EP DETERMINATIONS QUALITY ASSURANCE BULLETIN

FY-2008 No.1

Date: April 3, 2008

MULTIEMPLOYER PLANS: DETERMINATION PROCEDURES

Multiemployer determination letter applications present special procedural challenges to the Employee Plans (EP) determination specialist and to the EP determinations organization.

IRC 413(a) provides that the special rules of IRC 413(b) apply to a plan maintained pursuant to an agreement that the Secretary of Labor finds to be a collective bargaining agreement (CBA) between employee representatives and more than one employer, and to each trust that is part of such a plan. Because multiemployer plans are maintained pursuant to CBAs, they are subject to IRC 413(b).

IRC 413(b) describes how certain qualification and other rules apply to collectively bargained plans. In general, for purposes of participation and nondiscrimination, all employees who are employed by employers who are parties to the CBA and also covered by the same benefit computation formula are considered to be employed by a single employer. For purposes of the exclusive benefit rule, all plan participants are considered as though they were employed by a single employer. For purposes of vesting, section 411 (other than subsection (d)(3)), is applied as if all employers who have been parties to the CBA constituted a single employer, except that the application of any rules with respect to breaks in service shall be made under regulations prescribed by the Secretary of Labor.

I. CROSS REFERENCE OF AUXILIARY DOCUMENTS

One of the most prevalent issues involves the treatment of auxiliary (collective bargaining, participation, side and/or reciprocity) agreements. While some multiemployer plans contain all of the plan provisions within the plan document, other multiemployer plans incorporate some plan provisions by reference to provisions in one or more CBAs.

A. Definitions

1. Multiemployer Plan. "Multiemployer plan" is defined in section 414(f) of the Internal Revenue Code (the “Code”) as a plan maintained pursuant to one or more collective bargaining agreements and to which more than one employer is required to contribute. Multiemployer plans are subject to the qualification rules under section 401(a) and to the special rules under section 413(b) pertaining specifically to these plans. Multiemployer plans are not the same as "multiple employer plans," although certain requirements overlap. See Quality Assurance Bulletin (QAB) QAB 2007-1 on Multiple Employer Plans for additional information.

Multiemployer plans allow employees who move among employers within unionized industries – such as trucking, construction and grocery-store chains – to participate in the same retirement plan negotiated under either separate or common collective bargaining agreements. Reciprocity agreements extend this principle by allowing participants to aggregate service credit or benefits among one or more different multiemployer plans. In addition, non-collectively bargained employees can participate in a multiemployer plan under a participation agreement.

Multiemployer plans are subject to the same requirements as other plans, including, but not limited to, provisions relating to eligibility, vesting, joint and survivor, and distribution rules. Some rules, such as vesting and section 415, apply differently to multiemployer plans. These are discussed below under Plan Language Requirements.

2. Collective Bargaining Agreement (CBA). A written agreement negotiated between a local, regional, or national union and individual employers or an association bargaining for a group of employers that generally lasts from one to five years. Among other terms, the CBA specifies the detailed basis on which the payments are to be made to the trust, sets the rate of contribution and identifies the class of employees covered by the plan.

3. Reciprocity Agreements. A reciprocity agreement is an agreement among two or more multiemployer pension plans maintained pursuant to collective bargaining agreements. These agreements allow participants to aggregate their service under several plans to qualify for a benefit from a plan, or spell out how much of the benefit is paid by each multiemployer plan.

   Reciprocity agreements, if allowed under the plan document, allow a multiemployer plan ("home plan") to accept contributions for or recognize service credit earned by participants for service performed for employers who maintain an unrelated multiemployer plan ("away plan") provided that the away plan is a multiemployer plan in the United States. In other words, the agreement allows a plan to recognize "reciprocity service." Reciprocity agreements do not violate the exclusive benefit rule.

   Reciprocity agreements typically are one of two types:

   a. "money follows the man" agreements, under which contributions that accrue in the away plan are transferred to the worker's home plan to be applied to benefits under the home plan; or

   b. "pro rata" agreements, under which service earned toward a benefit under the away plan is recognized for vesting and/or accrual purposes under the home plan.

4. Participation Agreements. Participation agreements (sometimes referred to as side agreements) allow non-collectively bargained employees to participate in a multiemployer plan. Non-collectively bargained employees can only participate in a multiemployer plan if the plan provides for it. A participation agreement indicates who is eligible to participate, the contribution rate and which of the plan benefit formulas the eligible participants benefit under.

