

**DESCRIPTION OF THE CHAIRMAN'S AMENDMENT
IN THE NATURE OF A SUBSTITUTE TO H.R. 397, THE
"REHABILITATION FOR MULTIEMPLOYER
PENSIONS ACT OF 2019"**

Scheduled for Markup
by the
HOUSE COMMITTEE ON WAYS AND MEANS
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Prepared by the Staff
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INTRODUCTION

The House Committee on Ways and Means has scheduled a committee markup on July 10, 2019 of H.R. 397, the “Rehabilitation for Multiemployer Pensions Act of 2019.”¹ This document, prepared by the staff of the Joint Committee on Taxation, provides a description of the Chairman’s Amendment in the Nature of a Substitute to H.R. 397.²

¹ H.R. 397 was introduced on January 9, 2019. The Chairman’s Amendment in the Nature of a Substitute to H.R. 397 makes a number of significant changes to the bill as introduced. This document describes the provisions of the Chairman’s Amendment in the Nature of a Substitute, and also includes descriptions of present law.

² This document may be cited as follows: Joint Committee on Taxation, *Description of the Chairman’s Amendment in the Nature of a Substitute to H.R. 397, the “Rehabilitation for Multiemployer Pensions Act of 2019* (JCX-37-19), July 9, 2019. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references herein are to the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise stated.

TITLE I – REHABILITATION FOR MULTIEMPLOYER PENSION PLANS

A. Establishment of Pension Rehabilitation Administration to Provide Loans to Certain Multiemployer Plans

Present Law

Multiemployer plans

A multiemployer plan is a plan to which more than one unrelated employer contributes, that is established pursuant to one or more collective bargaining agreements, and which meets such other requirements as specified by the Secretary of Labor.³ Multiemployer plans are governed by a board of trustees consisting of an equal number of employer and employee representatives, referred to as the plan sponsor. In general, the level of contributions to a multiemployer plan is specified in the applicable collective bargaining agreements, and the level of plan benefits is established by the plan sponsor.

Like other private defined benefit plans⁴, multiemployer defined benefit plans are subject to minimum funding requirements under the Code and ERISA.⁵ An excise tax may be imposed on the employers maintaining the plan if the funding requirements are not met.⁶ However, the excise tax does not apply for a taxable year with respect to a multiemployer plan if, for the plan years ending with or within the taxable year, the plan is in critical status under Code section 432.⁷

General funding requirements for multiemployer plans

Employer contributions to a defined benefit plan are generally subject to minimum funding requirements, the details of which depend on whether the plan is a single-employer plan or a multiemployer plan. Unless a funding waiver is obtained, an employer may be subject to a two-tier excise tax if the funding requirements are not met.

In general, the annual deduction limit on employer contributions to a multiemployer defined benefit plan for a year is the excess of (1) 140 percent of the plan's current liability (the present value of all benefits earned under the plan), over (2) the value of plan assets. However,

³ Sec. 414(f) and ERISA section 2(37).

⁴ Sec. 414(j).

⁵ Secs. 412 and 431, and ERISA secs. 302 and 304. Additional rules apply to multiemployer plans that are insolvent under section 418E and ERISA section 4245. Certain changes were made to the funding requirements for multiemployer plans by the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280 and by the Multiemployer Pension Reform Act of 2014 ("MPRA"), Pub. L. No. 113-235, Division O.

⁶ Sec. 4971.

⁷ Sec. 4971(g)(1).

the deduction limit is never less than the amount of contributions required under the funding rules. If contributions exceed the amount deductible, the employers that contribute to the multiemployer plan are generally subject to an excise tax.

General funding requirements apply to all multiemployer plans. Additional funding requirements apply to plans in endangered⁸ or critical status. An employer that withdraws from a multiemployer plan is generally liable to the plan for a portion of the plan's unfunded vested benefits, referred to as withdrawal liability. Various provisions limit the amount of an employer's withdrawal liability.

Under the general funding requirements, a multiemployer defined benefit plan maintains a funding standard account, to which charges (such as for benefit accruals and negative plan experience) and credits (such as for positive plan experience and contributions) are made. The minimum required contribution for a plan year is the amount, if any, needed to balance accumulated credits and accumulated charges to the funding standard account. If required contributions are not made, so the funding standard account has a negative balance, an accumulated funding deficiency results.

A multiemployer plan is required to use an acceptable actuarial cost method (referred to as the plan's funding method) to determine the elements included in its funding standard account for a year, including normal cost and supplemental cost. Normal cost generally represents the cost of future benefits allocated to the year under the plan's funding method. The supplemental cost for a plan year is the cost of future benefits that would not be met by future normal costs, future employee contributions, or plan assets. Supplemental costs may be attributable to past service liability or to worse than expected plan experience. Supplemental costs are amortized (that is, recognized for funding purposes) over a specified number of years (generally 15 years) by annual charges to the funding standard account over that period. Factors that result in a supplemental loss can alternatively result in a gain that is recognized by annual credits to the funding standard account over a 15-year amortization period (in addition to a credit for contributions made for the plan year).

Actuarial assumptions used under the multiemployer plan funding rules must be reasonable. The interest rate (which represents the expected return on plan assets over time) and mortality assumptions used in funding computations are subject to these general standards; the funding rules do not specify the interest rate or mortality tables that must be used. For funding purposes, the actuarial value of plan assets may be used, rather than fair market value, subject to certain conditions.

⁸ A multiemployer plan is generally in endangered status if the plan is not in critical status and, as of the beginning of the plan year, (1) the plan's funded percentage for the plan year is less than 80 percent, or (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years (taking into account amortization extensions). A plan's funded percentage is the percentage determined by dividing the value of plan assets by the accrued liability of the plan. A plan that meets the requirements of both (1) and (2) is treated as in seriously endangered status.

