

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS



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VIA e-ORI@dol.gov
FIRST CLASS MAIL

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Proposed Regulation Providing a Model Notice of Certification that a Multiemployer Pension Plan Is in Critical Status, 73 Fed. Reg. 11072 (March 25, 2008)

Dear Friends:

The National Coordinating Committee for Multiemployer Plans (NCCMP) is pleased to have the opportunity to comment on the proposed Model Notice of Multiemployer Plan in Critical Status, published on March 25, 2007.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer benefit plans for retirement benefits and the more than 26 million who receive health and other benefits from our plans. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with affiliated plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

The NCCMP played a leading role in the Multiemployer Coalition, the bipartisan management-labor group that worked closely with Capitol Hill in developing the special multiemployer funding rules in the Pension Protection Act of 2006 (PPA). NCCMP affiliates include a number of pension plans that are, or are expected to be, in critical or endangered status.

We understand that the Labor Department has only a limited role in the oversight and enforcement of the notice requirements of subsection (b)(3)(D) of ERISA section 305 and Internal Revenue Code section 432, which are embedded in the new multiemployer-plan funding rules. However, the notices required when a plan is certified as in endangered or critical status are a fundamental link between the plan and its stakeholders. Given the significance of the notices, concerns about different aspects of the notices and the rules governing them are best expressed, and we hope appreciated, in context. Accordingly, we are discussing a range of

issues encountered in the status-notification process, even though some of them may be in the regulatory jurisdiction of the IRS and Treasury rather than DOL.

1. Outline of Comments

A. Process

- 1) The function of the model notice – sponsors’ freedom to modify, substitute, tailor
- 2) Submitting endangered-plan notices to DOL electronically
- 3) Future modifications in the model notice

B. Substance

- 1) Corrections to the model
- 2) Clarification and simplification of language in the model
- 3) Adding to and subtracting from the model
- 3) Notices after the first year in endangered or critical status
- 4) Notice of reduction in adjustable benefits

A. Process

1. The Preamble to the proposed regulation says that the IRS and Treasury will treat the DOL model notice as meeting the notice requirement for critical-status plans. Given the wide range of plan circumstances that these notices will be addressing, including a wide and varied range of audiences, some modification of the model is likely to be necessary in almost all cases. The regulation should confirm that it is a model, not a prescribed form, and that plans can meet the statutory notice requirement by clearly communicating the basic information covered in the notice to the parties entitled to receive it, although the advance approval granted by IRS and Treasury only applies to the approved model.

It would be especially useful if the DOL and/or IRS-Treasury could publish a list of items that must be covered in the zone-certification notice, if they are relevant for the particular plan. It should also confirm that plans may present additional information in or with the notice if the trustees believe it would help the audience understand the plan’s financial situation, the steps being taken to stabilize or improve it, and/or the potential impact on those to whom the notice is addressed. However, a self-designed notice (or notification package, if the information is presented in more than one document) would not be adequate if it had the effect of concealing the required information about the plan’s status-certification.

2. Like plans that are certified to be in critical status, plans determined to be in endangered status must notify the PBGC and the DOL, along with their stakeholders. The Preamble to the proposed regulation gives an e-mail address for sending the critical-status notices to the Labor Department (criticalstatusnotice@dol.gov), but not for submitting endangered-status notices electronically. The Department should establish an e-mail channel for filing endangered-status notices, and confirm that use of the critical-status e-mail address for those filings is acceptable for periods before publication of the designated address.

3. Our experience is that it is extremely difficult to predict in advance all of the issues that may need to be covered by these notices. On the other hand, it is extremely easy to make mistakes, especially mistakes of omission, in the drafting. To facilitate corrections, revisions and updates in this material, we recommend that the final regulation authorize the Secretary to publish corrected, revised or alternative notices from time to time, through generally applicable guidance such as information letters, Interpretive Bulletins or other appropriate communications channels that EBSA may devise.

B. Substance

1. Some of the language in the proposed model notice is incomplete and therefore potentially misleading. Specifically, we recommend correcting the following:

a) Treatment of amortization extension. For most of the critical-status tests, if the plan has an amortization extension the law requires that it be disregarded in projecting whether or when the plan is likely to have a funding deficiency. We believe that should be mentioned in the notice, so that the parties (including the employers) can know that the plan was not actually skating as close to the precipice as the imminence of a funding deficiency suggests. Accordingly, Options 2 through 6 in the list of critical-status tests in the proposed model notice should include language like this, immediately following the reference to the accumulated funding deficiency: “(ignoring the plan’s extension of time for financing the benefits already accrued.)” This special rule does not apply to the test recapped in Option 8.

