sponsor, the EIN of the plan, and the plan number.
- (b) That an election has been made under section 204 of WRERA to treat the plan as being neither in endangered nor critical status for the plan year beginning on **[fill in the date that is the first day of the election year]**.
- (c) The plan's endangered or critical status for the election year as certified by the plan's actuary (that is, the plan's status if no section 204 election were made).
- (d) An explanation that: (i) the election applies only for the current plan year; and (ii) if the plan is certified to be in endangered or critical status for the year following the election year, the plan sponsor will provide notice of the plan's status (i.e., endangered or critical) for that following year and steps will have to be taken to improve the plan's funded situation, which steps may include increases in contributions and reductions in future benefit accruals.
- (e) Solely in the case of a plan certified to be in critical status for the election year, an explanation that, if the plan is certified to be in critical status for the year following the election year, the steps that will have to be taken to improve the plan's funded situation will include a surcharge on employer contributions and the suspension of the payment of lump sums and similar accelerated distributions for individuals who commence receiving benefits after notice is provided of the plan's critical status, and may include amendments to reduce early retirement benefits or other adjustable benefits for such individuals.
- (f) Information on how to obtain additional information about the election from the plan administrator, including a telephone number, address, and email address (if appropriate).

3. Submission of notice to PBGC and DOL

A notice provided pursuant to section 204(c)(2)(A)(ii) of WRERA must be submitted to the Pension Benefit Guaranty Corporation and the Department of Labor. The notice should be sent to the following addresses:

Pension Benefit Guaranty Corporation
Multiemployer Program Division
1200 K Street, N.W., Suite 930
Washington, D.C. 20005

U.S. Department of Labor
Employee Benefits Security Administration
Public Disclosure Room, N-1513
200 Constitution Ave., N.W.
Washington, DC 20210

Alternatively, the notice may be submitted electronically to multiemployerprogram@pbgc.gov and to wreanotice@dol.gov.

WRERA notices received by the Department of Labor will be available for public inspection at the Public Disclosure Room, and accessible electronically at <http://www.dol.gov/ebsa>.

VI. EFFECT OF WRERA ELECTION ON FORM 5500, SCHEDULE MB AND SCHEDULE R FILINGS

A Form 5500, Annual Report/Return of Employee Benefit Plan, that is filed for a multiemployer plan must be accompanied by Schedule MB, Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information, and by Schedule R, Retirement Plan Information. Schedule MB requires the actuary for a multiemployer plan to report the plan's section 432 status. The instructions indicate that Schedule MB should be completed based on the actuary's certification of the status, and that the actuary should include supporting documentation for the certification. If a multiemployer plan is in endangered or critical status, the instructions indicate that the plan sponsor must submit with Schedule R a summary of the multiemployer plan's funding improvement or rehabilitation plan, or an update of the plan, as applicable.

As described above, an election under section 204 of WRERA affects whether a funding improvement or rehabilitation plan must be adopted or updated. Schedules MB and R and the related instructions for plan years beginning in 2008 have already been issued and do not address the effect of an election under section 204 of WRERA. However, such an election can be made with respect to a plan year beginning between October 1, 2008, and December 31, 2008. Therefore, the instructions for the 2008 Schedule MB and Schedule R must be revised to address the reporting for a multiemployer plan with a plan year beginning between October 1, 2008, and December 31, 2008, for which an election is made under section 204 of WRERA.

Under the revised instructions:

- The section 432 status of the plan that is reported on Schedule MB is the status of the multiemployer plan as certified by the plan actuary without taking into account an election under section 204 of WRERA.
- The plan sponsor must include an attachment to the Schedule R which provides information about the election under section 204 of WRERA, and its effect on the plan's section 432 status and on the requirement to adopt a funding improvement plan or rehabilitation plan.

VII. PAPERWORK REDUCTION ACT

The collections of information contained in this Notice have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(c)).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. The OMB approval number for this notice is 1545-2141.

The collections of information in this Notice are in sections IV, V, and VI. The information is required in order to implement an election under sections 204 and 205 or WRERA and to provide the required notice of the election. The collections of information are mandatory for those plan sponsors making an election. The likely respondents are sponsors of multiemployer defined benefit retirement plans.

We estimate the total number of respondents to be 1,600 for 2009.

We estimate it will take 1 hour to comply.

Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

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.

Drafting Information

The principal author of this notice is Diane S. Bloom of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1-877-829-5500 (a toll free number) or e-mail Ms. Bloom at RetirementPlanQuestions@irs.gov.