



Announcing **MULTI-ELERT®**

In an effort to provide the most timely, up-to-date news to our members regarding developments in legislation, regulations and court actions affecting multiemployer plans, the NCCMP is pleased to present the first issue of our new, e-mail based, early warning system called "**MULTI-ELERT.**" In addition to alerting you to important developments of general interest, our aim is to provide member funds and their professional advisors with the latest information on the activities of Congress and federal agencies with implications for our plans, and to solicit your input in the review and comment process.

Obviously, the time for making formal comments is not always sufficient to permit a full exchange of ideas on every proposed piece of legislation or regulation. Nor, for strategic reasons, will we always be able to reflect all comments received in our final submission. Time permitting, however, it is our intent to convey to you an overview of, and identify significant issues and/or questions related to, pending legislation and proposed regulations; to invite comments regarding possible approaches or concerns, and to solicit specific examples of situations in which multiemployer plans may be affected by such laws or regulations. By doing so, we hope to enhance our ability to reflect in our comments the variety of interests and breadth of the experience of member plans across all industries and geographic areas. Your ideas and suggestions will be considered in preparing our final comments. Once the final comments are formally submitted, the complete text will be posted on the NCCMP web page that is currently being updated.

We will also be turning to you, through the **MULTI-ELERT**, for information about plan practices, policies and other data that will be helpful in supporting the positions we take with the policy makers, and we thank you in advance for your help.

If you know of others who may be interested in receiving **MULTI-ELERT**, please forward this e-mail message to them and suggest that they contact the NCCMP at multi-elert@nccmp.org to be included in future distributions.

While improving our ability to expedite our member communications electronically has been a priority, not everyone has the ability to take advantage of this technology, so watch for your copy of the forthcoming issue of NCCMP Update in the near future.

Finally, please let us know what you think of this new service. Give us your ideas for how to make it more "user friendly." As noted above, our next priority is to reconstruct our web-page to enable us to share your comments and the final product our collective efforts produce.

Sincerely,

Randy G. DeFrehn

Randy G. DeFrehn
Executive Director



TOPIC:

SUMMARY OF FINAL IRS MULTIEMPLOYER PLAN EXAMINATION GUIDELINES – ISSUED MAY 2001

EXECUTIVE SUMMARY:

IN MAY, THE IRS ISSUED THE FINAL VERSION OF THE MULTIEMPLOYER PENSION PLAN EXAMINATION GUIDELINES FOR USE BY FIELD EXAMINERS IN THEIR REVIEW OF MULTIEMPLOYER PLANS. THE ATTACHED SUMMARY EXAMINES SEVERAL NEW OR SIGNIFICANTLY MODIFIED POSTIONS THAT MAY BE SUBJECT TO, OR IN FURTHER NEED OF CLARIFICATION. YOU ARE INVITED TO OFFER COMMENTS THAT MAY STILL BE INCORPORATED AS THESE GUIDELINES ARE IMPLEMENTED.

PURPOSE:

INFORMATIONAL

CATEGORY:

AGENCY - OPERATIONAL GUIDANCE

ISSUER:

IRS

TARGET AUDIENCE:

PENSION PLAN TRUSTEES AND PROFESSIONAL ADVISORS

INPUT REQUESTED:

1. COMMENTS CONCERNING AREAS REQUIRING CLARIFICATION FROM THE IRS
2. ANECDOTAL EXPERIENCES IN ACTUAL AUDITS

OFFICIAL COMMENT PERIOD ENDS:

NOT APPLICABLE – DISTRIBUTED IN FINAL FORM

NCCMP DEADLINE:

SEPTEMBER 7, 2001

FORWARD COMMENTS TO:

Multi-elert@nccmp.org

REFERENCE:

VOL. 1, ISSUE 1 - MULTIEMPLOYER PLAN EXAMINATION GUIDELINES

FOR ADDITIONAL BACKGROUND SEE:

FULL TEXT NOT YET AVAILABLE IN ELECTRONIC FORM - **A HARD COPY IS AVAILABLE ON REQUEST FROM THE NCCMP**

SUMMARY OF FINAL IRS MULTIEMPLOYER PLAN EXAMINATION GUIDELINES ISSUED MAY 2001

BACKGROUND

The IRS issued Final Multiemployer Plan Examination Guidelines in May, 2001. The Examination Guidelines are intended to provide guidance to IRS field personnel who audit qualified multiemployer pension plans including defined benefit pension plans as well as the various types of defined contributions plans (e.g., money purchase plans, profit sharing plans and 401(k) plans).