Additional requirements relating to plans in endangered or critical status

In general

Additional funding-related requirements apply to a multiemployer defined benefit pension plan that is in endangered or critical status.⁹ In connection with the endangered and critical rules, not later than the 90th day of each plan year, the actuary for any multiemployer plan must certify to the Secretary and to the plan sponsor whether or not the plan is in endangered or critical status for the plan year. If a plan is certified as being in endangered or critical status, notice of endangered or critical status must be provided within 30 days after the date of certification to plan participants and beneficiaries, the bargaining parties, the PBGC and the Secretary of Labor. Additional notice requirements apply in the case of a plan certified as being in critical status.

Various requirements apply to a plan in endangered or critical status, including adoption of and compliance with (1) a funding improvement plan in the case of a multiemployer plan in endangered status, and (2) a rehabilitation plan in the case of a multiemployer plan in critical status. In addition, restrictions on certain plan amendments, benefit increases, and reductions in employer contributions apply during certain periods.

A multiemployer plan is in critical status for a plan year if, as of the beginning of the plan year, it meets any of the following definitions:

- The funded percentage of the plan¹⁰ is less than 65 percent and the sum of (1) the market value of plan assets, plus (2) the present value of reasonably anticipated employer and employee contributions for the current plan year and each of the six succeeding plan years (assuming that the terms of the collective bargaining agreements continue in effect) is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the six succeeding plan years (plus administrative expenses),
- (1) The plan has an accumulated funding deficiency for the current plan year, not taking into account any amortization period extensions, or (2) the plan is projected to have an accumulated funding deficiency for any of the three succeeding plan years (four succeeding plan years if the funded percentage of the plan is 65 percent or less), not taking into account any amortization period extensions,
- (1) The plan's normal cost for the current plan year, plus interest for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last day of the preceding year, exceeds the present value of the reasonably anticipated employer contributions for the current plan year, (2) the present value of vested (that is, nonforfeitable) benefits of inactive participants is greater than the present value of

⁹ Endangered status and critical status are defined in section 432(b)(1) and (2) and ERISA section 305(b)(1) and (2).

¹⁰ A plan's multiemployer funded percentage is the percentage determined by dividing the value of plan assets by the plan's accrued liability (that is, generally, the present value of plan benefits).

vested benefits of active participants, and (3) the plan has an accumulated funding deficiency for the current plan year, or is projected to have an accumulated funding deficiency for any of the four succeeding plan years (not taking into account amortization period extensions), or

- The sum of (1) the market value of plan assets, plus (2) the present value of the reasonably anticipated employer contributions for the current plan year and each of the four succeeding plan years (assuming that the terms of the collective bargaining agreements continue in effect) is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the four succeeding plan years (plus administrative expenses).

The first plan year for which the plan is in critical status is referred to as the “initial critical year,” which governs the timing of certain requirements and periods.

In making the determinations and projections applicable in determining and certifying endangered or critical status (or neither), the plan actuary must follow certain statutory standards. The actuary’s projections generally must be based on reasonable actuarial estimates, assumptions, and methods that offer the actuary’s best estimate of anticipated experience under the plan.¹¹ In addition, the plan actuary must make projections for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of the year. The projected present value of liabilities as of the beginning of the year must be based on the most recent actuarial statement required with respect to the most recently filed annual report or the actuarial valuation for the preceding plan year. Any projection of activity in the industry or industries covered by the plan, including future covered employment and contribution levels, must be based on information provided by the plan sponsor, which shall act reasonably and in good faith.

In the case of a multiemployer plan in critical status, additional required contributions (referred to as employer surcharges) apply until the adoption of a collective bargaining agreement that is consistent with the rehabilitation plan. In addition, employers are relieved of liability for minimum required contributions under the otherwise applicable funding rules (and the related excise tax), provided that a rehabilitation plan is adopted and followed.¹² Moreover, subject to notice requirements, some benefits that would otherwise be protected from elimination or reduction may be eliminated or reduced in accordance with the rehabilitation plan.¹³

¹¹ Under section 432(j)(8) and ERISA section 305(j)(8), for purposes of the endangered and critical rules, various actuarial computations are based upon the unit credit funding method, regardless of whether it is the funding method used in applying the general funding requirements to the plan.

¹² Sec. 4971(g)(1)(A).

¹³ The rules for multiemployer plans in critical status include the elimination or reduction of “adjustable benefits,” which include some benefits that would otherwise be protected from elimination or reduction under the anti-cutback rules under section 411(d)(6) and ERISA section 204(g).

In the case of a failure to meet the requirements applicable to a multiemployer plan in endangered or critical status, the plan actuary, plan sponsor, or employers required to contribute to the plan may be subject to an excise tax under the Code or a civil penalty under ERISA.¹⁴

Anti-cutback exceptions for multiemployer plans

Under the anti-cutback rules, generally applicable to defined benefit plans, a plan amendment generally may not reduce accrued benefits or reduce or eliminate an optional form of benefit, early retirement benefit, or retirement-type subsidy with respect to accrued benefits. Amendments are generally permitted only to reduce future rates of accrual, eliminate optional forms of benefits, or eliminate or reduce early retirement benefits or retirement-type subsidies only with respect to future accruals; and, in those cases, notice must be provided.

In the case of a multiemployer defined benefit plan that is in critical status¹⁵ or critical and declining status,¹⁶ or is insolvent,¹⁷ subject to notice and other procedural requirements, certain plan benefits that would otherwise be protected under the anti-cutback rules are required or permitted to be reduced or eliminated.