B. Technical Advice Memorandum on Incorporation by Reference

A recent technical advice memorandum (TAM), Definitely Determinable Benefit and CBA, was issued which addressed the acceptability of incorporating by reference portions of a CBA into a multiemployer plan. The TAM determined that the incorporation by reference of the terms of a CBA by an employer is acceptable and does not violate the "definite written program" concept. The TAM, however, stated that the reference to the CBA within the employer's plan document, while sufficient to inform employers and participants of the specific terms of the Plan, does not always provide sufficient information about the terms of the plan in the context of an application for a determination letter from IRS. The TAM stated, "The manner in which the IRS will address this issue is more appropriately addressed in a document other than a technical advice memorandum." This Quality Assurance Bulletin (QAB) is being issued to provide that guidance, and to address some of the other special issues unique to the multiemployer plan.

If the sponsor of a multiemployer plan wants reliance on a determination letter for the portions of the plan that incorporate by reference parts of the CBA, then the exact language from portions of the CBA that are being incorporated into the plan must be submitted as an appendix to the plan. CBAs in their entirety will not be accepted.

Parts 3 and 4 of Section IV.A. below provide that an application may also include participation and/or reciprocal agreements. If the sponsor of a multiemployer plan wants reliance on a determination letter for the portions of a plan that incorporate by reference parts of a participation or reciprocity agreement, then the exact language of the portions of the participation or reciprocity agreement that are being incorporated into the plan must also be submitted as an appendix to the plan. Participation and reciprocity agreements in their entirety will not be accepted.

Hereafter, "CBAs," "participation" and "reciprocity" agreements will be referred to as "auxiliary agreements."

C. Determination Letter Reliance and Caveat

A determination letter will only provide reliance for any portion of an auxiliary agreement that is incorporated by reference if the employer includes the exact language of the portion of the auxiliary agreement that is being incorporated by reference into the plan document as an appendix to the plan document.

Effective with the issuance of this QAB, determination letters for all multiemployer plans will, if applicable, include the following caveat addressing the reliance provided by the letter for the portion of the plan document that is incorporated by reference to an auxiliary agreement:

EDS Paragraph 7033

"This determination letter does not provide reliance for any portion(s) of the document that incorporates the terms of an auxiliary agreement (collective bargaining, reciprocity and/or participation agreement), unless the exact language of the section(s) that is being incorporated by reference to the auxiliary agreement has been appended to the document."

II. EFFECTIVE DATES AND SUBMISSION CYCLE

Collectively bargained plans, including multiemployer plans, often have later effective dates for required plan provisions.

Under § 10.02 of Rev. Proc. 2007-44, IRB 2007-28, most multiemployer plans fall in "Cycle D" of the 5-year remedial amendment cycle for individually designed plans, including plans that have made the election under §1106 of PPA to be treated as multiemployer plans. However, governmental multiemployer plans fall under the "Cycle C". Accordingly, non-governmental multiemployer plans must next be submitted for a determination letter between February 1, 2009, and January 31, 2010. This submission must include plan language satisfying the 2008 Cumulative List of Changes in Plan Qualification Requirements (the 2008 Cumulative List), to be issued in November, 2008. Governmental multiemployer plans must next be submitted for a determination letter between February 1, 2008, and January 31, 2009. This submission must include plan language satisfying the 2007 Cumulative List of Changes in Plan Qualification Requirements (the 2007 Cumulative List).

Section 11.06 of Rev. Proc. 2007-44 states that if a plan changes its status by becoming or ceasing to be a multiemployer plan, the five-year remedial amendment cycle of the plan is thereafter determined as provided in section 9 or 10 of the same revenue procedure, as applicable, on the basis of the changed status of the plan.

With regard to retroactive amendments adopted pursuant to section 431(d)(2) (formerly section 412(c)(8)) that either increase or decrease a participant's accrued benefit, multiemployer plans have an extended period in which to adopt the amendment: two years after the plan year ends for multiemployer plans, as opposed to 2½ months after the end of the plan year for single employer plans.