The text should indicate that this parenthetical should be included only where the plan has an amortization extension.

b) Potential reductions in non-protected benefits. As required by subsection (b)(3)(D)(ii) of ERISA section 305 and IRC section 432, the model notice tells interested parties about the possibility of a reduction in adjustable benefits. However, no mention is made of the prospect of a reduction in other benefits, such as future accruals. To make sure that the readers do not draw the inference that all that is at risk are adjustable benefits, the model notice should mention the possibility of other benefit cuts as well.

Because the rules governing reductions in future accruals while in critical status are complicated, we recommend against attempting to explain them in this notice. A brief reference should be enough to remind people that adjustable benefits are not all that is at stake. This could be accomplished by, for instance, adding an introductory phrase

along the lines of: “In addition to reductions in future benefit accruals and similar changes,” to the sentence that begins “The law permits pension plans to reduce ...”, which is in both versions of the section headed “Rehabilitation Plan” in the model notice.¹

c) Benefit-cut notice. The second version of the section headed “Rehabilitation Plan” says: “On [*enter date*] you were notified that the plan reduced or eliminated adjustable benefits.” As participants, employers and sponsoring unions must receive at least 30 days advance notice of a reduction in adjustable benefits (see IRC s. 432(e)(8)(C)), this notice should not be depicted as if it were given after the fact.

d) Employer surcharges. The model notice says that, “with some exceptions,” the surcharges are applicable “for each succeeding plan year thereafter in which the plan is in critical status.” But a core assumption of the critical-status rules is that the trustees will recommend, and the parties will negotiate, contribution and benefit schedules that will bring the plans’ assets and liabilities into balance. An employer that agrees to such a schedule is relieved of the obligation to pay the surcharges. Many bargaining groups have a goal of keeping the time the surcharges are in force to a minimum, by negotiating acceptable contribution arrangements as promptly as they can. As the law contemplates, plans in which the surcharges remain in effect for most or all of the time should be the rare exception. We recommend that the section of the model notice dealing with surcharges be revised accordingly.

e) Availability of the rehabilitation plan. The last sentence of the model says, “You have a right to receive a copy of the rehabilitation plan from the plan.” But ordinarily the formal rehabilitation plan will not have been adopted until months after this initial notice is sent out, possibly as many as 6 or 7 months, and the deadline for distributing the recommended contribution and benefit schedules to the bargaining parties is 30 days after that, see subsections (b)(1)(A), (B)(i) of ERISA section 305 and IRC section 432. Also, it is not clear that the participants and beneficiaries have a right to a copy of the rehabilitation plan until it is offered to them by the annual funding notice that is due four months after the end of the plan year, see ERISA section 101(f)(2)(B)(v). We recommend that the model notice be revised to say something like, “After it has been adopted, you will receive a summary of it and will be offered the opportunity to request a copy.”

2) One type of change to the model that many plans will want to make is to clarify and simplify the language, to present the message in terms the stakeholders are more likely to understand. Of course, this is what makes all benefit-related disclosures so challenging to craft, and the current model language does a good job of trying to describe extremely complex actuarial and other concepts. Here are a few additional suggestions.

a) Substitute “Trustees” for “plan sponsor.”

¹ So the sentence would read, “In addition to reductions in future benefit accruals and similar changes, the law permits pension plans to reduce, or even eliminate, benefits called ‘adjustable benefits’ as part of a rehabilitation plan.”

b) Eliminate the recitation of the specific tests that the plan fails, which tipped it into critical status. Instead, give standard, simplified summaries. For instance, “In the next few years, the plan’s funding (as measured for purposes of the critical-status tests) is projected to fall short of what the law requires, which would cause an official ‘funding deficiency’. [In addition, the plan’s assets are running low, in comparison to its obligations to all participants including those who have not yet retired.]”

