Outline of Issues For NCCMP Comment on IRS Proposed Regulation on Multiemployer Plan Status Determination and Certification under IRC s. 432

A. Process Issues

1. Estimate of time needed to comply. Although ordinarily we would not review the Paperwork Reduction Act estimates of the compliance burden associated with a proposed regulation, in this case the reported estimate is striking. In the Preamble to the proposal, IRS and Treasury report that, on average, compliance would take 45 minutes per plan (specifically, the estimate is 0.75 burden hours). Moreover, the Preamble suggests that this estimate covers both the certification and the ensuing notice.

The proposed regulation itself adds little or nothing to the compliance burden, but the certification process required by the law will consume substantially more than 45 minutes, especially for plans that may be in critical or endangered status and therefore need more intensive services. Among the resources marshaled to accomplish the status certification and notices are:

- Fund Office time assembling financial and demographic data and preparing mailings;
- Investment consultants and advisors, and auditors and bookkeepers, gathering and reviewing financial information on an accelerated basis;
- Legal counsel's time analyzing the legal requirements and explaining them to the trustees, and drafting or reviewing notices;
- Trustees' time reviewing the issues and options with their professional advisors, and
- The actuary's time analyzing the data and performing, reviewing and communicating the various projections and other tests.

Depending on the circumstances of the plan, this process could easily consume anywhere from 10 to 40 or more hours, at least in the first few years. So that multiemployer plan fiduciaries, participants and contributing employers, not to mention Congress and relevant government agencies, are not misled into assuming that the status-certification process is a simple and speedy one, IRS and Treasury should clarify and correct the impression created by the burden-analysis in the proposal's Preamble.

2. Effective date; reasonable interpretations. The proposed regulation was released March 14, 2008, two weeks before the due date for status certifications for calendar-year plans. It is proposed to be effective for plan years *ending* after March 18, 2008. Given the inadequate notice for 2008 and the considerable remaining uncertainty about some of the issues, we recommend that the effective date be postponed to plan years beginning 90 or more days after publication of the final regulation. Along with this, the Treasury and IRS should also state explicitly that (a) plans must comply with a reasonable interpretation of the law prior to the effective date of the regulation, with the proposed regulation serving as a safe-harbor, and (b) future guidance that imposes more restrictions on plans and their sponsors will be prospective only.

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B. Substantive Issues

1. Red zone revolving door – clarify whether it is resolved by the regulatory language, and if so, how. To some extent the proposed regulation perpetuates the confusion by its continued reference to the 10-year emergence standard as a separate test, even though it is also incorporated into a critical-status test. [Question: Is there a reasonable interpretation of current law that we could suggest to enable a plan to get out of critical status by taking its amortization extension into account (whether 412(e) or 431(d)) and not rotate back in, either immediately or by the next plan year?]

2. Length of the funding improvement or rehabilitation period – confirm that, if it extends to the end of the 10th (or 15th) plan year the plan will emerge on the first day of the immediately following plan year. That is, the certification for the 11th (or 16th) plan year would be based on projections that show that the plan no longer meets any of the tests for endangered or critical status. If this were required for the 10th (or 15th) plan year, the correction period would essentially be shortened by one year.

3. Red zone benefit payment restrictions. If the final regulation continues to require that the notice of status certification identify the payment options that are restricted (see item 8, below), it will be necessary to clarify which benefits are affected and how they are to be handled. In this connection, we recommend that the final regulation confirm that the restrictions do not apply to death benefits defined as a lump sum and payable under the plan only in that form (e.g., a flat dollar amount, or a "refund" of employer contributions made on the participant's service). If the restriction does apply to those types of benefits, how can they be paid? Suggest it be in monthly installments equal to the deceased employee's accrued monthly benefit payable at NRA, with appropriate adjustment for interest.

4. Funding method. Support the clarification that the plan's regular funding method is used to project the funding standard account for purposes of the tests

5. Projecting contributions. The law describes two methods for projecting contributions for purposes of the status tests: use the prior year's contributions or assume the rates prescribed in the current bargaining agreements remain in effect for the full projection period. The proposed regulation largely repeats the statutory descriptions. This leaves open a number of unresolved questions:

a. The Preamble says that, if the projections assume continuation of collective bargaining agreements, the plan sponsor must provide a projection of covered activity. But the covered-activity projection is needed regardless of the basis on which contributions are projected, as the text of the proposal seems to recognize. This should be acknowledged in the Preamble to the final regulation.

b. The proposal says that plan actuaries cannot use continuation of contributions approach for applying the demographic/solvency red zone tests. We believe the general language of the statute can be interpreted to allow use of that approach for those purposes. Otherwise a plan without a CBA-specified rate covering most of the participants would not be able to apply the tests.

c. The proposal restates the two contribution-projection options, with the lead-in that they apply for "any actuarial projection of plan assets". But in fact contributions need to be projected for many purposes under the tests, including whether and when a funding deficiency is expected, what the benefits will be and how the plan measures up under the demographic tests. If those two contribution-projection methods are not allowed, it is difficult to see how the tests could be applied.

d. If a CBA calls for contributions as a percentage of salary, confirm that the salary growth beyond the expiration of the agreement can be assumed for projecting contributions as well as benefit liabilities (if benefits are a function of contributions or salary), as any other approach would be inconsistent with actuarial principles.

e. If, for some or all of the participants, no contribution basis is set out in the CBA but another related document, such as a participation agreement, does mandate a rate for determining contributions, that other document can be treated as if it were a CBA for this purpose.

f. The Preamble (although not the text of the law or of the proposed regulation) says that the fallback position absent a CBA is to assume the same *dollar amount* of contributions as the previous year. The implication that plans without an adequate CBA reference would be constrained to projecting contributions equal to using a frozen dollar amount should be dropped. Following the statutory direction, the final regulation should allow the actuary to project the contributions made on the same *basis* as the previous year, applied to reasonably anticipated industry activity (plan participation, payroll, e.g.) for relevant future years.

