

Summary of Funding Relief Rules for Multiemployer Pension Plans

On June 25, 2010, President Obama signed the Pension Relief Act of 2010 (PRA 2010) into law. In addition to other things, the law provides funding relief to single-employer and multiemployer pension plans.

For multiemployer plans, PRA 2010 eases statutory funding requirements under the Pension Protection Act of 2006 (PPA) by providing them the opportunity to elect longer periods of time to recognize and fund investment losses incurred during 2008 and 2009. This delayed recognition will allow plan sponsors (i.e., Trustees) to develop less arduous funding benchmarks for plans in critical or endangered status. Additionally, many plans will see an improvement in the current and future PPA statuses. For example, the provisions will make it easier for some plans to remain in or return to the “green zone.”

There were several unanswered questions within PRA 2010, many of which were expected to be addressed by regulations issued by the Secretary of the Treasury. The IRS released guidance in the form of two notices:

- Notice 2010-56 was released July 30, 2010. It provided preliminary guidance and indicated that more detailed guidance would be forthcoming.

The key piece of guidance from Notice 2010-56 pertained to the timing of the election by plan Trustees to apply the special relief rules. Specifically, Trustees will not be precluded from electing to apply the special rules for the applicable plan year if the Form 5500 had already been filed for that year.

- Notice 2010-83 was released November 26, 2010. This notice provides the more detailed guidance anticipated by Notice 2010-56 and does a good job of answering the technical questions that were raised by PRA 2010. Following are key provisions to note:
 - The 2008 and 2009 investment losses eligible for relief are determined on a *market value* basis, rather than the less favorable *actuarial value* basis, as some had feared. See Section I of the following detailed summary for more information.
 - For plans electing relief, it appears the restriction on benefit improvements will range from three to twelve years, depending on how much of the available relief is utilized. (The language of PRA 2010 hinted that the restriction might apply for as long as 32 years.) Restrictions do not apply if the benefit improvements are funded through increased contributions or are required by law. Further clarification on this issue may be needed. See Section IV.
 - Plans can shorten the benefit increase restriction period at any time by opting out of relief prospectively, without losing the effect of the relief applied prior to opting out. See Section V.
 - The PPA certification status for the current plan year may be revised to reflect funding relief, but re-certification is not required. Similarly, a plan may (but is not required to) update a previously-adopted funding improvement plan or rehabilitation plan to reflect the funding relief. See Section VII.
 - Details are provided regarding the manner and timing of the relief election (see Section V) and the required notices to plan participants and the PBGC (see Section VI). Generally, *Trustees must make a formal decision to use the special rules by the earlier of the date of the actuarial certification or June 30, 2011.*

DETAILED SUMMARY OF THE PENSION RELIEF ACT OF 2010

The following is a summary of the multiemployer plan provisions of the Pension Relief Act of 2010, reflecting applicable guidance from the IRS. The sections below are grouped to be consistent with IRS Notice 2010-83:

- I. Extended Amortization Periods in the Funding Standard Account
- II. Expanded Smoothing in the Actuarial Value of Assets
- III. Solvency Test
- IV. Restrictions on Plan Amendments Increasing Benefits
- V. Decision to Apply the Special Funding Rules
- VI. Notification to Participants, Beneficiaries, and the PBGC
- VII. Certification of Status under PPA
- VIII. Form 5500 Requirements

I. Extended Amortization Periods in the Funding Standard Account – Code Section 431(b)(8)(A)

The “funding standard account” is the notional account that a multiemployer plan uses to determine its statutory minimum funding requirements. In general, a multiemployer plan must amortize (that is, fund) experience gains and losses over a period of 15 years in its funding standard account.

Under PRA 2010, the Trustees of a multiemployer plan may elect to isolate the “net investment losses” from one or both of the two plan years ending after August 31, 2008 and amortize those losses over a period ending 30 years after the year in which the loss was incurred. In other words, PRA 2010 allows the plan to fund the 2008 and 2009 losses over a longer period of time.

For a plan that smoothes investment gains and losses into its actuarial value of assets over a number of years, a portion of the net investment losses will first be recognized in the plan’s funding standard account for each year of the smoothing period. For example, say a calendar year plan is using five-year smoothing to determine its actuarial value of assets and elects to extend the amortization period for its 2008 net investment loss. The first portion of the 2008 loss would be recognized in the 2009 funding standard account and amortized over 29 years, the second portion would be recognized in 2010 and amortized over 28 years, and so on. The fifth and final portion would be recognized in 2013 and amortized over 25 years. In this way, all five portions of the 2008 loss would be completely amortized at the same time – 30 years after 2008, the year in which the loss was incurred.

The language in PRA 2010 was ambiguous in its definition of the net investment losses. A key point in Notice 2010-83 is that net investment losses are determined on a market value basis. In general, this will provide greater funding relief than if net investment losses had been based on a smoothed, actuarial basis.