c) Describe the restriction on front-loaded payment forms in terms of what the plan in fact offers, and specify that the reference to that restriction can be deleted if there are no restricted payment forms (which will be common with multiemployer plans), e.g., “... the law does not permit the plan to pay [lump sum benefits][partial lump sums][social security level income options][____{other as provided by the plan}] while it is in critical status. *[delete the preceding sentence if the plan does not pay benefits in a form that is higher than the monthly amount paid under a single life annuity, other than small-benefit cashouts or accumulated payments with respect to a Retroactive Annuity Starting Date.]*

d) Identify the recent benefit increases that can be rolled back as those “that took effect on or after [_____-date 60 months before start of initial critical year] to avoid possible confusion about what the “past 5 years” means, especially for plans that are not on a calendar year.

e) The informal “yellow zone” and “red zone” labels for endangered and critical status are widely used and fit more conveniently into sentences than the official titles. We suggest identifying them parenthetically as synonyms for endangered status and critical status when those terms are first introduced, and then using them in the discussion where it feels natural to do so.

3. As a counterpart to our suggestion, above, that the Department publish a list of items that must be covered in these notices, we suggest that the final regulation also include an Approved List of items that may be added to the model notice without endangering its safe-harbor status. Given the challenge of predicting what could or should be included given the variety of situations in which the notices will be given, the Department should make clear that this is not a prescriptive list, but that other items may be added as long as they do not detract from the basic message.

Among the items that could be on such a list might be:

- ◆ A description of steps the trustees and bargaining parties have taken to date to bolster the plan’s finances;
- ◆ The conditional suspension from funding-deficiency excise taxes while the plan is in critical status (which might be a welcome follow-up to the announcement that the plan is projected to have a funding deficiency in the near term);

- ◆ A summary of what the trustees expect to propose in the rehabilitation plan, or what may have been tentatively agreed to among the bargaining parties;
- ◆ Instructions on how the employers are to determine and pay the surcharges;
- ◆ The fact that the surcharges cannot be the basis for benefits and are excluded from withdrawal liability calculations;
- ◆ An alert to the bargaining parties about the ban on the trustees' accepting bargaining agreements that reduce contribution rates, authorize contribution holidays, etc., during the rehabilitation plan adoption period and the restrictions on benefit increases while the plan is in critical status, see subsection (f) of ERISA section 305 and IRC section 432, and
- ◆ Formal advance notice of benefit reductions, including adjustable benefit reductions.

As has been mentioned at several points, the final regulation should make clear that a plan would not lose the safe-harbor treatment afforded by the model notice if it deletes irrelevant material from the version that it uses. For example, the discussion opens with the statement that “the plan is considered to be in critical status because it has funding or liquidity problems, or both.” If a given plan does not have liquidity problems, it should be free to strike that reference, with the confidence that it is still using a safe-harbor notice. Similarly, instead of checking the categories of adjustable benefits that the plan provides, most plans would prefer just to list those that are relevant, while generally using the model notice.

4. We recommend the Department draft a separate model notice for use after the initial critical year, even though that might require a fair amount of repetition. The current version, which attempts to combine the two, is confusing and hard to follow. Also, somewhat different information may be needed for the notice in the second and subsequent years, which is more likely to come to light if the drafters are focused specifically on what needs to be communicated in those years.

5. Subsection (e)(8)(C)(iii) of sections 305 of ERISA and 432 of the Internal Revenue Code call on the Department to publish a model for the 30-day advance notice of adjustable benefit cuts. We recognize the demands on the Department's time and the difficulty of developing a model notice that will cover all of the cases in which it is needed (as indicated by the length of these comments).

The law describes these notices generally in terms similar to what is required under ERISA section 204(h) and IRC section 4980F in connection with a cutback in future accruals or related non-protected benefits, and the guidance under those sections should be useful to trustees and their advisors in preparing these PPA notices. It would be useful for the PPA notice regulations to confirm that plans can rely on the regulations and any other guidance under those analogous statutory provisions.

There is one element to the PPA-required benefit-reduction notice for which model language would be useful. Subsection (e)(8)(C)(ii)(II) requires that the notice include “information as to the rights and remedies of plan participants and beneficiaries as well as how to contact the Department of Labor for further information and assistance where appropriate.” We urge the Department to prescribe standardized language that plans can use for this purpose.

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The NCCMP will be pleased to answer any questions or provide any additional information that may be helpful to you in connection with this project. Please feel free to be in touch with me, at (202) 756-4644, or by e-mail at rdefrehn@nccmp.org. Thank you for your consideration.

Sincerely,



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Executive Director

Cc: Jeffrey Turner, ORI
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