Navigating the Pension Protection Act Multiemployer Rules from Certification to Bargaining and Beyond

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The Pension Protection Act of 2006 (PPA) was one of the most significant pieces of pension legislation since the enactment of ERISA. The PPA establishes separate minimum funding standards for single employer defined benefit pension plans in Internal Revenue Code (Code) §§430 and 436 and for multiemployer defined benefit plans in Code §432. This paper will address the multiemployer funding requirements and the process established by the PPA by which joint labor-management boards of trustees and then the collective bargaining parties must navigate the complicated process from the point of the actuary's certification of endangered or critical status through collective bargaining and the implantation of the funding improvement or rehabilitation plan.

Prior to the economic downturn, these provisions affected a minority of multiemployer defined benefit pension plans. However, the financial crisis that began in 2008 has had a marked impact on the funded status of multiemployer plans. A study conducted by the Segal Company compared the funded status of surveyed plans in 2008 and 2009 and found a significant decline in the funded percentage of plans as well as an increase in endangered and critical status plans. Therefore, as defined benefit pension plans and their sponsoring unions and employers struggle with the effects of the economic down turn, they will face the added challenge of the meeting the requirements of the PPA. These requirements affect not only the plan and its trustees but the bargaining parties and the collective bargaining process as well.

In general, IRC §432 became effective in Plan Years beginning in 2008. However, the Worker, Retiree and Employer Recovery Act of 2008 (WRERA), a bill signed into law in the

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eleventh hour of the Bush Administration, provides limited relief to multiemployer defined benefit plans that must now comply with the PPA's more onerous funding rules while dealing with our country's ongoing financial crisis.

For smaller plans for which the trustees (plan sponsor) and the bargaining parties are essentially the same people, the challenges presented can often be managed cooperatively. The challenges are greater for large national or regional plans that may involve thousands of employers and collective bargaining relationships. For such plans, the process of implementing a funding improvement plan or rehabilitation plan under PPA rules may require the pension plan to take steps to reduce prospective benefits or increase contributions in addition to the schedules prepared for the bargaining parties.

In every case, more open communications and cooperative problem solving rather than an adversarial approach will produce the best results. Waiting for the market or the government to solve the problem will almost certainly not have the desired result. For this process to achieve solutions that all pension plan stakeholders find mutually acceptable, plan trustees must take prompt action to study and understand the options and the advantages and disadvantages of each, engage participating unions and employers and finally communicate decisions to plan participants. The process includes a number of points at which it can break down if parties choose an adversarial approach.

**PPA's Multiemployer Plan Funding Rules**

The PPA establishes new classifications for multiemployer defined benefit pension plans that do not meet certain funding requirements. These classifications are "endangered", "seriously endangered" and "critical" status plans. The statutory provisions relating to endangered, seriously endangered and critical status plans are found in new Code §432 and ERISA §305, and are generally effective for plans years beginning after 2007, subject to a sunset provision that is explained below. For purposes of this paper, I will cite only to the provisions of the Code as the limited guidance that has been issued has been issued by IRS and uses Code citation.

These classifications are often informally referred to using color codes, which I generally avoid but which I will note here because they are often used in other conference presentations and informal discussion. Critical status plans are referred to as “Red Zone”
plans. Endangered status plans are referred to as “Yellow Zone” plans while seriously endangered plans are referred to as “Orange Zone”. Plans that are not in critical or endangered status are referred to as “Green Zone” Plans.

Certification of Endangered or Critical Status

Annual Actuarial Certifications

By the 90th day of each plan year, the actuary for a multiemployer defined benefit plan must certify to the IRS and to the trustees (plan sponsor) whether the plan is in endangered or critical status. If the plan has been previously certified as endangered or critical and is in a funding improvement period or rehabilitation period, the actuary must certify whether the plan is making the scheduled progress under the funding improvement or rehabilitation plan.2

In making the certification of endangered or critical status, the actuary must make projections for the current and succeeding years of the current value of the plan's assets and the present value of its liabilities. These projections must be based on reasonable actuarial estimates, assumptions, and methods that offer the actuary's best estimate of anticipated plan experience. The actuary's projection of the present value of liabilities must be based on the prior year's valuation, and the actuary will have to use the unit credit funding method, even if another method is used for the actuarial valuation.3 The actuary's projections of activity in the industry covered by the plan, including future employment and contribution levels, are to be based on information provided by the plan sponsor which is the board of trustees for a multiemployer plan.4

Notice of Certification of Endangered or Critical Status

If the actuary certifies that the plan is in endangered or critical status, the trustees must, within thirty days, provide notification of the plan's status to the participants and beneficiaries, the bargaining parties, the PBGC, and the Secretary of Labor. If the plan's

2 Code § 432(b)(3)(A)

3 Code § 432(b)(3)(B)

4 Code §432(b)(3)(B)(iii)
status is critical, the notice must include an explanation that adjustable benefits may be reduced and the reductions may apply to participants and beneficiaries who begin receiving benefits after the notice is provided. The PPA directs the Secretary of Labor to develop a model notice.\(^5\) The Model Notice was issued in proposed form in March, 2008 and is available on the Department of Labor website.\(^6\)

**Endangered or Seriously Endangered Status**

*Endangered Status Multiemployer Plans*

A multiemployer defined benefit plan is in "*endangered status*" if it is not in critical status, and:

1. its *funded percentage* is less than 80%; or
2. the plan has an accumulated funding deficiency or is projected to have an accumulated funding deficiency in any of the six succeeding years.