In the case of a multiemployer plan in critical status, payments in excess of a single life annuity (plus any social security supplement, if applicable) may not be made to a participant or beneficiary who begins receiving benefits after notice that the plan is in critical status is provided and payments may not be made for the purchase of an irrevocable commitment from an insurer to pay benefits. In addition, the plan sponsor may reduce certain benefits (“adjustable benefits”) that the plan sponsor deems appropriate, but not for a participant or beneficiary who began to receive benefits before receiving notice that the plan is in critical status. Adjustable benefits generally include disability benefits not in pay status, early retirement benefits or retirement-type subsidies, and most benefit payment options, but not the amount of an accrued benefit payable at normal retirement age.

In general, a multiemployer plan is insolvent when its available resources in a plan year are not sufficient to pay the plan benefits for that plan year. In that case, benefits must be reduced to the level that can be covered by the plan’s assets, but not below the level of benefits that are eligible for guarantee under the PBGC’s multiemployer plan program. If plan assets are insufficient to pay benefits at the guarantee level, the PBGC provides financial assistance to the plan in the form of loans.

¹⁴ Sec. 4971(g) and ERISA sec. 502(c)(8). In addition, certain failures are treated as a failure to file an annual report with respect to the multiemployer plan, subject to a civil penalty under ERISA.

¹⁵ Sec. 432(b)(2) and sec. 305(b)(2) of ERISA.

¹⁶ Sec. 432(b)(6) and sec. 305(b)(6) of ERISA.

¹⁷ Sec. 418E of ERISA and sec. 4245 of ERISA.

Suspension of benefits in multiemployer plans that are in critical and declining status

A multiemployer plan is in critical and declining status¹⁸ if the plan (1) is in critical status and (2) is projected to become insolvent¹⁹ during the current plan year or any of the 14 succeeding plan years (19 succeeding plan years if either the ratio of inactive plan participants to active plan participants is more than two to one or the plan's funded percentage is less than 80 percent). In that case, subject to certain conditions, limitations, and procedural requirements, including the appointment of a retiree representative in some cases and approval by the Secretary of Treasury, previously earned benefits may be reduced (referred to as benefit suspensions), including benefits of some participants and beneficiaries in pay status.

Benefit suspensions are permitted only if the plan actuary certifies that, taking the benefit suspensions into account, the plan is projected to avoid insolvency, and the plan sponsor determines that, despite all reasonable measures to avoid insolvency, the plan is projected to become insolvent unless benefits are suspended.

The plan sponsor generally determines the amount of the benefit suspensions and how the suspensions apply to plan participants and beneficiaries. However, benefits cannot be reduced below 110 percent of the monthly PBGC guarantee level; disability benefits cannot be suspended; benefit reductions for a participant or beneficiary between the ages of 75 and 80 are limited; benefit reductions are not permitted for a participant or beneficiary age 80 or over; and benefit suspensions in the aggregate must be at the level reasonably estimated to achieve, but not materially exceed, the level that is necessary to avoid insolvency.

Partition

On application by the plan sponsor of an eligible multiemployer plan for a partition of the plan, the PBGC may order a partition of the plan. Not later than 30 days after submitting an application to the PBGC for partition of a plan, the plan sponsor must notify the participants and beneficiaries of the application, in the form and manner prescribed by PBGC regulations.

For purposes of the provision, a multiemployer plan is an eligible multiemployer plan if--

- the plan is in critical and declining status (as described above),
- the PBGC determines, after consultation with the Participant and Plan Sponsor Advocate,²⁰ that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including maximum benefit suspensions permitted in the case of a critical and declining plan, if applicable,

¹⁸ Sec. 432(b)(6) and sec. 305(b)(6) of ERISA.

¹⁹ As defined in section 418E.

²⁰ Established under section 4004 of ERISA.

- the PBGC reasonably expects that a partition of the plan will reduce the PBGC's expected long-term loss with respect to the plan and is necessary for the plan to remain solvent,
- the PBGC certifies to Congress that the PBGC's ability to meet existing financial assistance obligations to other plans (including any liabilities associated with multiemployer plans that are insolvent or that are projected to become insolvent within 10 years) will not be impaired by the partition, and
- the cost to the PBGC arising from the proposed partition is paid exclusively from the fund for basic benefits guaranteed for multiemployer plans.²¹

The PBGC must make a determination regarding a partition application not later than 270 days after the application is filed (or, if later, the date the application is completed) in accordance with PBGC regulations. Not later than 14 days after a partition order, the PBGC must provide notice thereof to the House Committees on Education and the Workforce and on Ways and Means and the Senate Committees on Finance and on Health, Education, Labor, and Pensions, as well as to any affected participants or beneficiaries.

The plan sponsor and the plan administrator of the eligible multiemployer plan (the "original" plan) before the partition are the plan sponsor and plan administrator of the plan created by the partition order (the "new" plan). For purposes of determining benefits eligible for guarantee by the PBGC, the new plan is a successor plan with respect to the original plan.

The PBGC's partition order is to provide for a transfer to the new plan the minimum amount of the original plan's liabilities necessary for the original plan to remain solvent. The provision does not provide for the transfer to the new plan of any assets of the original plan.

It is expected that the liabilities transferred to the new plan will be liabilities attributable to benefits of specific participants and beneficiaries (or a specific group or groups of participants and beneficiaries) as requested by the plan sponsor of the original plan and approved by the PBGC, up to the PBGC guarantee level applicable to each participant or beneficiary. Thus, benefits for such participants and beneficiaries up to the guarantee level will be paid by the new plan. For each month after the effective date of the partition that such a participant or beneficiary is in pay status, the original plan will pay a monthly benefit to the participant or beneficiary in the amount by which (1) the monthly benefit that would be paid to the participant or beneficiary under the terms of the original plan if the partition had not occurred (taking into account any benefit suspensions and any plan amendments after the effective date of the partition) exceeds (2) the amount of the participant's or beneficiary's benefit up to the PBGC guarantee level.