The Examination Guidelines are not regulations. However, they do provide an insight into the Service's views of the application of various IRS requirements to multiemployer plans. These Guidelines address only issues unique to multiemployer plans or that may be more commonly encountered in multiemployer plans than single employer plans. The Overview states that these Guidelines are not intended to serve as a complete guide for an IRS auditor's examination of multiemployer plans but as a supplement to other advice already available. The IRS representatives at the NCCMP Annual Conference emphasized that IRS auditors may request information and inquire into issues outside of the Guidelines.

The recently issued, final Examination Guidelines replace proposed Examination Guidelines issued in 1996. The NCCMP commented on the proposed Guidelines and engaged in cooperative efforts with the IRS and other organizations to explore the unique features and structures of multiemployer plans. As a result of those efforts, these Guidelines reflect significant understanding of multiemployer plans on the part of the Service. We appreciate their efforts as evidenced in this document.

We encourage trustees and professional advisors to qualified multiemployer retirement plans to review these Guidelines. They may be used with other similar information to monitor a plan's compliance with IRS requirements. In the experience of NCCMP affiliates, IRS auditors have used the proposed Guidelines extensively in audits of multiemployer plans. We expect that these revised Guidelines will be used in a similar fashion.

This summary generally follows the outline of the Guidelines. The summary does not include every issue touched upon by the Guidelines. Instead, we have included points and themes which we believe reflect the Service's view of an issue and of which plan administrators and advisors should be aware. We have also included comments by the IRS and responses to questions at the recent NCCMP Annual Conference. We have clearly indicated these verbal comments.

The summary generally reports on comments and recommendations from the IRS to its plan examiners, not the NCCMP. Occasional observations by the NCCMP appear in brackets []. *The NCCMP does not provide legal advice. For guidance on the application on the application of these guidelines, consult your local counsel and other professional advisors.*

PLAN DOCUMENTS AND AGREEMENTS

Trust Agreement

The Guidelines note that the Trust Agreement may contain key provisions including the power of the Trustees to reject other agreements in conflict with the plan document. This is important because documents augmenting the basic plan document (e.g., collective bargaining agreements, participation agreements, reciprocity agreements) must not conflict with the terms of the plan or the plan may violate the definite written program or definitely determinable benefit requirements of Treas. Reg. §1.401-1.

Collective Bargaining Agreements

The Guidelines instruct IRS auditors to obtain and review collective bargaining agreements with respect to several issues discussed throughout the Guidelines. As mentioned above, one principal issue is whether the collective bargaining agreement is consistent with the plan document. An example of an inconsistency given at the NCCMP Annual Conference was where the plan correctly included the IRS requirement that a new employee participate in the plan after completing 1000 hours of service but the collective bargaining agreement excludes employees for a longer period of time. IRS auditors also determine if the collective bargaining agreement excludes part-time employees. Such an exclusion may also violate IRS requirements if part-time employees who have completed 1000 hours of service with the employer in the type of employment covered by the plan, do not participate in the plan.

Participation and Reciprocity Agreements

If it is allowed by the terms of the plan, participation by non-collectively bargained employees must be provided for in the plan document. The plan terms authorizing this must require the employer of non-collectively bargained employees to enter into a “participation agreement” or “side agreement” with the plan trustees.

If the plan enters into reciprocity agreements, the terms of the plan must permit such agreements. At the NCCMP Annual Conference, the IRS representatives commented that the plan need not incorporate the specific terms of the reciprocity agreements but must authorize the trustees to enter into such agreements and provide for the crediting of service under such reciprocity agreements. We encourage trustees and professional advisors to qualified multiemployer pension plans to review these Guidelines. They may be used with other similar information to monitor a plan's compliance with IRS requirements. In the experience of NCCMP affiliates, IRS auditors have used the proposed Guidelines extensively in audits of multiemployer plans. We expect that these revised Guidelines will be used in a similar fashion.

See additional comments on reciprocity agreements later in this summary.

ADMINISTRATIVE FEATURES OF MULTIEMPLOYER PLANS

As defined in ERISA, the joint board of trustees of a multiemployer plan is the plan sponsor and the plan administrator unless the plan document designates another administrator. Committees or a professional administrator may also carry out administrative responsibilities. The Guidelines note that the minutes of trustee and committee meetings are an excellent source of information on service crediting practices, benefit payments, partial termination events, employer or participant suits and other matters that may relate to a plan's qualified status. Therefore, care should be taken to insure that minutes accurately state the actions of trustees and committees.