A plan is in *seriously endangered status* if both 1 and 2 apply.\(^7\)

The funded percentage is the percentage equal to a fraction, the numerator of which is the value of the plan's assets as determined under Code §431(c)(2) and the denominator of which is plan's accrued liability determined using actuarial assumptions described in Code §432(c)(3).\(^8\)

*Funding Improvement Plans for Endangered Multiemployer Plans*

The trustees of an endangered plan must adopt and implement a *funding improvement plan* (FIP) to meet applicable funding improvement benchmarks during a *funding improvement period*.

The FIP must be adopted within 240 days after the date the plan's actuary first certifies that the plan is in endangered status.\(^9\) If the trustees cannot agree to a FIP and fewer than 60 days remain before the FIP must be adopted, any trustee may require that the board of trustees enter into an expedited dispute resolution procedure for the development and adoption of a FIP.\(^10\)

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\(^5\) Code §432(b)(3)(D)
\(^6\) Model Notice of Multiemployer Plan in Critical Status [03/25/2008]
\(^7\) Code §432(b)(1)
\(^8\) Code §432(i)(2)
\(^9\) Code §432(c)(1)(A)
\(^10\) Code §432(g)
The FIP consists of actions, including the options or range of options that are to be proposed to the bargaining parties, designed to provide for the plan to meet two benchmarks:11

1. **Increase the Plan’s Funded Percentage:** The plan's funded percentage at the end of a ten year funding improvement period must be equal to or greater than the percentage at the beginning of the period plus 33 percent of the difference between 100% and the funded percentage at the beginning of the funding improvement period (in other words, a 33% reduction in the under-funding in ten years); and

2. **Avoid Accumulated Funding Deficiency:** The must be no funding deficiency for any plan year in the ten year funding improvement period taking into account any extension of amortization periods under Code §304(d).

For a **seriously endangered plan** with a funded percentage of less than 70%, the funding improvement period is fifteen years and the reduction benchmark is 20%.12

**Submission of Funding Improvement Plans to the Bargaining Parties**

Within 30 days after adopting the FIP, the trustees must provide the bargaining parties with one or more schedules showing revised benefit structures, revised contribution schedules, or both, which, if adopted are reasonably expected to enable the plan to meet the applicable benchmarks described above. One of the schedules, known as the **default schedule**, must show the reduction in future benefit accruals required to meet the benchmarks, assuming there is no increase in the rate of contributions. Another required schedule must show the amount of increase in contributions required to reach the applicable benchmarks without any reduction in future benefit accruals. If deemed appropriate, the trustees may also provide the bargaining parties with additional information about contribution rates or benefit reductions or about alternative schedules.13

The trustees must adopt the default schedule if the bargaining parties are unable to reach a new agreement that includes contribution or benefit schedules sufficient to meet the applicable benchmarks. The default schedule must be implemented on the earlier of: (a) the date that the Secretary of Labor certifies that the bargaining parties are at an impasse; or (b)

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11 Code §432(c)(3)(A)  
12 Code §432(c)(3)(B)
the date 180 days after the expiration of the collective bargaining agreement that was in
effect when the plan entered endangered status.\textsuperscript{14}

**Funding Plan Adoption Period**

The funding plan adoption period\textsuperscript{15} begins on the date of the actuary's initial certification of
the plan's endangered status and ends on the day before the first day of the funding
improvement period.

**Funding Improvement Period**

The funding improvement period\textsuperscript{16} for a FIP is generally the 10-year (or 15-year if the
plan is seriously endangered) period beginning on the first day of the first plan year following
the earlier of-

1. the second anniversary of the adoption of the FIP; 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 critical year
   covering at least 75 percent of the active participants in the plan.

The funding improvement period will end early if the plan emerges from endangered
status before the end of the 10-year (or 15-year) period. A plan emerges from endangered status
in a plan year for which the actuary certifies that the plan is no longer in endangered status.
(Code §432(c)(4)(C)(i)).

