



MARCH 25, 2008

*Immediate action may be required*

## IRS Issues Proposed Regulations on Certification of Funding Status for Multiemployer Plans

The Internal Revenue Service has just published a proposed regulation containing guidance on the procedures for certifying whether a plan is endangered or critical and providing notice as required by the Pension Protection Act of 2006 (“PPA”).

The regulation is basically a restatement of the law and leaves unanswered many thorny questions regarding development of funding improvement and rehabilitation plans. It does, however, clarify certain issues for those plans that sent out early notices of expected critical status and the use of pre-PPA extensions of the amortization period for determining whether the plan is critical.

Because the regulation is only proposed, actuaries and Trustees need not follow it, but doing so seems the safest course. Trustees may wish to consult with plan counsel in developing the required notice to participants in critical or endangered plans, and issues created by the rules on pre-PPA amortization extensions and early notices of expected critical status.

### **REGULATION HIGHLIGHTS**

- Failure of the actuary to provide timely certification of the plan’s status subjects the Trustees to a penalty of up to \$1,000 per day. The regulation directs the actuary to send

the notice to the plan address listed on the Form 5500 unless the Trustees request otherwise. *For calendar year plans the notice is due on March 30, 2008, which is a Sunday. The Trustees should consult with Fund Counsel whether the date is extended to Monday, March 31 under the usual rules regarding due dates that fall on Sundays or holidays.*

- If the plan receives a certification that it is endangered, seriously endangered, or critical, it must send notice of that fact to participants and beneficiaries, bargaining parties, the PBGC and the DOL within 30 days of the date of the certification. The regulation does not specify whether the 30 days is measured from the date received or the date sent, and accordingly plan counsel should be consulted. The regulation also requires that other identifying information be included in the notice.
- On March 25, 2008, the DOL issued a proposed regulation which contains a model notice that plans in critical status may rely on. The DOL publication also contains the addresses of the DOL and PBGC to which to send the notice. The notice may be found at <http://www.dol.gov/ebsa/regs/fedreg/proposed/3252008.htm>.

- In performing the tests for endangered and critical status the actuary must project expected contributions for future years. The law allows the actuary to assume that amount of contributions received in the last plan year will continue indefinitely, but only if the actuary determines that there have been no demographic changes that would impair this assumption. The default projection method is to assume that the current collective bargaining agreements continue in effect and rely on the Trustees projection of future covered work. The Trustees' projection must be made in good faith.
- Many of the tests for critical status are based on whether the plan is expected to incur an accumulated funding deficiency within a specified number of years. The regulation states that the actuary must ignore the effect of any pre-PPA or post-PPA extension of the amortization period in making this determination. Thus, plans that would not actually incur a funding deficiency because of an extension may be in critical status.
- The regulation does allow the plan actuary to take an extension into account in determining whether the plan has emerged from critical status. The effect of this rule is that plans may find themselves falling in and out of critical status, but the extension can either negate the need to cut benefits or increase contributions or lessen the extent of such changes needed to emerge from critical status.

- The regulation provides that the restriction on a critical plan paying lump-sums or accelerated benefits applies on and after the first day of the 2008 plan year. If a plan prohibited participants from electing such benefit options prior to that date, it must take corrective action. Also, if a plan had an early certification of expected critical status, it must still make a determination as of the first day of the plan year. If it turns out that the plan is not critical and it restricted benefits based on the early certification, it must correct its actions.

## **CONCLUSION**

The proposed regulation basically restates the law with clarification on the use of pre-PPA amortization extensions and the effective date of the prohibition on critical plans paying lump-sums and accelerated benefits or purchasing annuities.

Unfortunately, the regulation still contains some ambiguities and is only in proposed form. Trustees will need to work closely with plan counsel in making sure the required notice complies with the law.