The Guidelines note that due to the structure of multiemployer plans, employee payroll data does not feed automatically into the plan's database as it often does for single employer plans. Therefore, the Guidelines comment that multiemployer plan administrators must take extra care that contributing employers provide the proper participant information. This theme emphasizing the importance of complete and accurate data to maintain the plan's qualified status is found throughout the Guidelines and was emphasized by the IRS representatives at the NCCMP Annual Conference. In the experience of NCCMP affiliates, data has been an important focus of IRS audits.

IRS EXAMINATION PRACTICES FOR MULTIEMPLOYER PLANS

IRS auditors are directed to interview trustees, the plan administrator or an individual with power of attorney to speak for the plan (typically, the plan's auditor or counsel). The IRS auditor will not have contact with employers or participants except in limited circumstances such as the disallowance of the employers' deduction, a coverage problem involving an employer's non-collectively bargained employees, or the inadequacy of the plan's participant data records. IRS auditors are directed to carefully review minutes of trustee meetings or committee meetings.

Tracking Participant Data

The Guidelines note that an audit of a multiemployer plan will require extra effort to ensure that the administrator's participant records are complete and accurate since this information is important for a variety of qualification requirements.

The Guidelines direct the IRS auditor to look first at the collective bargaining agreements to determine what is covered service and whether there is a provision for continued coverage for workers who move to non-bargained status ("bargaining unit alumni"). The auditor is also directed to review participation agreements covering non-collectively bargained employees of contributing employers as well as the employees of the plan and the union which are non-collectively bargained unless staff are covered by an office collective bargaining agreement.

The IRS auditor will test the service credit and benefit calculations of a representative sample of non-collectively bargained employees. The auditor is also directed to ask for copies of employer certifications or other evidence that the IRS non-discrimination requirements are satisfied for each separate group of non-collectively bargained employees.

The Guidelines direct the IRS auditor to ask the plan administrator how participant information is gathered and verified. Sources listed in the Guidelines to be checked by the IRS auditor include remittance reports, confirmations that may be sent to employers and participants and records of the sponsoring union. The Guidelines note that evidence of employer reporting problems may appear in payroll audit reports, correspondence, and minutes.

The IRS auditor is directed to track a few participants who applied for and/or began receiving benefits to check their service credit, benefit calculations and joint and survivor elections. The auditor will check to see that credit has been given for contiguous non-covered service, reciprocity service and periods for which employers did not make the required contributions. The auditor will contact employers and participants if necessary. If there appear to be problems, the auditor is to inquire about the plan's procedures for educating employers and insulating participants from the consequences of reporting errors.

TECHNICAL REQUIREMENTS

Plan Amendments and Effective Dates

In order for a plan to be and remain qualified, the plan documents must be timely amended to satisfy any changes to IRS qualification requirements. The Guidelines include a useful chart showing the effective dates and amendment dates for multiemployer plans in connection with changes to IRS requirements from 1982-2000. Where the amendment date is after the effective date of the change, plans must generally comply in operation with the new law as of its effective date.

The Guidelines direct the IRS auditor to obtain a copy of the plan's latest IRS determination letter. If there is no IRS determination letter relating to some of the changes in IRS requirements or if it appears that the letter was issued in error, the IRS auditor is to verify the adoption dates of the relevant plan amendments either by reviewing signed amendments or by checking the minutes of the meeting for adoption actions. NOTE: In the experience of NCCMP affiliates, IRS auditors request signed amendments. The Guidelines indicate that either signed amendments or Trustee minutes can be used to verify adoption of plan amendments.

Minimum Participation and Non-Discrimination Rules

Multiemployer plans automatically satisfy the IRS requirements concerning non-discrimination in coverage (Code § 410(b)) and benefit accrual (Code § 401(a)(4)) and the minimum participation rules for participants who are collectively bargained. The portion of a multiemployer plan covering non-collectively bargained employees—including employees of the union and the plan itself, which are non-collectively bargained under the IRS regulations—must satisfy the non-discrimination rules on an employer-by-employer basis. These groups may be treated as collectively bargained employees if they are “bargaining unit alumni.”

Code §410(b) Definition of Non-Collectively Bargained Employee

For purposes of the IRS coverage and non-discrimination regulations, an employee is considered collectively bargained only if the employee is represented by a union that is party to the collective bargaining agreement under which the plan is maintained. Employees of the pension plan, a related plan or the union are not generally covered by the plan under a collective bargaining agreement and are not considered collectively bargained.