If an endangered plan is for a later year certified to be in critical status, then the
current funding plan adoption period or funding improvement period will end as of the close
of the plan year preceding the first plan year in the plan's rehabilitation period as a critical
status plan.\textsuperscript{17}

**Actions during the Funding Improvement and Plan Adoption Periods**

During the plan adoption period and the funding improvement period, the trustees may
not accept a collective bargaining agreement or participation agreement that provides for-

\textsuperscript{13} Code §432(c)(B)
\textsuperscript{14} Code §432(c)(7)
\textsuperscript{15} Code §432(c)(8)
\textsuperscript{16} Code §432(c)(4)
\textsuperscript{17} Code §432(c)(4)(C)(ii)
1. lower contributions for any participants;
2. a suspension of contributions with respect to any period of service; or
3. any new direct or indirect exclusion of younger or newly hired employees from plan participation.\(^{18}\)

During the plan adoption period, the trustees may not amend the plan in any way that increases plan liabilities by reason of an increase in benefits, change in accruals, or change in the vesting rate, unless the amendment is necessary to maintain the plan's qualified status.\(^{19}\)

If the plan is seriously endangered, the trustees, during the plan adoption period, must take all reasonable steps, consistent with the plan's terms, based on reasonable assumptions that are expected to achieve an increase in the plan's funded percentage and the postponement of a funding deficiency for a least one additional year. Examples of such steps described in the statute are extensions of amortization periods, use of the shortfall funding method, amending the plan's structure, and reducing future benefit accruals.\(^{20}\)

Once a FIP has been adopted, a plan may not be amended in a manner that is inconsistent with the FIP. In addition, the plan may not be amended to increase benefits, including future benefit accruals, unless the actuary certifies that the benefit increase is consistent with the FIP and is paid for out of contributions not required by the funding improvement plan to meet the applicable benchmarks. It is not clear if the FIP may include language that benefit increases are not inconsistent with the FIP.

The FIP must be updated each year and each update must be made part of the plan's 5500 Form. There is nothing in the PPA, however, specifying that the FIP must be part of the 5500 Form for the year of its adoption.

**Critical Status**

*Critical Status Multiemployer Plans*

A multiemployer plan is in *critical status*\(^{21}\) if-

1. The plan is less than 65% funded and it is projected to not have sufficient assets to pay promised benefits within 7 years; or

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\(^{18}\) Code §432(d)(1)(A)

\(^{19}\) Code §432(d)(1)(B)

\(^{20}\) Code §432(d)(1)(C)
2. 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 3 succeeding plan years (4 succeeding plan years if the plan is less than 65% funded); or

3. The plan is projected to not have sufficient assets to pay promised benefits within 5 years; or

4. (a) the present value of benefits for inactive participants is greater than the present value of benefits for active participants; (b) its expected contributions are less than the sum of its normal cost and the interest on its unfunded liabilities; and (c) the plan will have a funding deficiency within 5 years.

Rehabilitation Plans for Critical Status Multiemployer Plans

The trustees of a critical status plan must adopt and implement a rehabilitation plan designed to enable the plan to emerge from critical status. Like a FIP (in the case of an endangered plan) a rehabilitation plan must be adopted within 240 days after the date the actuary first certifies that the plan is in critical status. If the trustees cannot agree to a rehabilitation plan and fewer than 60 days remain before the rehabilitation plan must be adopted, any trustee may require that the board of trustees enter into an expedited dispute resolution procedure for the development of a rehabilitation plan.

The rehabilitation plan consists of actions, including the options or range of options that are to be proposed to the bargaining parties, formulated based on reasonably anticipated experience and reasonable actuarial assumptions which will enable the plan to emerge from critical status by the end of the rehabilitation period. These actions may include--

- reductions in plan expenditures (including plan mergers and consolidations);
- reductions in future benefit accruals; and
- increases in contributions (if agreed by the bargaining parties).

If the trustees determine that, based on reasonable actuarial assumptions and upon the exhaustion of all reasonable measures, the plan cannot be expected to emerge from critical

21 Code §432(b)(2)(A)-(D)
22 Code §432(e)(1)(A)
status by the end of the rehabilitation period, the rehabilitation plan must include reasonable measures that will allow the plan to emerge from critical status at a later time or at least delay the insolvency of the plan.\textsuperscript{24}

The rehabilitation plan must provide annual standards for determining whether its requirements are being met. The rehabilitation plan must also include the schedules to be provided to the collective bargaining parties discussed below. If the trustees determine that the plan is not reasonably expected to emerge from critical status by the end of the rehabilitation period, the rehabilitation plan must explain the basis for the trustees’ determination and must also specify when, if ever, the plan is expected to emerge from critical status in accordance with the rehabilitation plan.\textsuperscript{25}

**Submission of Rehabilitation Plan to the Bargaining Parties**

Within 30 days after adopting the rehabilitation plan, the trustees must provide the collective bargaining parties with one or more schedules showing revised benefit structures, revised contribution schedules, or both, which if adopted are reasonably expected allow the plan to emerge from critical status. The schedule or schedules must reflect reductions in future benefit accruals and adjustable benefits, and increases in contributions, that the trustees determine are reasonably necessary to emerge from critical status.