6. <u>Content of the certification.</u> The proposal lays out only bare-bones specifications for the content of the actuary's status certification, but warns that IRS and Treasury intend to ask for more information and invites recommendations on what should be added. We recommend that anything that is added to the certification requirement should be based upon the American Academy of Actuaries' standards for actuarial communications in connection with a statement of actuarial opinion. [To be appended to the NCCMP comment.]

The Preamble suggests one possible add-on to the required certification: a projection of the plan's funded percentage. We submit that that would not be an appropriate item to be reported on the actuary's status certification for a plan year, as it is not an element of any of the tests for either critical or endangered status. Unless trustees request that projection for their own planning purposes, actuaries will not otherwise be performing those calculations.

Any expanded list of items to be reported in the certification should only apply to certifications that are due at least 90 after publication of the new requirements, or, if the IRS/Treasury decide to require supplemental submissions with respect to certifications that have already been filed, actuaries should be given at least 90 days from the publication of the new requirements to prepare and submit the additional information.

7. <u>Notice of status determination - 1.</u> The proposal restates the statutory requirement that notice be given to stakeholders, the Labor Department and the PBGC when a plan is certified as being in endangered or critical status. It also says that use of the DOL model critical-status notice will be deemed to be compliance with this requirement.

The NCCMP has submitted substantial comments on the DOL's proposed model notice (copy attached). These include a number of recommendations for further guidance that are probably more within the jurisdiction of the IRS and Treasury, rather than the Labor Department, and we urge you to consider them. For example, the suggestion made in our first substantive comments should be addressed in the final version of the proposed regulation at issue here:

> 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.

8. Notice of Status Determination – 2. IRC s. 432(f)(2) imposes restrictions on lump sum and similar distributions from critical-status plans, effective on the date the notice of status-certification is sent to stakeholders. However, the law does not prescribe a specific notification requirement in connection with those restrictions. To fill that gap, the proposed regulations require that the status-certification notice include an explanation of the distribution restrictions. The discussion of this in the Preamble says that a status-certification notice would not be valid if it does not contain an explanation of the distribution restrictions, and therefore would not be treated as adequate notice to retiring participants that their benefits might be cut.

While we agree that participants need prompt notice of the distribution restrictions and would not oppose a reasonable rule requiring it, linking that new requirement to plans' ability to reduce adjustable benefits is inappropriate. This is particularly so given the lack of clear guidance on what payment forms are restricted (see item B.3, above).

C. Possible Suggestions for Future Guidance

The Preamble to the proposed regulation invites suggestions of items that IRS and Treasury should address, as a priority, in future guidance. Taking into account the complexity of the issues and the possibility that a hasty response from the government could be more harmful than the current ambiguity, what, if any, items should the NCCMP identify for this purpose?

Here are a few suggestions.

1. Funding Improvement and Rehabilitation Periods – there are a number of issues, but these need to be resolved fairly early so that endangered or critical-status plans and their bargaining parties know how to start on the path to recovery.

a. Can the start date of these be changed as a result of changes in the CBAs made after the due date for the actuary's status certification, for example, by amendment to the CBA? By a reopener or termination of the CBA?
b. What is the expiration date of a CBA with an "evergreen" clause that states that the bargaining agreement remains in effect from year to year but either side can terminate it by, say, giving 60 days notice?
c. What if the agreement stays in effect generally, but the terms relating to pension contributions are reopened and renegotiated? Do new or renewed agreements under which employers agree to contribution rates provided in a schedule, which have the effect

of eliminating the red-zone surcharges, have any effect on the start date of the Rehabilitation Period?

d. What if the CBAs in effect on the due date of the actuary's status determination cover fewer than 75% of the active participants, perhaps because agreements that expired before that date have not yet been renewed or because the plan also covers a material number of non-bargained participants?

e. Confirm that "expiration of the CBAs" is a term to be interpreted by the trustees, based on labor-law principles.

2. Benchmarks and progress. Starting with the plan year after the Funding Improvement or Rehabilitation Plan is adopted, the actuary must certify whether plan is making scheduled progress against its plan. IRS/Treasury should confirm that "progress" does not have to be linear, as indeed it would not be expected to be since the plan will often be endangered or critical because its funding position is projected to decline. Rather, this requirement calls on the actuary to determine whether the plan is meeting the steps spelled out in its corrective plan. Future guidance should confirm that the benchmarks can describe actions the trustees or the bargaining parties will take, quantitative measures the plan will achieve, or both.

3. Critical-status surcharges. Confirm the basis on which the surcharges are payable: contributions due 30 days after the employers are notified of their obligation to pay them, or contributions due on work performed 30 days after that notice. Whichever rule is chosen, make clear that it is effective for surcharges payable no less than 60 days after publication of the final regulation, and that either approach will be treated as a reasonable interpretation prior to that date.