However, the Guidelines outline the special rules (known as the “Bargaining Unit Alumni Rules”) that allow certain non-collectively bargained employees in a multiemployer plan who were formerly collectively bargained employees covered by the plan to continue to be treated as collectively bargained employees. In connection with these special rules the Guidelines note the following:

- The special rules only apply to current or former members of the bargaining unit;
- The collective bargaining agreement must provide for continued coverage of these employees although the provisions of a participation agreement or similar document may be taken into account;
- Such employees must perform services for a signatory employer, the union or the retirement plan;
- The provisions of the pension plan concerning benefit accrual may not treat these employees more favorably than similarly situated collectively bargained employees; and
- No more than 5% of employees covered under the plan are non-collectively bargained employees.

The Guidelines explain the relationship between Revenue Procedure 93-42 concerning substantiation quality data and the definition of collectively bargained employee. For example, if the employer elects to use the snapshot testing method described in the Revenue Procedure, then the employee's status as a collectively bargained employee on the snapshot testing date would determine the employee's status for the entire year.

Code §401(a)(4) Defined Benefit Plan Safe Harbor

The safe harbor tests require the plan to provide a benefit to each participant that is the same percentage of compensation for the same number of years of service. Multiemployer plans that grant a retroactive benefit increase conditioned on a participant completing a certain amount of service in the future would fall out of the safe harbor. However, a special rule permits a multiemployer defined benefit plan to disregard such a service condition if the condition applies to all employees in the plan and the amount of future service required does not exceed five years.

If the multiemployer plan adopts a future-years-of-service condition that does not satisfy the exception, or its benefit rules otherwise fall out of the safe harbor, the non-collectively bargained employees must be tested under the general nondiscrimination rules (separately for each employer).

Substantiation Quality Data

Revenue Procedure 93-42 provides special procedures for plan sponsors to use imperfect data for nondiscrimination testing. These procedures are particularly important for multiemployer plans which do not have direct access to certain data maintained by employers.

Each employer participating in a multiemployer plan must satisfy the IRS nondiscrimination rules for the employees of that employer that are not treated as collectively bargained. The failure of the multiemployer plan to satisfy the non-discrimination requirements with respect to the non-collectively bargained employees of each employer is a basis for disqualifying the entire plan. However, the Guidelines point out that, in a proper case, the Commissioner has the authority to maintain the qualified status of a multiemployer plan with respect to "innocent" employers. The Commissioner may exercise this discretion where the plan has followed procedures that are reasonably designed to obtain the required information from each employer to determine that the employer satisfies the nondiscrimination requirements and it is reasonable for the plan to rely on that information. The Guidelines state by way of example that a multiemployer plan may rely on an employer certification that the portion of the plan benefiting that employer's non-collectively bargained employees satisfies the nondiscrimination requirements provided it is reasonable for the plan to rely on that certification.

Examining Coverage

The Guidelines direct the IRS auditor to take the following steps:

- Determine if the plan terms permit coverage of non-collectively bargained employees.
- Refer to the collective bargaining agreement and any side agreements to determine which non-collectively bargained employees are allowed to participate.
- Ask the plan to identify any eligible non-collectively bargained employees and their employers.
- If possible, cross check a sample of eligible non-collectively bargained employees against payroll audits and other records to determine if they actually participate and whether their employers are making contributions.

- Ask the plan for employer certifications of compliance with IRS nondiscrimination requirements as provided in Revenue Procedure 93-42.
- If the evidence seems questionable, the auditor should obtain the separate records for each affected employer.

Vesting, Accruals and Service Credit

The five-year vesting schedule applies to collectively bargained employees who have at least one hour of service after the effective date of the Small Business Job Protection Act. Non-collectively bargained employees in a multiemployer plan were previously required to be subject to five-year vesting. Multiemployer plan participants are required to receive credit for eligibility and vesting for "contiguous non-covered service" where a participant moves from covered service to non-covered service (or vice versa) with the same employer.

The Guidelines note that the SSA schedules are a good source of information concerning a plan's compliance with the vesting requirements. Deferred vested employees must be listed on the SSA Schedule when they have ceased vesting service for two years. See Treas. Reg. §301.6057-1(b)(3) concerning record keeping requirements for multiemployer plans with regard to SSA schedules.

Suspension of Benefits

Suspension of benefits is a permitted forfeiture of benefits. See Code §411(a)(3)(B) for the special rules for multiemployer plans. See also DOL Reg. §2530.203-3. Service for which benefits may be suspended under the regulations is referred to as "203(a)(3)(B) service" which is service after benefit payments begin or after a participant becomes eligible to receive a normal retirement benefit.