One schedule, designated as the \textit{default schedule}, must assume that there are no increases in contributions other than those necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits the reduction or elimination of which are not permitted under Code § 411(d)(6)) have been reduced by the maximum allowed by law.\textsuperscript{26} The statute does not mandate that the future benefit accruals be cut before adjustable benefits or vice versa. Nor does the statute require that non-protected benefits be reduced before adjustable benefits. There is a divergence of opinion among plan counsel whether the default schedule can include the reduction of adjustable benefits.

If, upon expiration of a collective bargaining agreement in effect at the time the plan entered into critical status, the bargaining parties after receiving one or more schedules from

\textsuperscript{23} Code §432(g)
\textsuperscript{24} Code §432(e)(3)(A)
\textsuperscript{25} Code §432(e)(3)(A)
\textsuperscript{26} Code §432(e)(1)(B)(ii)
the trustees fail to adopt one of the contribution or benefit schedules with terms consistent with the rehabilitation plan, the trustees must implement the default schedule. The default schedule must be implemented by the Trustees by the earlier of the date the Secretary of Labor certifies that the bargaining parties are at an impasse or the date that is 180 days after the expiration of the applicable collective bargaining agreement.

The implementation of the default schedule by the Trustees in the absence of a collective bargaining agreement does not end the employer surcharge which terminates with respect to contributions made for employees covered by a collective bargaining agreement on the effective date of a collective bargaining agreement consistent with the schedules. Therefore, there may be both reduced benefits under a default schedule and an employer surcharge for a period of time.

The default schedule in a rehabilitation plan cannot entirely eliminate future accruals. The minimum rate of future accruals under a default schedule cannot be less than the lower of:

1. the accrual rate under the plan on the first day of the initial critical year; or
2. a monthly benefit payable as a single life annuity commencing at the participant’s normal retirement age equal to one percent (1%) of the contributions required to be made with respect to a participant or the equivalent standard accrual rate for a participant or group of participants under the collective bargaining agreements in effect on the first day of the initial critical year.

This provision may not be construed as limiting the trustees' ability to prepare and provide the bargaining parties with alternative schedules to the default schedule that set lower or higher accrual rates. In other words, the trustees may prepare alternative schedules to the default schedule that eliminate future accruals or provide for future accruals below the 1% level described above. However, this schedule may not be imposed as the default schedule without bargaining.

27 Code §432(e)(3)(C)(i)
28 Code §432(e)(3)(C)(ii)
29 Code §432(e)(7)(C)
30 Code §432(e)(6)
Cutbacks of Adjustable Benefits under Rehabilitation Plans

The schedules provided to the collective bargaining parties in the case of a critical status plan may provide for the reduction of adjustable benefits. Based on the outcome of collective bargaining over the schedules, the trustees, after giving the required notice, make reductions to adjustable benefits consistent with the implemented schedule. These reductions to adjustable benefits are cutbacks would otherwise violate Section 204(g) of ERISA and Code §411(d)(6), but are permitted for critical status by Code §432(e)(8).

Adjustable benefits are defined in Code §432(e)(8)(A)(iv) as--

1. benefits, rights, and features under the plan, including post retirement death benefits, 60-month guarantees, disability benefits not in pay status, and similar benefits;

2. any early retirement benefit or retirement-type subsidy within the meaning of Code §411(d)(d)(B)(i) and any benefit payment option other than the qualified joint and survivor annuity; and

3. benefit increases that would not be eligible for a guarantee under ERISA §4022A on the first day of the initial critical year because the increases were adopted or took effect less than 60 months before the first day of the initial critical year.

Except for the increases described in 3 above, adjustable benefits of participants and beneficiaries with benefit commencement dates before the date of the plan’s notice of critical status may not be reduced, and for everyone else, the reductions may not result in a reduction of the level of a participant's accrued benefit at normal retirement age. The effect of this is that the plan trustees can reduce the benefits for anyone whose benefits were not in pay status on the date when the trustees first provided notice that the plan had entered "critical status," even though that date was before the schedule including the benefit reduction was agreed to by the collective bargaining parties.31

The Trustees of the pension plan are provided flexibility to include in the schedules provided to the collective bargaining parties an allowance for funding the benefits of the
participants “with respect to whom contributions are not currently required to be made”. The trustees shall reduce their benefits to the extent permitted under this title and considered appropriate by the trustees based on the plan’s overall funding status. It is not clear who is included in the category of participants “with respect to whom contributions are not currently required to be made” and no guidance has been issued to date. This would clearly include terminated employees. However, in the case of plans in industries characterized by short-term employment, there is rarely a clear definition of a terminated employee. Employees earning credited service under the plan through reciprocity agreements may also be in this category because they are not working for an employer required to contribute to the pension plan creating the schedules.

Because the trustees may reduce the benefits of this category of participants without bargaining and to the full extent permitted by this title, it is important to carefully think through who is included and not included and the extent of the benefit reduction imposed. It will be extremely difficult to modify the category and the benefits after the adoption of the rehabilitation plan.