During the 10-year period following the effective date of the partition, the original plan must pay the PBGC premiums due for each year with respect to participants whose benefits were transferred to the new plan. The original plan must pay an additional amount to the PBGC if it provides a benefit improvement (as defined under the rules for plans in critical and declining

²¹ Thus, other Federal funds, including funds from the PBGC single-employer plan program, may not be used for this purpose.

status, described above) that takes effect after the effective date of the partition. Specifically, for each year during the 10-year period following the effective date of the partition, the original plan must pay the PBGC an annual amount equal to the lesser of (1) the total value of the increase in benefit payments for the year that is attributable to the benefit improvement, or (2) the total benefit payments from the new plan for the year. This payment must be made to the PBGC at the time of, and in addition to, any other PBGC premium due from the original plan.

If an employer withdraws from the original plan within ten years after the date of the partition order, the employer's withdrawal liability will be determined by reference to both the original plan and the new plan. If the withdrawal occurs more than ten years after the date of the partition order, withdrawal liability will be determined only by reference to the original plan and not with respect to the new plan

Withdrawal liability

An employer that withdraws from a multiemployer plan in a complete or partial withdrawal is generally liable to the plan in the amount determined to be the employer's withdrawal liability.²² In general, a "complete withdrawal" means the employer has permanently ceased operations under the plan or has permanently ceased to have an obligation to contribute. A "partial withdrawal" generally occurs if, on the last day of a plan year, there is a 70-percent contribution decline for such plan year or there is a partial cessation of the employer's contribution obligation.

When an employer withdraws from a multiemployer plan, the plan sponsor is required to determine the amount of the employer's withdrawal liability, notify the employer of the amount of the withdrawal liability, and collect the amount of the withdrawal liability from the employer. In order to determine an employer's withdrawal liability, a portion of the plan's unfunded vested benefits is first allocated to the employer, generally in proportion to the employer's share of plan contributions for a previous period.²³ The amount of unfunded vested benefits allocable to the employer is then subject to various reductions and adjustments. An employer's withdrawal liability is generally payable, with interest, in level annual installments. However, the amount of the annual installments is limited, based on the amount of the employer's previous contributions to the plan, and the period over which installments are paid is limited to 20 years. An employer's withdrawal liability is the amount determined after application of these limits. In addition, the plan sponsor and the employer may agree to settle an employer's withdrawal liability obligation for a different amount.

If a multiemployer plan is in critical status, payments in excess of a single life annuity (plus any social security supplement, if applicable) may not be made and reductions in adjustable benefits are permitted. If a plan is in critical and declining status, benefit suspensions are permitted, including with respect to participants and beneficiaries in pay status. The elimination of any prohibited forms of distribution and reductions in adjustable benefits are disregarded in

²² ERISA secs. 4201-4225.

²³ Under 29 C.F.R. sec. 4211.2, for this purpose, unfunded vested benefits is the amount by which the value of vested benefits under the plan exceeds the value of plan assets.

determining a plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability. In addition, suspensions of benefits made under a multiemployer plan in critical and declining status are disregarded in determining the plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability unless the withdrawal occurs more than 10 years after the effective date of the benefit suspension.

Multiemployer Plan Program of the Pension Benefit Guaranty Corporation

The PBGC, a corporation within DOL, provides an insurance program for benefits under most defined benefit plans maintained by private employers. The PBGC is administered by a director. Its board of directors consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce.

The PBGC is financed through the payment of premiums by covered defined benefit plans, assets from terminated single-employer defined benefit plans trustee by the PBGC, and investment income on PBGC assets. The PBGC insures pension benefits under separate programs for single-employer and multiemployer defined benefit plans.

In the case of a multiemployer plan, flat-rate premiums apply at a rate of \$29 per participant for 2019. The PBGC provides financial assistance to insolvent multiemployer plans in the amount needed to pay benefits at the guarantee limit, which is the sum of 100 percent of the first \$11 of monthly benefits plus 75 percent of the next \$33 of monthly benefits multiplied by the participant's years of service.

Termination of a multiemployer defined benefit pension plan can occur as a result of (1) the adoption of a plan amendment providing that participants receive no credit under the plan for any purpose for service with any employer after a date specified in the amendment (referred to as "freezing accruals"), (2) the adoption of a plan amendment causing the plan to become a defined contribution plan, or (3) the withdrawal of every employer from the plan or the cessation of the obligation of all employers to contribute to the plan (referred to as "mass withdrawal").²⁴

If a terminated multiemployer plan becomes insolvent and plan assets are not sufficient to pay benefits at the level guaranteed by the PBGC, the PBGC will provide financial assistance as needed to pay benefits at the guarantee level, as described above.²⁵ If a multiemployer plan that has not terminated becomes insolvent, similar rules apply, including the provision by the PBGC of financial assistance in an amount needed to provide benefits at the guarantee level.

²⁴ ERISA sec. 4041A. Unlike the termination of a single-employer plan (and except in the case of multiemployer plan terminations occurring before 1981), termination of a multiemployer plan does not of itself result in the end of the operation of the plan or in the PBGC's taking over the plan. Instead, the plan sponsor continues to administer the plan.

²⁵ ERISA secs. 4261 and 4281.

Description of Proposal

Establishment of Pension Rehabilitation Administration to provide loans to multiemployer plans

Under the proposal, the Pension Rehabilitation Administration (“PRA”) is to be established as an agency within the Department of the Treasury. The PRA is authorized to make loans to certain multiemployer defined benefit plans.