The amount of monthly benefits that may be suspended is the amount equal to the monthly portion of the annuity attributable to employer contributions. [NOTE that the portion of a benefit attributable to employee contributions may not be suspended.] Suspension of benefits may not begin until the plan notifies the employee that benefits will be suspended and the period of suspension lasts only while the employee is engaged in 203(a)(3)(B) service. This amount is permanently lost. However, if a plan withholds benefit payments for service that is not 203(a)(3)(B) service, the value of these benefits may not be permanently lost.

If an employee continues to work in 203(a)(3)(B) service past normal retirement age, and benefit payments are suspended, the accrued benefit need not be actuarially adjusted for the late commencement of benefits as normally required by Code §411(b)(1)(H). However, if the employee continues to work in 203(a)(3)(B) service past his or her required beginning date (April 1 following the year in which the person reaches age 70 $\frac{1}{2}$), the plan must make the actuarial adjustment.

Benefits paid in error while an employee was engaged in 203(a)(3)(B) service may be recouped in limited circumstances provided in DOL Reg. § 2530.203-3(b)(3) by a ratable offset against future benefits and after notice. If benefits have been suspended improperly without notice, correction must be made by restoring the suspended benefit. Providing the notice at the time the error is discovered does not correct the benefits suspended prior to the notice. If the service for which benefits were improperly suspended is covered service under the plan, the plan must correct by providing the greater of (1) the benefit provided for retirement after normal retirement age, if applicable or (2) the benefit actuarially increased for the improperly suspended payments including interest for the delay in payment or the present value of these payments taking into account the delay in payment in a lump sum.

Significantly, the Guidelines provide that a plan amendment that reduces benefits protected under Code §411(d)(6) by providing for suspension of benefits for 203(a)(3)(B) service does not violate Code §411(d)(6). Therefore, a plan may be amended to add a suspension of benefits provision for 203(a)(3)(B) service. [NOTE: This is a change from the view the Service expressed previously.] However, a plan may not be amended to provide for suspension of already accrued benefits in excess of the normal retirement benefits as permitted in DOL Reg. §2530-203-3(a). At the NCCMP Annual Conference in response to questions, the IRS representative expressed the view that a plan could be amended to provide for such suspension for benefits not yet accrued. For example, the provision could apply prospectively to service not yet earned. Alternatively, if the plan is amended to add a new benefit type or form such as a 30 and out pension, the suspension could be included as one of the conditions attached to this benefit at the time of its adoption.

[NOTE: Plan Trustees and advisors should pay particular attention to Example 5 in the Guidelines. This deals with a rule adopted by some multiemployer plans some years ago which provides that if a participant engages in service with a non-union employer that he or she loses eligibility for the early retirement benefit available under the plan or the earliest date on which that benefit is available is postponed. In connection with this example, the Guidelines state that such a provision violates Code §411(d)(6). This is consistent with prior IRS rulings on this type of provision.]

Past Service Credit

Another permitted forfeiture that applies to multiemployer plans is in Code §411(a)(3)(E) which permits a multiemployer plan to provide that past service with an employer will be forfeited when an employer withdraws from the plan. The Guidelines provide that a plan can be amended to add a forfeiture provision that satisfies Code §411(a)(3)(E) without violating the anti-cut back rule of Code §411(d)(6).

Service with an Employer Who Fails to Make Required Contributions

The Guidelines state clearly that a defined benefit or money purchase pension plan violates the definitely determinable rules of Treas. Reg. §1.401-1(b)(1)(i) if benefit credit in a defined benefit plan or crediting of contributions to an individual account in a money purchase plan is conditioned on the actual receipt of the contributions by the plan. However, because the definitely determinable requirement does not apply to profit sharing plans, the Guidelines state that multiemployer profit-sharing plans may provide that a delinquency in contributions will be allocated only among the employees of the delinquent employer. Such a provision would not violate the definite allocation formula requirement in Treas. Reg. §1.401-1(b)(1)(ii). The Guidelines point out that in order to be qualified, a plan must state whether it is a money purchase plan or a profit-sharing plan. See Code §401(a)(27).

Partial Terminations

The Guidelines direct the IRS auditor to ask the administrator about employer withdrawals, local union shutdowns or other events that might have triggered a partial termination.

Reciprocity Agreements

The Guidelines include a good description of both pro rata and money-follows-the-man reciprocity agreements. [NOTE: There is very little law on reciprocity agreements. Therefore, the comments in the Guidelines are instructive.] The Guidelines state that properly designed reciprocity agreements do not cause the signatory plans to become disqualified. Although money-follows-the-man reciprocity arrangements may appear to cause problems for the signatory plans under various technical qualification requirements, the Guidelines state that if the terms of the plan permit the trustees to enter into such arrangements, the reciprocity agreement will be considered by IRS to be part of the plan's definite written program for purposes of satisfying the qualification requirements.