Notice of Reductions in Adjustable Benefits

Special notice rules apply to the reductions in adjustable benefits pursuant to a rehabilitation plan. No reductions in adjustable benefits are permitted unless written notice has been given at least 30 days before the general effective date of the reduction. The notice must be made to plan participants and beneficiaries, contributing employers, and unions representing participants. The notice must give sufficient information to enable participants and beneficiaries to understand the effect of the reduction, including an estimate of any affected adjustable benefit that a participant or beneficiary would otherwise have been eligible for as of the reduction's general effective date. The notice must also contain information about the rights and remedies of plan participants and beneficiaries, as well as information about how to contact the Department of Labor for further assistance. The PPA directs the Department of Labor to develop a model notice but such a notice has not yet been issued.

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31 Code §432(e)(8)(A)(ii)
32 Code §432(e)(8)(A)(iii)
33 Code §432(e)(8)(C).
Annual Update of Rehabilitation Plan

The rehabilitation plan must be updated annually by the trustees of the pension plan and each update must be filed with the pension plan’s 5500 Form. The trustees must also update annually any schedule of contribution rates to reflect the experience of the plan.

A schedule of contribution rates provided by the trustees and relied upon by bargaining parties in negotiating a collective bargaining agreement shall remain in effect for the duration of that collective bargaining agreement.  

Operation of the Pension Plan during the Rehabilitation Plan Adoption Period and Rehabilitation Period

Code §432(f) provides a number of rules and restrictions for the operation of the pension plan during the rehabilitation adoption period and the rehabilitation period.

The rehabilitation plan adoption period begins on the date of the actuary's initial certification of the plan's critical status and ends on the day before the first day of the rehabilitation period.  

The rehabilitation period is generally the 10-year period beginning on the first day of the first plan year following the earlier of--

1. the second anniversary 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 covering at least 75% of the active participants in the plan.

The rehabilitation period will end early if the plan emerges from critical status before the end of the 10-year period. A plan emerges from critical status in a plan year for which the actuary certifies that the plan is not projected to have a funding deficiency for the plan year or any of the nine (9) succeeding plan years (without regard to use of the shortfall funding method but taking into account any extensions of amortization periods).

Because the implementation of the rehabilitation plan (and the FIP for an endangered plan) depends upon the expiration of collective bargaining agreements, questions have arisen concerning when a collective bargaining agreement expires. Can the collective bargaining parties

34 Code §432(e)(3)(B)(iii)
35 Code §432(e)(5)
36 Code §432(e)(4)
negotiate an extension of an existing collective bargaining agreement and thereby postpone the imposition of a FIP or rehabilitation plan? How does a reopener of a collective bargaining agreement affect the date a schedule applies? Does a reopener accelerate the application of the schedules?

**Restrictions on Certain Actions during the Rehabilitation Plan Adoption Period**

As noted above, there are limitations on the actions of the trustees during both the rehabilitation plan adoption period and the rehabilitation period. During the rehabilitation plan adoption period, the trustees may not accept a collective bargaining agreement or participation agreement that provides for--

1. lower contributions for any participants;

2. a suspension of contributions with respect to any period of service; or

3. any new direct or indirect exclusion of younger or newly hired employees from plan participation.

Moreover, during the rehabilitation plan adoption period, the trustees may not amend the plan in any way that increases plan liabilities by reason of an increase in benefits, change in accruals, or change in the vesting rate, unless the amendment is necessary to maintain the plan's qualified status or to comply with other applicable law.37

**Restrictions on Certain Actions during the Rehabilitation Period**

Once a rehabilitation plan has been adopted, the plan may not be amended in a manner that is inconsistent with the rehabilitation plan. In addition, the plan may not be amended to increase benefits, including future benefit accruals, unless the actuary certifies that the benefit increase is paid for out of contributions not contemplated by the rehabilitation plan, and after accounting for the increase, the plan is still reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan.38

An unresolved question has arisen as the stock market has recovered this year. If the investment

37 Code §432(f)(4)
38 Code §432(f)(4)
return on assets of a critical status plan is better than expected, resulting in an updated schedule of contributions under the rehabilitation plan that is lower than the contribution rate provided under the collective bargaining agreement, do amounts received by the Fund in excess of the new (lower) contribution rate constitute "additional contributions" under Code §432(f)(1)(b) that could be used for a benefit increase?

Restriction on Lump Sums and Similar Benefits

Notwithstanding the anti-cutback rule, effective on the date the notice of the certification of the plan's critical status for the initial critical year is sent, the plan may not pay certain types of benefits. These are described in Code §432(f)(2) as follows--

- any payment in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of Code §411(b)(1)(A)),
- any payment for the purchase of an irrevocable commitment from an insurer to pay benefits; and
- any other payment that the IRS specifies in regulations. (To date the Secretary has not issued regulations.)