Multiemployer plan eligibility for loans from the PRA

A multiemployer defined benefit plan which is eligible to receive such a loan is a plan:

- In critical and declining status as of the date of enactment or for which a suspension of benefits has been approved as of such date;²⁶
- In critical status as of the date of enactment, has a modified funded percentage of less than 40 percent²⁷, and has a ratio of active to inactive participants which is less than two to five; or
- Insolvent, if it became insolvent after December 16, 2014, and has not been terminated;²⁸

The PRA also establishes appropriate terms for such loans; certain required terms of the loan are discussed further below.

Establishment of the loan program

Under the proposal, the loan program is to be established not later than September 30, 2019, with guidance regarding the program to be promulgated by the Director of the PRA (who is appointed by the President for a five-year term of office)(“Director”) in consultation with the Director of the PBGC, the Secretary and the Secretary of Labor not later than December 31, 2019.

²⁶ Sec. 432(e)(9) and sec. 305(e)(9) of ERISA.

²⁷ As noted above, for determining critical status for purposes of section 432 and section 305 of ERISA, assets and liabilities are generally both determined at their actuarial value for purposes of calculating the funded percentage, but for purposes of determining which plans are eligible for a loan from the PRA, the modified funded percentage means the percentage equal to a fraction the numerator of which is the current value of plan assets as defined in ERISA section 3(26) (fair market value if available and otherwise the fair value as determined in good faith by a trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination) and the denominator of which is current liabilities (as defined in section 431(c)(6)(D) and section 304(c)(6)(D) of ERISA).

²⁸ Pursuant to section 4041A of ERISA.

Before the loan program has been established, or before guidance has been promulgated, a plan may apply for a loan, and the PRA will approve the application and make the loan before establishment of the program if necessary to avoid any suspension of participants' accrued benefits.

The Director²⁹ consults with the Secretary, the Secretary of Labor, and the Director of the Pension Benefit Guaranty Corporation ("PBGC") before making any such loan to a multiemployer plan, and shares the application and plan information with such individuals.

Pension Rehabilitation Trust Fund

Under the proposal, the Pension Rehabilitation Trust Fund (the "Fund") is established in the Treasury Department to fund the loan program. The Fund consists of the following amounts as may be appropriated or credited to the Fund as follows:³⁰

- Amounts transferred from the general fund of the Treasury by the Secretary to the Fund as are necessary to fund the loan program, including from proceeds of the Secretary's issuance of Treasury obligations (under 31 U.S.C. chapter 31);
- Any amounts received from a plan as payment of interest (including points and other similar amounts) or principal on a loan (which are deposited into the Fund by the Director); and.
- Any unobligated amounts appropriated to the Department of Treasury transferred by the Secretary to the PRA as may be reasonably necessary to pay for administrative and operating expenses as described above (which are deposited into the Fund by the Director).

Amounts credited to, or deposited in the Fund, remain available until expended for:

- Making loans to multiemployer defined benefit plans;
- Payment of principal and interest on Treasury obligations issued by the Secretary; and
- PRA administrative and operating expenses.

²⁹ The Director may serve after the expiration of a term until a successor is appointed. The Director may appoint Deputy Directors, officers and employees (including attorneys) and may contract for financial and administrative services (including those related to budget and accounting, financial reporting, personnel, and procurement, but only to the extent that appropriations are available for that purpose for any fiscal year) with the General Services Administration (or such other Federal agency that the Director determines to be appropriate) paid in advance, or by reimbursement from PRA funds in amounts agreed to by the Director and the head of the Federal agency providing the services. The Secretary may transfer (for any fiscal year) from unobligated amounts appropriated to the Department of Treasury to the PRA as may be reasonably necessary to pay for its administrative and operating expenses.

³⁰ Sec. 9512 and sec. 9602(b).

Loan amount and use

A plan sponsor must apply to the PRA in order to receive a loan under the proposal. Any sponsor of a plan for which a suspension of benefits has been approved³¹ before the date of enactment must apply for such a loan.³²

The amount of any loan will generally be, as demonstrated by the plan sponsor on the application, the amount needed to purchase annuity contracts or to implement a portfolio (or a combination of the two) sufficient to provide benefits of participants and beneficiaries of the plan in pay status, and terminated vested benefits, at the time the loan is made. The loan amount may differ if the plan is also applying for financial assistance from the PBGC (see below).

Coordination of loan amount where suspension of benefits has been approved

In the case of a plan with respect to which a suspension of benefits has been approved, the suspension of benefits shall not be taken into account in determining the amount of the loan under the proposal, but rather, the loan amount shall be the amount sufficient to provide benefits of participants and beneficiaries of the plan in pay status and terminated vested benefits at the time the loan is made, determined without regard to the suspension, including retroactive payment of benefits which would otherwise have been payable during the period of suspension.

Coordination of loan amount with PBGC financial assistance

If a plan that is applying for a loan is also applying for financial assistance with the PBGC,³³ the plan sponsor must submit the loan application and the application for financial assistance jointly to the PRA and to the PBGC with the information necessary to determine the eligibility for and amount of the loan and the financial assistance.

If such financial assistance is granted, then the amount of the loan may not exceed an amount equal to the excess of either (1) or (2) below (depending on which is applicable) over the amount of any PBGC financial assistance:

1. the amount required to purchase annuity contracts or to implement a portfolio (or a combination of the two) sufficient to provide benefits of participants and beneficiaries of the plan in pay status and terminated vested benefits, at the time the loan is made, or
2. the amount required for plans for which a suspension of benefits has been approved which is sufficient to provide benefits of participants and beneficiaries of the plan in pay status and terminated vested benefits at the time the loan is made, determined

³¹ Under section 432(e)(9) and section 305(e)(9) of ERISA or under section 418E.

³² But such a plan may use the simplified application.

³³ Under section 4261(d) of ERISA.

without regard to the suspension, including retroactive payment of benefits which would have otherwise have been payable during the period of the suspension.