The Guidelines note that crediting of service under reciprocity agreements properly authorized in the plan is permitted even though the service is technically earned with an employer (contributing to the away plan) that does not maintain the home plan. The temporary or away from home employer will be considered to be maintaining the home fund of the employee for the limited purpose of satisfying IRS qualification requirements. In response to a question, the IRS representatives expressed their view that both plans party to the money-follows-the-man reciprocity arrangement must be qualified plans under the Internal Revenue Code. In their view, which they emphasized was not an official position, qualified plans in the US cannot reciprocate with Canadian plans.

The Guidelines direct the IRS auditor to inquire how plans verify and track reciprocity service. The Guidelines state that plan procedures should require the plan to explain reciprocity service to participants, ask retiring participants if they have any reciprocity service, and verify reciprocity service with the reciprocal plan and/or the temporary employer.

Deduction Limits and Deduction Issues

Code §413(b)(7) provides that the deduction limits under Code §404(a) are determined as if all of the participants in a multiemployer plan were employed by a single employer. The amount contributed to the plan by an employer is considered not to exceed the Code §404(a) limitation if the anticipated employer contributions for the plan year do not exceed the limitation. The Guidelines state that the anticipated employer contributions must be determined in a manner consistent with the manner in which actual contributions are determined. The Guidelines note that if contributions exceed the Code §404 limits, multiemployer plans often correct this problem by adopting plan amendments increasing benefits. If such amendments are retroactive they must satisfy Code §412(c)(8), (see below). The Guidelines note that recurring excess contributions may cause plans to adopt recurring benefit increases that can result in Code § 415 violations. [NOTE: The Guidelines were adopted before enactment of the new law granting Code § 415 relief for multiemployer plans.]

In the case of a defined benefit plan, the aggregate deductible limit for the plan year should appear in the actuarial valuation. The Guidelines comment that it is a good administrative practice for the plan to communicate the deductible limit to contributing employers. [NOTE: Such notice is not required, however, and the NCCMP is not aware of any funds that follow that practice.]

The IRS auditor is also directed to determine if the deduction limits for defined contribution plans or the limit under Code §404(a)(7) that applies to a combination of defined benefit and defined contribution plans were exceeded.

Code §4972 imposes on employers a 10% excise tax on nondeductible contributions. The amount of nondeductible contributions is to be allocated among employers in order to determine each employer's tax liability.

Distribution Issues

Although there are no special distribution rules for multiemployer plans, the Guidelines note certain administrative practices of multiemployer plans that may result in violations.

Prohibited Alienation of Benefits: Code §401(a)(13) The Guidelines warn that amounts withheld from retirement benefit payments to pay for retiree medical benefits from a welfare plan may violate these rules unless they fit an exception. Exceptions permit amounts to be withheld in accordance with a voluntary and revocable assignment that does not exceed 10% of the retirement benefit under Treas. Reg. §1.401(a)-13(d)(1) or in accordance with the special rules under Treas. Reg. §1.401(a)(13)-13(e).

The Guidelines direct the IRS auditor to check for reductions in retirement benefits and election forms signed by the retirees.

Required Minimum Distributions: Code § 401(a)(9). The Guidelines note that certain structural features of multiemployer plans make them particularly vulnerable to violations of the required minimum distribution requirements. Again, the Guidelines emphasize the importance of an adequate record keeping system and procedures to ensure compliance. The IRS auditor is directed to ask the plan about its method for ensuring that plan records include accurate birth dates and up to date addresses for participants. The auditor will also ask if the IRS/SSA locator services are regularly used by the plan.

The Guidelines note that the definition of required beginning date was amended in 1996 to be, for employees who are not 5% owners, April 1 of the calendar year following the later of the year in which the participant attains age 70 or the year in which the participant retires. Plans are not required to adopt the new definition. In the case of multiemployer plans that have adopted the new definition, it will be difficult to determine when employees retire since retirement is not the same as commencing a benefit from the plan. The Guidelines state that a plan provision or practice that determines a participant's retirement date based on when the participant applies for benefits violates Code §401(a)(9) if it allows further postponement of benefit payments by terminated vested participants who have attained age 70 . Plans must also have procedures in place to determine the status of participants as 5% owners for this purpose.