This restriction does not apply to cash-outs of benefits with an actuarial present value of $5,000 or less which under Code §411(a)(11) may be immediately distributed without the consent of the participant. Nor does this restriction apply to make up payments in the case of a retroactive annuity starting date or any similar payment of benefits owed with respect to a prior period.39

Employer Surcharges

To encourage employers to renegotiate collective bargaining agreements in order to meet the requirements of a rehabilitation plan, the PPA imposes an automatic but temporary surcharge on employer contributions.

For the first plan year in which the plan is in critical status, each employer will be obligated to pay the plan a surcharge equal to 5% of the contributions otherwise required under the collective bargaining agreement or other agreement pursuant to which the employer

39 Code §432(f)(2)
contributes. For each succeeding year the plan is in critical status, the surcharge is 10% of the contribution otherwise required. 40 The surcharge will cease to be effective with respect to employees covered by a collective bargaining agreement or other agreement pursuant to which the employer contributes, beginning on the effective date of a collective bargaining agreement that includes terms consistent with a rehabilitation plan schedule of revised benefits and contributions as presented by the trustees.41 The surcharge does not end if the pension plan trustees must implement the default schedule in the absence of an agreement by the collective bargaining parties.

The surcharge is not effective with respect to an employer until 30 days after the employer has been notified by the trustees that the plan is in critical status and that the surcharge is in effect.42 The surcharges are due and payable at the same time as the contributions on which the surcharges are based. The failure to pay a surcharge is treated as a delinquent contribution under ERISA §515 and is enforceable as such.43 Presumably, the provisions of Prohibited Transaction Class Exemption 76-1 that apply to the collection of delinquent employer contributions would also apply to the collection of employer surcharges.

Notwithstanding any provision of the pension plan to the contrary, the amount of the surcharge may not be the basis for any benefit accruals under the plan.44

Non Bargained Participants

Non-bargained participants present a variety of challenges for multiemployer pension plans under other applicable laws such as the Taft-Hartley Act and other provisions of the Code. There are special provisions concerning the treatment of non-bargained participants for under both FIPs and rehabilitation plans in Code §432(h).

If an employer contributes to a multiemployer pension plan both on behalf of employees covered by a collective bargaining agreement and employees not covered by a collective bargaining agreement, benefits and contributions for the non-bargained employees,

40 Code §432(e)(7)(A)
41 Code §432(e)(7)(C)
42 Code §432(e)(7)(D)
43 Code §432(e)(7)(B)
44 Code §432(7)(E)
including surcharges on those contributions are to be determined as if the non-bargained employees were covered under the first to expire of the employer’s collective bargaining agreements in effect when the employer entered critical status.\textsuperscript{45} As many employers contribute to plans under more than one agreement, this provision may require employers to connect non-bargained employees to a collective bargaining agreement other than the one with which they are generally associated. A solution may be for the plan to amend participation agreement covering such employees to be consistent with the FIP or rehabilitation plan. Such agreements may also self-adjust if by their terms, they are connected to a specific collective bargaining agreement.

In the case of an employer that contributes to a multiemployer pension plan only on behalf of employees who are not covered by a collective bargaining agreement, Code §432 is to be 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 with the schedules in connection with the FIP or rehabilitation plan as applicable.\textsuperscript{46}

Some multiemployer may have inadequate records of non-collectively bargained employees and should update those records so that this provision can be implemented.

**WRERA Impact on Multiemployer Funding Rules**

The Worker, Retiree, and Employer Recovery Act of 2008, P.L. 110-458 (WRERA) included provisions that impact the trustee decision-making under the PPA provisions discussed above and, therefore, may impact collective bargaining.

*One-Year Freeze in Zone Status*

For the 2009 plan year, Section 204 of WRERA generally gave the trustees of a multiemployer pension plan the option to temporarily freeze the plan's status under Code §432 (as an endangered, critical status plan or as a plan that was none of these) so that it remains the same as the plan’s §432 status for the plan year immediately prior to the

\textsuperscript{45} Code §432(h)(1)

\textsuperscript{46} Code §432(h)(2)
Trustees of plans that were not certified as endangered or critical in the 2008 had the right to elect to use the plan's 2008 status for the 2009 plan year. A plan that was in endangered or critical status for the preceding plan year is not required to update its FIP or rehabilitation plan or schedules. The election applies for the first plan year beginning during the period beginning on October 1, 2008 and ending on September 30, 2009.

An election under WRERA §204 must be made at the time and in the manner prescribed by the Secretary of the Treasury or the Secretary’s delegate. Once made, the election may be revoked only with the consent of the Secretary. If the election is made before the date that the annual actuarial certification of the plan’s status under Code §432 is submitted to IRS, the election must be included with the certification. If the election is made after the annual certification is submitted, it must be submitted no later than 30 days after the election is made.