Use of loan amounts

Under the proposal, the restrictions that apply to purchasing annuity contracts from an insurer to a multiemployer plan effective on the date of the notice of certification of a multiemployer plan's critical status³⁴ do not apply to a loan from the PRA. Rather, under the proposal, a loan from the PRA may only be used to purchase annuity contracts or to implement a portfolio (or a combination of the two) to provide benefits of participants and beneficiaries in pay status, and terminated vested benefits, at the time the loan is made, that satisfy the following requirements:

The annuity contracts purchased must be issued by an insurance company which is licensed to do business under the laws of any State (and which is rated A or better by a nationally recognized statistical rating organization), and the purchase of such contracts must meet all applicable fiduciary standards under ERISA.³⁵

The portfolio described must be either a:

- Cash matching or duration matching portfolio consisting of investment grade (as rated by a nationally recognized statistical rating organization) fixed income investments, including United States dollar-denominated public or private debt obligations issued or guaranteed by the United States or a foreign issuer, which are tradeable in United States currency and are issued at fixed or zero coupon rates; or
- Any other portfolio prescribed by the Secretary in regulations which has a similar risk profile to the portfolios described above and is equally protective of the interests of participants and beneficiaries.

Once implemented, the portfolio is maintained until all liabilities to participants and beneficiaries in pay status, and terminated vested participants, at the time of the loan, are satisfied. Any investment manager of a portfolio must acknowledge in writing that such person is a fiduciary under ERISA with respect to the plan. Participants and beneficiaries covered by a portfolio continue to be treated as participants and beneficiaries of the plan, including for

³⁴ Sec. 432(f)(2)(A)(ii) and section 305(f)(2)(A)(ii) of ERISA.

³⁵ Under Title I of ERISA, including section 404, a fiduciary must discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to such participants and their beneficiaries, and defraying reasonable expenses of administering the plan. Each fiduciary must undertake these responsibilities with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of a like character and with like aims. Fiduciaries must also avoid prohibited transactions, such as self-dealing. The Department of Labor has also established guidelines for the selection of an annuity provider. See 29 C.F.R. 2550.404a-4.

purposes of the PBGC plan termination insurance program.³⁶ Such portfolios are subject to oversight by the PRA, including a mandatory triennial review of the adequacy of the portfolio to provide the benefits described and approval (to be provided within a reasonable period of time) of any decision by the plan sponsor to change the investment manager of the portfolio. If the oversight determines an inadequacy in the portfolio, the plan sponsor must take remedial action to ensure that the inadequacy is cured within two years of such determination.

Such annuity contracts purchased and portfolios implemented must be used solely to provide benefits to these participants and beneficiaries who are either in pay status or are terminated vested participants until all such benefits have been paid and these investments shall be accounted for separately from any other assets of the plan. In addition, the PBGC Participant and Plan Sponsor Advocate³⁷ shall act as the ombudsperson for participants and beneficiaries on behalf of whom annuity contracts are purchased or who are covered by a portfolio.

Loan application

Under the proposal, the Director (in consultation with the Director of PBGC, the Secretary of the Treasury, and the Secretary of Labor) is authorized to issue rules regarding the form, content, and process of applications for loans from the PRA, the actuarial standards and assumptions to be used in making estimates and projections for purposes of such applications, and assumptions regarding interest rates, mortality, and distributions with respect to portfolio investments. The Director must provide for a simplified loan application which may be used by (1) an insolvent plan which has not been terminated and which is already receiving financial assistance from the PBGC at the time of application for the loan and (2) a plan with respect to which a suspension of benefits has been approved before the date of the enactment.

As part of an application for a loan, the plan sponsor will need to:

- Demonstrate that the loan (in combination with any financial assistance to be provided by the PBGC as described below) will (1) enable the plan to avoid insolvency for at least the 30-year period of the loan or, in the case of a plan which is already insolvent, to emerge from insolvency within and avoid insolvency for the remainder of such 30-year period, and (2) provide that the plan is reasonably expected to be able to pay benefits and the interest on the loan during such period and to accumulate sufficient funds to repay the principal when due;
- Provide the plan's most recently filed Form 5500 as of the date of application and any other information necessary to determine the loan amount;

³⁶ Under Title IV of ERISA. In other words, such participants and beneficiaries continue to maintain their rights under that Title including that these plan benefits will continue to be guaranteed under section 4022A of ERISA.

³⁷ Established under section 4004 of ERISA.

- Stipulate whether the plan is also applying for financial assistance from the PBGC³⁸ in coordination with the loan to enable the plan to avoid insolvency and to pay benefits or is already receiving such financial assistance as a result of a previous application;
- State how the loan proceeds will be invested (whether to purchase annuities or to provide for the portfolio described below), the person from whom any annuity contracts will be purchased and the investment manager for any such portfolio implemented; and
- Include such other information and certifications as the PRA Director requires.

Evaluation of the loan application

In evaluating the plan sponsor's application, the Director will accept the determinations and demonstrations in the application unless the Director (in consultation with the Director of the PBGC, the Secretary of the Treasury, and the Secretary of Labor), concludes that any such determinations or demonstrations in the application (or any underlying assumptions) are unreasonable or are inconsistent with any rules issued by the PRA Director.

The Director will approve or deny any application within 90 days after its submission. An application will be deemed to be approved unless, within such 90 day period, the Director notifies the plan sponsor of the denial of the application and the reasons for the denial. Any approval or denial of an application by the Director will be treated as a final agency action.³⁹

Once the application has been approved, the PRA will promptly make the loan to the plan.