Thirteenth Check Distributions: The Guidelines describe a number of potential problems with thirteenth check distributions. The IRS auditor is directed to look for plan amendments or minutes in the form of a plan amendment authorizing the thirteenth check. The Guidelines state that if an amendment is not adopted, the thirteenth check may violate a number of Code provisions. If the plan is amended on a regular basis to provide for thirteenth checks (as well as other retiree increases), the series of amendments may give rise to an expectation of such payments and be subject to protection as an accrued benefit under Code §411(d)(6). In addition, a generous thirteenth check may violate Code §415 limits or cause the benefit formula to be back-loaded in violation of Code §411(b). The Guidelines state that thirteenth checks that are part of the participant's accrued benefit are subject to joint and survivor requirements. If any non-collectively bargained retirees receive a thirteenth check, these distributions must satisfy the non-discrimination rules for former employees in Treas. Reg. §1.401(a)(4)-10.

Code §415 Limits: The Guidelines provide several pages of comments and examples concerning the application of Code §415 limits to multiemployer plans. Remember, that these limits apply to years prior to the effective date of the Economic Growth and Tax Relief Reconciliation Act which are open years for IRS audits. We anticipate that these Guidelines will be amended to reflect the changes in the 415 limits, but the pre-existing rules an these guidelines will be followed for years before 2002. This summary includes only a few of the comments.

The Guidelines summarize the special rules for multiemployer plans:

- Treas. Reg. §1.415-2(b)(6) which provides that the limitation year is the calendar year unless the plan administrator elects otherwise.
- Treas. Reg. §1.415-3(f)(2) which provides that the \$10,000 exception under Code § 415(b)(4) applies to a participant in a multiemployer plan regardless of whether he ever participated in another plan maintained by the employer provided that none of the other plans resulted from collective bargaining with the same employee representative as the multiemployer plan.
- Treas. Reg. §1.415-8(e) which provides that multiemployer plans are not aggregated with each other for determining 415 limits. However, multiemployer plans are aggregated with non-multiemployer plans (either single employer or multiple employer plans) to the extent that an employer participates in both plans on behalf of a participant. A common example is where union employees are covered by a multiemployer plan in addition to a regional or national non-multiemployer plan covering union employees. This might also occur if a participant in a multiemployer plan participates in a single employer plan maintained by an individual employer. IRS auditors are directed to determine if this situation exists and whether 415 limits have been exceeded for employees in this situation. See example 6. The Guidelines note that if the 415 limits are exceeded and the benefits are not brought into compliance, the non-multiemployer plan is the first to be disqualified.
- Treas. Reg. §1.415-1(e)(2) provides two alternatives for applying the 415 limits to a participant in a multiemployer plan. First, the limits may be applied to the aggregate benefits or contributions under the plan. Second, the limits may be applied on an employer by employer basis with respect to a participant taking into account only the compensation and benefits or contributions of a participant attributable to service with that employer.

The Guidelines note that the 415 compensation limits may be exceeded because of the flat benefit formulae common among multiemployer plans. The dollar limit may be exceeded for benefits that begin early particularly when those benefits are fully or partially subsidized and not fully reduced based on age. For defined contribution plans, the 25% compensation limit may impact lower paid classifications of employment such as apprentices. The IRS auditor is directed to read the applicable collective bargaining agreement to determine the wages and contributions.

RETROACTIVE PLAN AMENDMENTS

Code §412(c)(8) provides that in the case of a multiemployer plan, a plan administrator may elect to have an amendment apply retroactively to a plan year if it is adopted within two years after the end of that plan year and does not reduce accrued benefits. Amendments that reduce accrued benefits must be approved by IRS. Retroactive amendments may be taken into account for funding purposes.

PROHIBITED TRANSACTIONS

The Guidelines note that soon after the passage of ERISA, the DOL and IRS jointly issued two Prohibited Transaction Class Exemptions that tailored specifically to issues that arise in multiemployer plans. These exemptions are PTE 76-1 and 77-10. They deal with issues involving the collection of delinquent employer contributions, construction loans and sharing of administrative services and office space.

Collection of Contributions (Part A of PTE 76-1): The Guidelines note that a plan fiduciary's failure to enforce collection of contributions can lead to a violation of a number of plan qualification requirements as well as constitute a prohibited transaction. The guidelines direct the IRS auditor to determine the total employer liability for the period under audit based on the contribution obligations in the collective bargaining agreements and verify payments and deposits. The IRS auditor should note all accounts receivable, determine if the plan has procedures for collection of delinquent contributions and whether the plan followed those procedures. The IRS auditor should review payroll audit reports, correspondence and minutes of trustees meetings to determine if there are longstanding delinquencies and what actions were taken to resolve them.

Construction Loans (Part B of PTE 76-1): The Guidelines note that there is a limited exemption for certain construction loans by multiemployer plans in the building trades to participating employer. This exemption does not apply to longer term mortgages.