III. REMEDIAL AMENDMENT PERIOD (RAP)

A. EGTRRA

Generally, collectively bargained plans are subject to the same effective dates under EGTRRA as other plans. However, collectively bargained plans have a different effective date for § 633 of EGTRRA (faster vesting for employer matches). The provision is effective for most plans for plan years beginning after 12/31/01; for collectively bargained plans it is not effective for plan years beginning before the earlier of: a) 1/1/06, or b) the later of 1/1/02 or the last CBA termination date on or after the enactment of EGTRRA (5/26/01). If during the review of a determination application, a sponsor asserts that the CBA termination date is the effective date for the plan, it may be necessary to review the relevant CBA to verify that a delay in the effective date is warranted.

B. GUST

Generally, the GUST RAP for multiemployer plans was the same as for other plans. In the case of GUST, the only provision for which collectively bargained plans had a different effective date was the amendment to the vesting schedule required for multiemployer plans described in Section IV D of this QAB. The new rule was effective for multiemployer plans for plan years beginning on or after the earlier of: a) 1/1/99, or b) the later of 1/1/97, or the last CBA termination date on or after the enactment of SBJPA (8/20/96). The new schedule did not apply to employees who did not have more than one hour of service under the plan on or after the effective date. If during the review of a determination application, a sponsor asserts that the CBA termination date is the effective date for the plan, it may be necessary to review the relevant CBA to verify that a delay in the effective date is warranted.

C. PPA

[Reserved]

IV. PLAN REVIEW GUIDELINES and LANGUAGE REQUIREMENTS

The following are guidelines for reviewing multiemployer plan terms. For a more in-depth discussion of rules particular for examining multiemployer plans, see chapter 4.72.14 of the IRM Employee Plans Guidelines for Examining Multiemployer Plans.

A. Incorporation by Reference

1. Code and Regulations. In accordance with IRS guidance and explained in QAB 2004-5, Incorporation by Reference of the Code and regulations is not permitted for any plan, including multiemployer plans, unless specifically authorized by the Code, regulations or other authority. No language may be incorporated if there is a choice to be made.

2. Incorporation of CBA by Reference. The most common provision incorporated into a plan document by reference to a CBA is the class of covered employees. CBAs also specify contribution rates, and these are sometimes incorporated by reference into the plan document where the participant's benefit or individual account is based on the negotiated contribution level (e.g., in a defined benefit plan that uses a "multiplier" formula, or a defined contribution money purchase plan or 401(k) plan.) Although these are the two most common provisions, there may be additional provisions incorporated by reference into the document. If the plan sponsors want reliance on the determination letter with regard to the cross-referenced provisions of a CBA, the cross-referenced provisions should be attached as an appendix to the plan for purposes of the determination letter application in accordance with the procedures described in section I of this QAB.

3. Participation Agreements. A plan document should be reviewed to determine if it provides for the participation of non-collectively bargained employees (e.g., union or plan staffers or non-collectively bargained employees of a contributing employer). Such plan language usually empowers the Board of Trustees to enter into a separate participation agreement with the employer of the non-collectively bargained participants, and incorporates by reference relevant provisions of the participation agreement, such as identifying the class of employees benefiting under the agreement and plan and the applicable benefit formula. If the plan sponsors want reliance on the determination letter with regard to the cross-referenced provisions of a participation agreement, the cross-referenced provisions should be attached as an appendix to the plan for purposes of the determination letter application in accordance with the procedures described in section I of this QAB.

4. Reciprocity Agreements. A plan document should be reviewed to determine if the board of trustees is empowered to enter into reciprocal agreements with other multiemployer plan, and either accepts contributions transferred from an away plan or recognizes reciprocity service with an away plan toward benefits under the plan. If the plan sponsors want reliance on the determination letter with regard to the cross-referenced provisions of a participation agreement, the cross-referenced provisions should be attached as an appendix to the plan for purposes of the determination letter application in accordance with the procedures described in section I of this QAB.

B. Nondiscrimination

Multiemployer plans automatically satisfy the rules governing nondiscrimination in coverage and accruals of IRC 410(b) and IRC 401(a)(4), and the minimum participation rules of IRC

401(a)(26) for those participants who are collectively bargained. A specialist reviewing a multiemployer plan application should determine whether the plan is intended to cover both collectively and non-collectively bargained employees. If a plan also covers non-collectively bargained employees, the mandatorily disaggregated portion of the plan that covers these employees must separately satisfy IRC 410(b), 401(a)(4), and IRC 401(a)(26). See IT Reg. 1.410(b)-2(b)(7); 1.401(a)(4)-1(c)(5); 1.401(a)(26)-1(b)(2)(i) and (ii).