WRERA §204(c)(2) includes the special notice requirements of the freeze election and these modify the otherwise applicable notice requirements of endangered or critical status plans under the rules in Code §432(b)(3)(D). If the plan would have been in endangered or critical status but because of the freeze election the plan is not in critical or endangered status the notice described in section 204(c)(2)(A)(ii) of WRERA is provided in lieu of the notice that would have been provided under the PPA rules.

The guidance issued by IRS requires the notice of the freeze election to disclose the status of the plan in the absence of the election, the effect of the election and that the election applies only for the current plan year. In the case of a plan otherwise certified to be in critical status for the election year, the notice must include 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 status include an employer surcharge and the suspension of lump sums and similar accelerated distributions and may include amendments to reduce early retirement benefits or other adjustable benefits. The notice of the freeze election must be sent to participants and beneficiaries, the collective bargaining parties, the

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47 WRERA §204(a)(1)
48 WRERA §204(a)(2)
49 WRERA §204(a)(1)
50 WRERA §204(c)(1)
51 See text at Footnote 5.
52 IRS Notice 2009-31
53 Notice 2009-31,V(2)
Pension Benefit Guaranty Corporation and the Secretary of Labor.\textsuperscript{54}

As noted above, 30 days after notice of a plan's critical status, contributing employers of that plan will be required to pay a surcharge of 5% and then 10% of their contributions until the effective date of a collective bargaining agreement that includes terms consistent with the plan's rehabilitation plan. However, if the trustees elect to freeze a plan's zone status in 2009 that would have been a critical plan but for such election, the surcharges are not applicable.

In Notice 2009-42, the IRS extended the date for making the election under WRERA §204 from April 30, 2009 under Notice 2009-31 until June 30, 2009.

\textbf{Longer Correction Period}

Section 205 of WRERA provides trustees of a plan that has been certified as endangered or critical for the 2008 or 2009 plan year with the option to elect a 13-year funding improvement (or rehabilitation period) rather than the 10-year period set forth in the PPA (a seriously endangered plan can elect an 18-year period rather than a 15-year period).\textsuperscript{55} The WRERA §205 election is made after the application of WRERA 204. For many plans this means that they can not make both a §204 election and §205 election because the effect of the §204 election is that the plan is neither in endangered nor critical status for the 2008 and 2009 plan years for which the §205 election was available. For plans in this situation, trustees must assess the relative value of the §204 election versus the §205 election in solving the plan’s problem.

\textbf{Deciding whether to Elect WRERA Relief}

The limited relief provided by WRERA has injected much complexity in the decision-making process. There may be good reasons to freeze a plan’s status or it may simply be a means to postpone the imposition of surcharges and/or benefit cuts. These and other issues were addressed in an arbitration decision in which the arbitrator determined that it would best serve the interests of plan participants and beneficiaries for the plan trustees not to elect the one-year freeze.\textsuperscript{56} The plan trustees had deadlocked as to whether the plans should make an

\begin{footnotesize}
\footnotesize\textsuperscript{54}WRERA §204(c)(2)(A)(ii)
\footnotesize\textsuperscript{55}WRERA §205
\footnotesize\textsuperscript{56}In the Matter of Arbitration: Employer Appointed Trustees and Union Appointed Trustees of the Rocky Mountain UFCW and Employers Pension Plan and the Denver Area Meat Cutters and Employers Pension Plan, FMCS Case No. 19
\end{footnotesize}
election under Section 204 of WRERA. There was an initial dispute as to whether the matter was arbitrable but the matter was ruled arbitrable by the United States District Court. The plans involved would have been in critical status for the 2009 plan year unless the trustees elected to continue the 2008 plan year status. The plans were neither in endangered nor critical status for 2008.

The union trustees wanted to elect the freeze and the employer trustees opposed the freeze election. In a detailed analysis, the arbitrator reviewed the effect of the freeze election which he determined would be to delay the date on which the rehabilitation plan would become effective with respect to the pension plans by perhaps as much as five years depending on the result of collective bargaining. He reviewed the WRERA §204 elections filed by other plans and the reasons they gave for making the elections, the financial conditional of the pension plans involved in the dispute, PPA requirements, the long term funding policy of the pension plans, the evidence of negotiations of successor agreements to determine whether such negotiations would result in agreements that would satisfy rehabilitation plan requirements despite the freeze, the impact on contributions of making or not making the election, the impact on benefits of making or not making the election and other factors which included whether making the election would facilitate the adoption of a rehabilitation plan. The arbitrator determined that insuring the long term viability of the plans best served the interests of participants and beneficiaries as a whole. On balance, under the facts and circumstances of the plans at issue, the arbitrator determined that it was important for the trustees to act promptly to address their funding problems rather than waiting, potentially for years which the arbitrator found would increase the magnitude and severity of the problem. The arbitrator found that while it was unlikely that the bargaining parties would ignore the problem in upcoming negotiations if the election were made, in the absence of the rehabilitation plan and PPA rules, the trustees lacked the means to insure that appropriate action was taken nor would the trustees have the ability to insure that the actions taken in negotiations would be sufficient to insure the long term viability of the plans.