Notice 2010-83 also provides technical guidance regarding the calculation of the net investment losses and how these amounts are recognized in the funding standard account. The notice provides two methods for calculating the net investment losses – a “prospective” method and a “retrospective” method. Once one method is selected by the plan, it must be used for all calculations related to recognizing the net investment losses in the funding standard account in all future years.

II. Expanded Smoothing in the Actuarial Value of Assets – Code Section 431(b)(8)(B)

In general, a multiemployer plan may smooth investment gains and losses into its actuarial value of assets over a period of up to five years. However, the actuarial value of assets must be limited by a “corridor,” in that it must be no less than 80% and no more than 120% of the market value of assets. Together, the smoothing and the corridor comprise the plan’s actuarial asset valuation method.

Under PRA 2010, the Trustees of a multiemployer plan may elect to smooth the net investment losses from one or both of the two plan years ending after August 31, 2008 over a period of up to ten years. Further, the Trustees may elect to expand the corridor on the actuarial value of assets to be no less than 80% and no more than 130% of the market value of assets for either or both of the first two plan years beginning after August 31, 2008. Any resulting reduction in the unfunded actuarial accrued liability resulting from the application of these special rules must be amortized in the funding standard account over a period of 30 years, assuming relief is also elected to extend amortization periods in the funding standard account. Otherwise, the amortization period is 10 years.

The language in PRA 2010 was ambiguous regarding the calculation of the amount of the net investment losses eligible for the expanded smoothing. Notice 2010-83 addressed that issue in the prior section. The notice also confirms that any change in the asset valuation method consistent with the special rules in PRA 2010 will be automatically approved, in spite of the normal rules set forth in Revenue Procedure 2000-40. Notice 2010-83 also provides technical guidance on how to determine the change in the unfunded accrued liability that results from a change in the asset valuation method.

III. Solvency Test – Code Section 431(b)(8)(C)

Under PRA 2010, the Trustees of a multiemployer plan may elect to use the special relief rules described above only if the plan actuary certifies that the plan passes a “solvency test.” To pass the solvency test, the plan must have sufficient assets to pay its projected benefit payments and operating expenses over the amortization period in the funding standard account, as extended under the special relief rules.

Notice 2010-83 confirms that the required projection period for the solvency test is 29 years if the Trustees elect to use extend the amortization periods in the funding standard account for the net investment losses. If the Trustees elect to change the asset valuation method but do not elect to extend the amortization periods in the funding standard account, then the projection period may be only 10 years.

Notice 2010-83 also states that, when performing the solvency test, the plan actuary must use the same actuarial basis (assumptions, plan provisions, contribution increases, etc.) that is used for purposes of the annual actuarial certification under PPA. One potential issue here is to what extent contribution increases adopted by the Trustees as part of a funding improvement plan or rehabilitation plan – but not yet adopted in current bargaining agreements – may be reflected in the projections. If only the contribution increases that have actually been agreed to in bargaining may be reflected in the projections, then some plans may have difficulty satisfying the solvency test. Further clarification on this issue may be needed.

IV. Restrictions on Plan Amendments Increasing Benefits – Code Section 431(b)(8)(D)

Under PRA 2010, if the Trustees of a multiemployer plan elect to use the special relief rules, then the plan is restricted from adopting a plan amendment increasing benefits for a period of two years after the year in which the special rules apply. However, this restriction does not apply if the plan actuary certifies that the benefit increase is funded from increased contributions or if the benefit increase is required by law. These restrictions are slightly different from comparable restrictions on benefit increases for plans in endangered or critical status.

The language in PRA 2010 was ambiguous regarding the restriction on benefit increases was how long the restriction applies. Before the release of Notice 2010-83, one interpretation was that the restriction applies for two years after the year in which the special relief rules first apply (i.e., for a period of three years in total), while another interpretation was that the restriction applies for two years after the extended amortization period (i.e., for more than 30 years in total).

For a plan electing to extend the amortization periods for its net investment losses, Notice 2010-83 appears to tie the restriction period to the number of years over which portions of the net investment losses are first recognized in the funding standard account. For example, say a plan elects to extend the amortization periods for its net investment losses *and* elects to recognize portions of the net investment losses in its funding standard account over a period of ten years. In that case, the restriction will apply for a period of twelve years (ten years of loss recognition plus two additional years). If that plan instead recognizes its net investment losses in its funding standard account over five years, then the restriction would apply for a period of seven years (five years of loss recognition plus two additional years). Or, if a plan elects not to extend the amortization periods in its funding standard account but does elect to expand the smoothing period or increase the “corridor” in its asset valuation method, the restriction will only apply for a period of three years (the current year plus two additional years). Further clarification on this issue may be needed.

Notice 2010-83 further emphasizes that the restriction does not apply if the benefit increase is funded by contributions not allocated to the plan as of the end of the preceding year. To qualify for this exemption, the plan actuary must certify that the plan’s funding standard account credit balance and funded percentage are at least as high as they would have been if the benefit increase had not been adopted.

The notice also states that the restriction does not apply to amendments that were effective prior to June 25, 2010 (the date PRA was signed into law). However, amendments that were adopted prior to June 25, 2010 with benefit increases effective on or after June 25, 2010 are subject to the restriction.

