

Revocation of Elections by Multiemployer Defined Benefit Pension Plans to Freeze Funded Status under section 204 of WRERA

Revenue Procedure 2009-43

I. Background

Section 432 of the Internal Revenue Code (Code), which was added by the Pension Protection Act of 2006, P.L. 109-280 (PPA), prescribes rules for multiemployer defined benefit pension 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.

A number of actions are required for a plan that has been certified to be in endangered or critical status. In particular, section 432(b)(3)(D) requires that a sponsor provide, within 30 days following the certification, notice to participants and others of the certification and, if the plan has been certified to be in critical status, that adjustable benefits under section 432(e)(8) may be reduced. In addition, section 432(f)(2) requires, in the case of a plan certified to be in critical status, that payments of certain accelerated benefits must be suspended as of the date the notice is sent.

In the first plan year that a plan is 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, in the first year that a plan is in critical status, the plan sponsor 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, as applicable, must be adopted by the 330th day of the plan year (i.e., not later than 240 days after the due date for the certification of status, which is the 90th day of the plan year).

Section 432(d)(1) provides that, during the funding plan adoption period (described in section 432(d)(8) as the period beginning on the date of the plan's certification for the initial determination year and ending on the day before the

first day of the funding improvement period), the sponsor of a plan that is in endangered status may not take certain actions that would adversely affect the plan's funded status, such as accepting a collective bargaining agreement that provides for a reduction in the level of contributions for any participants. Section 432(f)(4) provides similar rules for sponsors of critical status plans during the rehabilitation plan adoption period (described in section 432(e)(5) as the period beginning on the plan's certification for the initial critical year and ending on the day before the first day of the rehabilitation period). For plan years following the initial endangered or initial critical year, section 432(c)(6) and section 432(e)(3)(B) require that the funding improvement plan or rehabilitation plan, as applicable, be updated to reflect the experience of the plan.

The Worker, Retiree, and Employer Recovery Act of 2008, P.L. 110-458 (WRERA), provides, in part, funding relief for multiemployer plans in endangered or critical status. 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) 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 ("section 204 election"). If a section 204 election is made, no update of a funding improvement plan or rehabilitation plan is required for the election year.

Section 204(c)(1) of WRERA provides that a section 204 election 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.

Section 204(c)(2) of WRERA provides special notice rules that apply when a section 204 election 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. In addition, if a plan is certified to be in critical status for the election year but is in endangered status by reason of a section 204 election, 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.

On March 27, 2009, the Service issued Notice 2009-31, 2009-16 I.R.B. 856, which provided guidance to multiemployer plans making a section 204 election.

Section IV of the notice described the election procedures. Under Notice 2009-31, as modified by Notice 2009-42, 2009-20 I.R.B. 1011, the due date for making the election was the later of June 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.

Notice 2009-42 further provides that the Service will automatically approve a request to revoke a section 204 election if (1) as of the otherwise applicable deadline for making a section 204 election, a plan sponsor has been unable to reach agreement as to whether to make the election so that the decision must be resolved through an arbitration process; (2) the plan sponsor makes an election by the otherwise applicable deadline that is contingent on the resolution of the arbitration; and (3) the resolution is to not make an election.

Section II of this revenue procedure sets forth additional circumstances in which the Service will automatically approve a request to revoke a section 204 election. Section III sets forth the procedures for submitting a request for automatic approval of revocation of a section 204 election. Section IV addresses other requests for approval to revoke a section 204 election.

II. Conditions for automatic approval of request for revocation of a section 204 election

Pursuant to section 204(c)(1) of WRERA, a request for revocation of an election under section 204 will be approved automatically by the Service, regardless of whether the election was the subject of arbitration, if the following requirements are met:

1. The request for revocation of the election must be submitted to the Service by the due date for the adoption of a funding improvement plan, rehabilitation plan, or update, whichever is applicable for the election year after taking the revocation into account. In the case of a plan described in Notice 2009-42, where the decision to make a section 204 election is the subject of an arbitration process, the deadline for submitting the request for revocation is the later of the due date under the preceding sentence or 30 days following the resolution of the arbitration.
2. Notice under section 432(b)(3)(D) of the plan's actual certified status for the election year must be provided no later than 30 days after the request for revocation is submitted. The notice is also required to include a statement that the election was revoked and to explain the consequences of the revocation.
3. The plan sponsor must have complied with the requirements of section 432(d)(1)(A) and (B) or section 432(f)(4), as applicable, during the plan's funding plan adoption period or rehabilitation plan adoption period, determined as though a section 204 election had never been made. This

requirement does not apply to a plan where revocation results from the resolution of arbitration as described in Notice 2009-42.

III. Submission of request for automatic approval of revocation

A request for revocation that is eligible for automatic approval under section II above must be signed by an authorized trustee who is a current member of the board of trustees that is the plan sponsor, and a copy of the plan's section 204 election must be attached. The request for revocation must be mailed to the Service at the following address (which is also the address to which a section 204 election is sent):

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

The request for revocation may not be submitted electronically.

IV. Other requests for approval to revoke a section 204 election

The Service may approve requests for revocations in circumstances other than those set forth in section II above. Such requests are not eligible for automatic approval under this revenue procedure, but must instead be made in accordance with Rev. Proc. 2009-4, 2009-1 I.R.B. 118.

V. Effect on other guidance

Notice 2009-31 and Notice 2009-42 are hereby amplified.

VI. Paperwork Reduction Act

The collection of information described in section III of this revenue procedure modifies the collection of information described in section IV of Notice 2009-31. The collection of information required under section IV and other parts of that notice has 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 Notice 2009-31 and for this revenue procedure is 1545-2141.

Drafting information

The principal author of this revenue procedure 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@Service.gov.