The results of this decision are obviously plan specific but are a useful review of the

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issues plan trustees should consider in making the freeze election.

**Revoking WRERA Elections**

### §204 Elections

IRS Notice 2009-42 provides that the IRS will automatically approve a request to revoke a WRERA §204 election if, as of the otherwise applicable deadline for making a §204 election, the trustees have not been able to reach agreement whether to make the election so that the decision must be resolved through arbitration; the trustees make an election by the otherwise applicable deadline contingent on the results of the arbitration; and the resolution of the arbitration is to not make an election.

IRS Notice 2009-43 provides additional circumstances in which the election under WRERA §204 can be revoked. Under the Notice a request for revocation of an election under section 204 will be approved automatically by IRS, 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 IRS by the due date for the adoption of a FIP, rehabilitation plan, or update, as applicable for the election year after taking the revocation into account. Where the decision to make a §204 election is the subject of arbitration, request for revocation must be submitted by the later of the date under the preceding sentence or 30 days following the resolution of the arbitration.

2. Notice under Code §432(b)(3)(D) of the plan’s actual status for the election year must be provided no later than 30 days after the request for revocation is submitted. The notice must include a statement that the election was revoked and must explain the consequences of the revocation of the election.

3. The trustees must have complied with the requirements of Code §432(d)(1)(A) and (B) or §432(f)(4), as applicable, during the funding plan adoption period or rehabilitation plan adoption period, determined as though a WRERA §204 election had not been made. However, this requirement does not apply to a plan where revocation results from the resolution of arbitration as described in Notice 2009-42.

### §205 Elections

A plan that has made an election under WRERA §205 to extend its correction period
automatically revokes that election if it subsequently makes an election to freeze its status under WEREA §204 and the result of that freeze election is that the plan is neither in endangered nor critical status for the years during which the §205 election can be made. IRS has informally confirmed this interpretation.

Enforcement Mechanisms

**Excise Taxes, Penalties, and Enforcement**

Several excise tax liabilities may arise with respect to an endangered plan or critical plan.

1. An employer that fails to pay timely a contribution required under a funding improvement or rehabilitation plan is subject to an excise tax of 100 percent of the contribution.\(^{59}\)

2. If a seriously endangered plan fails to satisfy the applicable benchmarks by the end of the funding improvement period, or if a critical plan fails to satisfy its requirements by the end of the rehabilitation period or has received a certification for three consecutive plan years that the plan is not making the scheduled progress in meeting the requirements of the rehabilitation plan, the plan is treated as having an accumulated funding deficiency for the last plan year of the funding improvement, rehabilitation, or three consecutive year period (and for each succeeding year until the benchmarks or requirements are met). The excise tax is equal to the greater of the amount of contributions needed to meet the applicable benchmarks or the amount of the plan's accumulated funding deficiency.\(^{60}\)

These taxes may be waived by the IRS for reasonable cause, such as material market fluctuations or loss of a significant contributing employer.\(^{61}\)

3. The Secretary of Labor may assess a penalty of up to $1,100 per day against the trustees for failing to adopt timely a funding improvement plan or rehabilitation plan.\(^{62}\)

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\(^{59}\) Code §4971(g)(2)

\(^{60}\) Code §4971(g)(3)

\(^{61}\) Code §4971(g)(5)

\(^{62}\) ERISA §502(c)(8)
4. There is an excise tax owed by the trustees if a critical plan fails to adopt timely a rehabilitation plan.  

5. If the trustees fail to adopt, update, or comply with the terms of a funding improvement plan or rehabilitation plan, any participating union or employer may sue to compel the trustees to take the required action.

Conclusion

The economic downturn that began in 2008 commenced before plans had had the time to fully recover from the effects of the downturn at the beginning of the decade. Plans were just beginning to implement PPA provisions when they were flattened by the 2008 tidal wave. Little guidance has been issued by the agencies and few cases have been decided. Therefore, many issues remain unresolved as the temporary relief under WRERA is about to expire and a majority of multiemployer plans may be in endangered or critical status. Whether the PPA provisions provide the means to save these plans or are the agent of their destruction remains to be seen. The PPA requirements that bring plan funding issues into the bargaining process will also provide opportunities for cooperative or destructive actions.

My personal observations and those of my partners in connections with the plans we represent are that the trustees and the bargaining parties have tended to take the high road. To a very large extent they have worked together to promptly address funding issues. The union trustees are sensitive to employer economic concerns on the contribution side and the employer trustees have listened to the union trustees’ concerning where necessary cuts should be made. I know this is not the case with all plans and in all industries. However, given the importance of issues involved and the lack of guidance, trustees and bargaining parties have done a commendable job to date navigating the PPA requirements under difficult circumstances. Many more issues are likely to arise as the WRERA freeze expires.

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63 Code §4971(g)(4)
64 ERISA §502(a)(10)