Terms of the loan

Under the proposal, the terms of the loan shall provide that:

- The plan shall make payments of interest only on the loan for a period of 29 years beginning on the date of the loan (or 19 years in the case of a plan making the special election for early repayment described above);
- The final payment of interest and principal will be due in the 30th year after the date of the loan (except as provided by the special election for early repayment described above);
- As a condition of the loan, the plan sponsor stipulates that:
 - The plan will not increase benefits, allow any employer participating in the plan to reduce its contributions, or accept any collective bargaining agreement which provides for reduced contribution rates during the 30-year period of the loan;

³⁸ Under section 4261(d) of ERISA.

³⁹ For purposes of section 704 of title 5 of the United States Code.

- However, in the case of a plan for which a suspension of benefits has been approved before the loan was made, the plan will reinstate the suspended benefits (or will not carry out any suspension which has been approved, but not yet implemented);
 - The plan sponsor will comply with the reporting requirements set forth below;
 - The plan will continue to pay PBGC premiums;⁴⁰ and
 - The plan and plan administrator will meet such other requirements as the Director provides in the loan terms.
- The terms of the loan will not make reference as to whether the plan is receiving financial assistance from the PBGC⁴¹ or to any adjustment in the amount of the loan due to such financial assistance;
 - The interest rate on the loan, (as determined by the PRA) will be as low as is feasible and will:
 - Not be lower than the rate of interest on 30-year Treasury securities on the first day of the calendar year in which the loan is issued; and
 - Will not exceed the greater of (1) a rate 0.2 percent higher than such rate of interest on such date, or (2) the rate necessary to collect revenues sufficient to administer the program.

Incentive for early repayment

At the time of the application, under the proposal, the plan sponsor may elect to repay the loan principal, along with remaining interest, at least as rapidly as equal installments over the 10-year period beginning with the 21st year after the date of the loan. In the case of a plan making this election, the interest on the loan is reduced by 0.5 percent. For example, if a loan of \$10,000,000 has been approved and the plan sponsor makes this election, then beginning in the 21st year after the date of the loan, the plan sponsor must pay at least \$1,000,000 (along with interest) in each year of the 10-year period. The plan sponsor could pay off the entire remaining amount of the loan in the 25th year as long as the plan sponsor had been making installments of at least \$1,000,000 (along with interest) in years 21 through 24.

Repayment of loan and loan default

The PRA shall make every effort to collect repayment of the loans under the proposal.⁴² However, if a plan is unable to make any payment on a loan when due, the PRA shall negotiate revised terms for repayment (including installment payments over a reasonable period or

⁴⁰ Sec. 4007 of ERISA.

⁴¹ Sec. 4261(d) of ERISA.

⁴² In accordance with 31 U.S.C. section 3711, Collection and compromise.

forgiveness of a portion of the loan principal) with the plan sponsor, but only to the extent necessary to avoid insolvency in the subsequent 18 months.

Coordination with other rules

Coordination with withdrawal liability rules

If any employer participating in a plan at the time the plan receives a loan withdraws from the plan before the end of the 30-year period beginning on the date of the loan, under the proposal, the withdrawal liability of such employer shall be determined by (1) treating the plan as if it were terminating by the withdrawal of every employer from the plan (i.e., mass withdrawal)⁴³ and (2) by determining the value of nonforfeitable benefits under the plan at the time of the deemed termination by using the interest assumptions prescribed for the termination of a single-employer plan.⁴⁴ In addition, annuity contracts purchased and portfolios implemented shall not be taken into account as plan assets⁴⁵ in determining the withdrawal liability of any employer but the amount equal to the greater of (1) the benefits provided under such contracts or portfolios to participants and beneficiaries, or (2) the remaining payments due on the loan, shall be taken into account as unfunded vested benefits in determining such withdrawal liability.

Coordination with funding rules

In the case of a plan which receives a loan from the PRA, the following shall apply with respect to the funding rules under the proposal:

- Annuity contracts purchased and portfolios implemented, and the benefits provided to participants and beneficiaries under such contracts or portfolios, shall not be taken into account in determining minimum required contributions;⁴⁶
- Payments on the interest and principal under the loan, and any benefits owed in excess of those provided under such contracts or portfolios, shall be taken into account as liabilities; and

⁴³ The significance of this treatment is that the amount of withdrawal liability will not be limited to 20 annual payments and the total unfunded vested benefits of the plan shall be fully allocated among all the withdrawing employers, see section 4219(c)(1)(D) of ERISA.

⁴⁴ Sec. 4044 of ERISA, as prescribed in the regulations under section 4281 of ERISA in the case of such a mass withdrawal, including section 4281.13.

⁴⁵ For purposes of the Code, but for purposes of ERISA, the bill provides, “annuity contracts purchased and portfolios implemented... shall not be taken into account in determining the withdrawal liability of any employer...”

⁴⁶ Under section 412 and section 302 of ERISA.

- If such a portfolio is projected due to unfavorable investment or actuarial experience to be unable to fully satisfy the liabilities which it covers, the amount of the liabilities projected to be unsatisfied shall be taken into account as liabilities.

Coordination with taxation of unrelated business income

For purposes of determining unrelated debt-financed income, “acquisition indebtedness” does not include indebtedness with respect to a multiemployer plan under a loan made by the PRA.⁴⁷

Reporting requirements

Under the proposal, not later than the 90th day of the first plan year beginning after the date of the loan and each of the 29 succeeding plan years, the plan sponsor of a multiemployer defined benefit plan receiving a PRA loan must file a report with the Secretary (including the appropriate documentation and actuarial certifications from the plan actuary, as required by the Secretary) that contains:

1. The funded percentage⁴⁸ as of the first day of such plan year, and the underlying actuarial value of assets (determined with regard, and without regard, to annuity contracts purchased and portfolios implemented with proceeds of such loan) and liabilities (including any amounts due with respect to such loan) taken into account in determining such percentage;
2. The market value of the assets of the plan (determined with regard, and without regard, to annuity contracts purchased and portfolios implemented with proceeds of such loan) as of the last day of the plan year preceding such plan year;
3. The total value of all contributions made by employers and employees during the plan year preceding such plan year;
4. The total value of all benefits paid during the plan year preceding such plan year;
5. Cash flow projections for such plan year and the nine succeeding plan years, and the assumptions relied upon in making such projections;
6. Funding standard account projections for such plan year and the nine succeeding plan years, and the assumptions relied upon in making such projections;
7. The total value of all investment gains or losses during the plan year preceding such plan year;

⁴⁷ Sec. 514(c)(6).