Sharing of Administrative Services and Office Space (Part C of PTE 76-1): The Guidelines note that multiemployer plans often lease or share office or share administrative services with disqualified persons such as the union or related plans. PTE 76-1 provides a limited exemption for these transactions if certain conditions are met. PTE 77-10 provides an exemption from ERISA 406(b)(2) for these same transactions. The IRS auditor is directed to check for evidence of such transactions.

The Guidelines direct the IRS auditor to be alert to evidence that the retirement plan is bearing administrative costs that should be allocated to related plans (and to the sponsoring union or employer association.) [NOTE: In the experience of NCCMP affiliates both the IRS and the DOL inquire into arrangements to share costs and income among related plans and/or plan sponsors. Auditors may ask for documentation of the basis of the allocation of costs. Plans which have not allocated costs or which do not have the documentation for the allocation have been required to reconstruct it often retroactively for several years.]

The Guidelines also advise that IRS auditors should be alert for evidence that assets have been shifted from one related plan to another. The Guidelines comment that multiemployer plan trustees may believe that it is permissible to shift assets because collective bargaining agreements often treat employer contributions as one pot of money to be used for several different purposes.

However, except for limited assignments under Code §413(a)(13)(A) (such as deducting amounts from pension benefits to purchase retiree medical benefits), assets may NOT be shifted after they are deposited in a trust. Such a transfer is a prohibited transaction. [NOTE, however, that contributions may be allocated to a different plan prospectively, generally by collective bargaining.] The Guidelines also advise the IRS auditor to examine the plan's Code §401(h) account, if any. They point out that multiemployer pension plans are not permitted to transfer retirement assets to a §401(h) account pursuant to Code §420.

TOP HEAVY RULES

The Top Heavy Rules of Code §416 do apply to collectively bargained plans. However, a plan need not actually include top heavy provisions in the plan document if it is not top heavy in operation and it covers only collectively bargained employees and employees of the sponsoring union. See Treas. Reg. §1.416-1, T-38. To determine if the plan is top heavy, Code §416 and the regulations are applied to the entire multiemployer plan. If the plan covers other non-collectively bargained employees in addition to the employees of the sponsoring union, the plan must contain top heavy language. [NOTE: Whether or not top heavy language is included in the plan, the top heavy provisions do apply.]

Treas. Reg. §1.416-1, Q&A T-2 and T-3 provide guidance on how the top heavy rules apply to multiemployer plans. T-2 provides that a multiemployer plan is treated as a plan of a contributing employer (for determining if that employer's aggregated plans are top heavy) but only to the extent that the multiemployer plan provides benefits to employees of that employer based on service with that employer. T-3 provides that multiemployer plans are treated like other plans of an employer for purposes of determining required and permissive aggregation groups. Under the top heavy rules, collectively bargained employees do not benefit from the special top heavy minimum vesting and benefit requirements.

RETURN OF CONTRIBUTIONS

Generally, if plan assets are returned to an employer, the plan violates the exclusive purpose rule of ERISA §403(c)(1) and Code §401(a)(2). However, ERISA §403(c)(2) and Code §401(a)(2) describe circumstances in which contributions may be returned to employers which include, contributions (including withdrawal liability payments) made by mistake of fact or law, contributions conditioned on the initial qualification of the plan, contributions conditioned on deductibility. Code §401(a)(2) provides that a multiemployer plan may return mistaken contributions within six months of the date the plan administrator determines the contribution was made by mistake. See also Treas. Reg. §1.401(a)-3. The amount to be returned is the amount paid less the amount that would have been paid if no mistake had occurred. The plan must retain any earnings and any losses must be deducted from the amount returned.

MULTIEMPLOYER 401(k) PLANS

The Guidelines comment that one of the difficulties for multiemployer 401(k) plans is obtaining accurate compensation data for participants for purposes of conducting the ADP (actual deferral percentage) test. Therefore, plans may multiply hours worked times the negotiated wage rate to compute compensation. The Guidelines state that the IRS does not permit ADP testing with data that is not accurate for each participant. If the plan tests using a method that only approximates compensation data, the plan must also use a back-up method to verify the accuracy of the compensation.

CONCLUSION

In this Summary, we have attempted to highlight some of the most important issues for multiemployer plans. However, we urge you to read the entire Guidelines. After reviewing this Summary and the Guidelines, we would appreciate your input concerning questions and your experiences with audits.

The NCCMP does not provide legal advice. For guidance on the application on the application of these guidelines, consult your local counsel and other professional advisors.
