

FUNDING RELIEF FOR MULTIEMPLOYER DEFINED BENEFIT PLANS UNDER THE PENSION RELIEF ACT OF 2010

Pension funding relief for multiemployer pension plans became law on June 25, 2010 when President Obama signed H.R. 3962, the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (the “Act” or “PRA”). The Act provides relief with respect to the 2008/2009 investment losses and is designed to give plans more time to address and absorb these losses than is afforded under the funding rules of the Pension Protection Act of 2006 (“PPA”). It is important to note that a plan need not be in endangered or critical status to take advantage of the relief provisions.

The Act provides three important options for addressing funding issues for plans that:

- can pass a “solvency test”,
- where the Trustees are willing to live with no benefit increases for a period of two (possibly more) years, and
- where the Trustees notify the participants and the PBGC of their actions.

Any relief elected will be disregarded in applying the funding and zone status rules of the PPA to the first plan year beginning after August 31, 2008. Thus, if a calendar year plan was in critical or endangered status for the 2009 plan year, election of relief will not change that status. As has been true with most of the multiemployer funding provisions of PPA, the Trustees and advisors will have to make decisions without clear cut guidance from the IRS.

Relief Options – These options may be used separately or in any combination with one another.

- **Asset Smoothing Period** - The actuary can use traditional asset smoothing techniques to spread recognition of the investment losses in either (or both) of the first two plan years commencing after August 31, 2008 over 10 years instead of the previous maximum 5 years the IRS currently allows.
- **Actuarial Value of Asset Corridor Restriction** - The plan can opt for an expansion of the so-called 80% - 120% corridor rule that requires plans to limit the actuarial value of their assets to a value that is no less than 80% and no more than 120% of the market value of those assets. Under the expanded corridor rule, the actuary can allow the actuarial value of plan assets to be as much as 130% of their market value for either or both of the first two plan years beginning after August 31, 2008.

- Amortization Extension - The investment losses incurred in either or both of those two plan years can be amortized over a longer period than the 15 years that has historically been allowed. The “portion” of the investment losses that is recognized in the actuarial value of the plan's assets in the first plan year is amortized over a period of 29 years; the “portion” recognized in the second year is amortized over a period of 28 years, and so on. For plans using 5-year smoothing, the investment loss for the first year following August 31, 2008 would be split into 5 portions, each with its own extended amortization period. If the new 10 year Asset Smoothing Period above is adopted, the targeted market investment loss for the first year following August 31, 2008 would be split into 10 portions, each with its own extended amortization period.
- Combinations of the Above Options – The decision to use one or more of the above options may well depend on the reason the Plan is in need of relief.
 - For example, if the Plan is Endangered simply because the funded percentage is below 80% for a year or two, but is not anticipated to have any problems with a future failure to satisfy Minimum Funding Standards, then an election to expand the Asset Corridor to 130% could fix that problem without the need for any other relief option.
 - Alternatively, if the Plan is projected to experience a Funding Deficiency at some point in the future, but the funded percentage is not a problem, then an Amortization Extension will lower Minimum Funding charges and preserve Credit Balance.

Because the markets started recovering in 2009, many multiemployer plans have investment losses only in the first plan year ending after August 31, 2008, and are not likely to benefit from electing any of the relief options for the second plan year. In any case, the Trustees will want the actuary to analyze the degree to which each of the available options helps the plan's funding status, but only after determining whether the plan qualifies to elect the relief under the Act's solvency test.

Solvency Test

The solvency test is satisfied if the actuary is able to certify that the plan is projected to have sufficient assets to timely pay expected benefits and anticipated expenditures over "the amortization period" after taking into account whatever relief options the trustees want to elect. If the Amortization Extension is elected, with or without any of the other relief, the Solvency Test must be certified to for 29 future years because the investment loss is amortized over 29 years. If the Asset

Smoothing Period and/or Asset Corridor Restriction is elected, but the Amortization Extension is not elected, then the Solvency Test must be certified to for 10 future years.

Benefit Improvement Restriction

If a multiemployer plan elects any of the relief options, then no plan amendment increasing benefits can go into effect during the two plan years following a plan year for which the relief applies, unless:

- the benefit increase is either required by law, or
- the actuary certifies that the benefit increase is funded by previously unscheduled contributions increases and, further, that the benefit increase will not result in either a lower PPA funded percentage or a lower projected Funding Standard Account Credit Balance.

Unanswered Issues

It is uncertain at this point whether a plan that elects the maximum 29 year Amortization Extension has a benefit increase restriction in effect for 29 successive two-year periods (30 years), or whether there just one restriction period of two years starting the year after the first year in which the relief is effective. The general consensus is that there is just one restriction period of two years.

There is a provision in the regulations that indicates the Trustees can elect out of any relief options that were selected at some point in the future. It is unclear at this point as to whether the Plan funding simply proceeds prospectively from the point at which the relief is elected out of (having enjoyed the relief to that point), or whether the Plan funding needs to be retroactively reconstructed as if the relief had never been elected. The general consensus is that the Plan proceeds prospectively from the point at which the relief is ended.

Notice Requirements

Plans that elect any of the Act's relief options must provide notice of the election to all participants and beneficiaries and the PBGC within 30 days of the deadline for the decision. Unlike WRERA, notice to contributing employers, unions representing participants and the Department of Labor, is not required.

Conclusion

Relief provisions must be elected by the earlier of the date of the 2011 certification of PPA status (March 31, 2011 for calendar year plans) or June 30, 2011. If they

are not elected by that date, they cannot be elected at some future date should there be a future economic downturn.

It is also conceivable that election of relief could move a Plan's PPA status from critical (where a Rehabilitation Plan has already been established) to endangered (where the Rehabilitation Plan would cease and a new Funding Improvement Plan be established that has the potential for even higher benefit reductions than were required under the Rehabilitation Plan).

Given the potential uncertainties of the relief provisions and the potential downside should the PPA status change from critical to endangered, relief may be the best course of action only when the Plan has the potential to become "green" to the extent that it can weather some economic difficulties without reverting back into endangered or critical status.



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