⁴⁸ As defined in section 432(j)(2).

8. Any significant reduction in the number of active participants during the plan year preceding such plan year, and the reason for such reductions;
9. A list of employers that withdrew from the plan in the plan year preceding such plan year, and the resulting reduction in contributions;
10. A list of employers that paid withdrawal liability to the plan during the plan year preceding such plan year and, for each employer, a total assessment of the withdrawal liability paid, the annual payment amount, and the number of years remaining in the payment schedule with respect to such withdrawal liability;
11. Any material changes to benefits, accrual rates, or contribution rates during the plan year preceding such plan year, and whether such changes relate to the terms of the loan;
12. Details regarding any funding improvement plan or rehabilitation plan and updates to such plan;
13. The number of participants during the plan year preceding such plan year who are active participants, the number of participants and beneficiaries in pay status, and the number of terminated vested participants and beneficiaries;
14. The amount of any financial assistance received from the PBGC⁴⁹ to pay benefits during the preceding plan year, and the total amount of such financial assistance received for all preceding plan years;
15. The information contained on the most recent annual funding notice submitted by the plan;⁵⁰
16. The information contained on the most recent annual return and actuarial report; and
17. Copies of the plan document and amendments, other retirement benefit or ancillary benefit plans relating to the plan and contribution obligations under such plans, a breakdown of administrative expenses of the plan, participant census data and distribution of benefits, the most recent actuarial valuation report as of that plan year, copies of collective bargaining agreements, and financial reports, and such other information as the Secretary, in consultation with the Director, may require.

The report is to be submitted electronically. The Secretary shall share the information contained in the report with the Secretary of Labor and the Director of the PBGC.

Each plan sponsor required to file such a report shall, before the expiration of the time prescribed for filing the report, also provide a summary (written in a manner so as to be

⁴⁹ Sec. 4261 of ERISA.

⁵⁰ Sec. 101(f) of ERISA.

understood by the average plan participant) of the information in such report to participants and beneficiaries in the plan and to each contributing employer.

Penalty for failure to file report

If a plan sponsor fails to file a report required for plans receiving a loan from the PRA, a penalty of \$100 will be imposed for each day during which the failure continues, unless it is shown that such failure is due to reasonable cause, but the penalty is not to exceed a total of \$15,000 on any person for failure to file such report. Under the proposal, the amount imposed is not to be paid from the assets of the plan.

Eligibility for financial assistance from PBGC

Under the proposal, a plan sponsor is eligible to apply to the PBGC for financial assistance for a multiemployer defined benefit plan if the plan sponsor is applying for a loan from the PRA and is a multiemployer defined benefit plan that is:

- In critical and declining status; or
- Insolvent, but has not been terminated and is receiving PBGC financial assistance (other than assistance being provided in combination with a PRA loan).

The plan sponsor must apply by jointly submitting such applications to the PRA for the loan and the PBGC for the financial assistance. The application for financial assistance shall demonstrate, based on projections by the plan actuary, that after the receipt of the anticipated loan amount, the plan will still become (or remain) insolvent within the 30-year period beginning on the date of the loan.

Amount of financial assistance

In the case of a plan that is in critical and declining status, the financial assistance provided shall be the amount (determined by the plan actuary and submitted on the application) equal to the sum of (1) the percentage of benefits of participants and beneficiaries of the plan in pay status at the time of the application, and (2) the percentage of future benefits to which participants who have separated from service but are not yet in pay status are entitled, which if such percentage were paid by the PBGC in combination with the loan, would allow the plan to avoid the projected insolvency and be projected to have increasing assets over any five-year period following the repayment of the loan. Such amount shall not exceed the maximum guaranteed benefit with respect to all participants and beneficiaries of the plan.⁵¹ The maximum guaranteed benefit amount is determined by disregarding any loan available from the PRA and shall be determined as if the plan were insolvent on the date of the application. The present value of the maximum guaranteed benefit amount with respect to such participants and beneficiaries may be calculated in the aggregate rather than by reference to the benefit of each such participant or beneficiary. In the case of a plan which is insolvent, the financial assistance provided shall be the amount (determined by the plan actuary and submitted on the application) which, if such

⁵¹ Under sections 4022A and 4022B of ERISA.

amount were paid by the PBGC in combination with the loan and any other assistance being provided to the plan by the PBGC at the time of the application, would enable the plan to emerge from insolvency.

Conditions and repayment terms of the loan, and financial assistance provided before a final determination of the amount of the loan by the PBGC,⁵² apply to financial assistance under the loan program as if it were otherwise provided to the plan by the PBGC except that the terms for repayment will not require the financial assistance to be repaid before the date on which the loan is repaid in full.

The PBGC may forego repayment of the financial assistance if necessary to avoid any suspension of the accrued benefits of participants.

There is appropriated to the Director of the PBGC such sums as may be necessary for each fiscal year to provide the financial assistance including necessary administrative and operating expenses relating to such assistance.

Effective Date

The proposal generally applies to loans made to multiemployer plans after the date of enactment.

⁵² Sec. 4261(b) and (c) of ERISA.