V. Decision to Apply the Special Funding Rules

PRA 2010 itself provided little instruction on how the Trustees of multiemployer plans should elect to apply the special funding relief rules. Notice 2010-83 sets forth a series of rules and deadlines for formalizing the decision.

1. If the Trustees wish to elect the special funding relief rules under PRA 2010, they must make a formal decision to do so using their normal decision-making procedures, such as a resolution of the Board of Trustees.
2. The Trustees must make the decision by a set deadline. That deadline is the earliest of (i) the deadline for the 2011 actuarial certification, (ii) the date that the 2011 certification is made, or (iii) June 30, 2011. If arbitration is needed to reach an agreement on whether to apply the special funding rules, the notice extends the deadline to 30 days after the resolution of the arbitration.
3. The Trustees may elect to stop applying the special amortization rules as of a plan year, provided that they make a formal decision to do so. In this case, no new special extended amortization bases will be established in the funding standard account. However, special amortization bases that were already established in the funding standard account will not be affected.

VI. Notice to Participants, Beneficiaries, and the PBGC – Code Section 431(b)(8)(E)

Under PRA 2010, if the Trustees of a multiemployer plan elect to apply any of the special relief rules, the plan must send a notice to participants and beneficiaries that the special rules apply.

Notice 2010-83 clarifies that the notice must be sent to participants and beneficiaries within 30 days after the deadline for the Trustees' formal decision, as described in the prior section. Notice 2010-83 also clarifies that the notice to participants and beneficiaries must be provided only once, even if the special funding rules apply for more than one plan year.

Notice 2010-83 also describes the required content of the notice to participants and beneficiaries:

1. Identification information: plan name, employer identification number (EIN), plan number (PN)
2. An explanation of which special relief rules apply to which plan years
3. The effects of the application of the special relief rules on the plan's funding standard account and/or asset value
4. A general description of the special relief rules on the plan's minimum contribution requirements, which could affect the required contribution increases under the plan's funding improvement plan or rehabilitation plan (if applicable)
5. An explanation of the restriction on benefit increases, unless certain conditions are met
6. The name, address, and telephone number of the plan administrator or other contact person.

Finally, Notice 2010-83 states that the notice to participants and beneficiaries must also be provided to the PBGC no later than 30 days after the Trustees make the formal decision to apply the special relief rules, but not earlier than January 18, 2011. This means that plans who have already formally elected the relief by December 19, 2010 must notify the PBGC by January 18, 2011.

VII. Certification of Status under PPA

Notice 2010-83 clarifies several ambiguities regarding how the special funding rules under PRA 2010 may affect the plan's certification status under PPA. The guidance given by the notice is as follows:

1. If the special relief rules are elected, they must be reflected in all current and future PPA certifications.
2. The Trustees may elect to update a previously-adopted funding improvement plan or rehabilitation plan to reflect the special funding rules, although they are not required to do so.
3. The Trustees may request the plan actuary to re-certify the plan's status to take into account the special funding rules (assuming that doing so would result in a different status). However, the status for the first plan year beginning after August 31, 2008 (i.e., the 2009 plan year for calendar year plans) *cannot* be re-certified. If the plan's status is re-certified, then the following actions must be taken:
 - a. The plan actuary must send a new certification to the Trustees and to the IRS before the end of the plan year for which the status is being re-certified. *(In other words, for calendar year plans, any re-certification of the 2010 plan year must be completed by December 31, 2010.)*
 - b. The plan must send a notice of the re-certification to participants, beneficiaries, bargaining parties, the PBGC, and the DOL no later than 30 days after the revised certification is made.
 - c. The plan must reverse any actions it took that would not be permitted under the plan's revised certification status. For a plan that was originally certified in critical status but is no longer in critical status as a result of the revised certification, such actions that would have to be reversed include restrictions on lump sums and level income annuities, the reduction or removal of adjustable benefits, and the imposition of employer surcharges.
4. The plan's certification status for the first plan year beginning after August 31, 2008 (i.e., the 2009 plan year for calendar year plans) cannot be revised.

VIII. Form 5500 Requirements

As originally prescribed by Notice 2010-56, the Trustees of a multiemployer plan will not be precluded from retroactively applying the special relief rules to an eligible plan year simply because the Form 5500 has already been filed. For example, the Trustees of a calendar year plan are not precluded from retroactively applying the special relief rules to the plan year beginning January 1, 2009 merely because the 2009 Form 5500 has already been filed.

Notice 2010-83 also states that the Form 5500 does not need to be re-filed to reflect the special relief rules. Instead, a special attachment can be made to the Schedule MB filed for a subsequent plan year showing how the application of the special relief rules changes information in the previously-filed Schedule MB. The same approach can be taken in the event that a Form 5500 was filed reflecting the special relief rules, but the calculations differ from those required by Notice 2010-83. However, Notice 2010-83 also states that a plan may file an amended Form 5500 with a revised Schedule MB rather than simply including a special attachment to a subsequent Schedule MB.

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