C. Benefits and service credit conditioned on making contributions

A pension plan (including a money purchase plan) should not condition the crediting of service and/or an allocation to a participant on the employer's payment of the contribution. A plan provision that has language withholding an accrual or allocation on account of delinquent contributions violates the definitely determinable benefit rule and should be deleted. See Rev. Rul. 85-130, 1985-2 C.B. 137. If service credit is also withheld on account of delinquent contributions the plan provision violates the requirement that all years of service with the employers maintaining the plan be taken into account for participation and vesting purposes. See DOL reg. § 2530.210.

D. Vesting schedules

Single employer plans were required under TRA '86 to provide vesting at least as generous as the 5-year cliff or 7-year graded vesting schedule. Multiemployer plans were allowed to continue using the 10-year cliff-vesting schedule under TRA '86, but only for participants covered under the plan pursuant to a collective bargaining agreement. Plan participants not covered pursuant to a CBA were required to be subject to one of the tighter TRA '86 vesting schedules. SBJPA, enacted in 1996, removed that exception for multiemployer plans. Multiemployer plans must now conform to the same vesting schedules as single employer plans. To determine the effective date of the SBJPA change, as integrated into GUST, for a particular plan, see the discussion on RAP in Section III above.

E. Amendments adding permitted forfeitures

A plan amendment that provides for or expands any permitted forfeiture under § 411(a) (e.g., the suspension of benefits on account of reemployment under § 411(a)(3)(B) or the forfeiture of accruals attributable to pre-participation service upon the employer's withdrawal from the plan under § 411(a)(3)(E)) violates § 411(d)(6) because it takes away a protected right associated with benefits already accrued. Pursuant to Central Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) and §1.411(d)-3(a)(3), the IRS has reversed its prior position on this issue. See Rev. Procedures 2005-23, 2005-18 I.R.B. 991 and 2005-76, 2005-50 I.R.B. 1139, for specific guidance on correction of prior plan amendments that added or expanded an otherwise permissible suspension of benefits forfeiture, including guidance on the relief available under section 7805(b).

F. Suspension of benefits

Review the plan's suspension of benefit provisions to determine if they satisfy § 411(a)(3)(B) and DOL reg. § 2530.203-3. If a prior amendment expanded the plan's suspension of benefits provision, this is a violation of § 411(d)(6) that must be corrected. See Section IV E above.

If a multiemployer plan provides that a participant's benefit will be suspended on account of reemployment that does not meet DOL reg. § 2530.203-3 the provision is a prohibited forfeiture under Code section 411(a). Examples of suspension provisions that do not satisfy § 2530.203-3:

> *Example 1*: A plan provides that a participant's benefit will be suspended as soon as he or she works one hour of non-collectively bargained service. This is a violation of the requirement that benefits not be suspended for less than 40 hours per month of reemployment.

Example 2: A plan provides that a participant will lose service credit toward an early retirement benefit if he or she engages in 40 or more hours per month of non-union employment. This violates the regulations because only benefit payments can be suspended, not service credit.

G. Delayed Retirement

Pension plans that allow for a delayed commencement of pension benefits past normal retirement age must provide for actuarial adjustment unless the plan provides the participant's benefit will be suspended in accordance with plan terms that satisfy the requirements of DOL reg. § 2530.203-3.

H. Section 411(d)(6) protection of post-retirement benefits

1. COLAs that are part of accrued benefit. Under § 1.411(d)-3(a)(1), a plan amendment that reduces or eliminates COLA features that are part of the accrued benefit is a violation of IRC § 411(d)(6) even if the COLA features were added to the plan after a participant retired, because they are protected benefits under IRC § 411(d)(6). The regulation was issued after the decision under *Sheet Metal Workers' National Pension Fund v. C.I.R*., 318 F. 3d 599 (4th Cir. 2003), which held that such amendments are permitted. Pursuant to the regulation the IRS will disqualify any plan that adopts provisions similar to those upheld under *Sheet Metal Workers*. However, determination agents should consult with National Office regarding any plan with a similar amendment adopted prior to the effective date of § 1.411(d)-3 (August 12, 2005), or that is based within the jurisdiction of the 4th circuit.

2. Ad hoc COLAs. Plans that adopt ad hoc COLAs for several years in a row may violate § 411(d)(6) in the first year that they fail to adopt an ad hoc COLA (i.e. a one-time benefit increase for retirees in pay status). See § 1.411(d)-4, Q&A-1(c)(1). Ask the plan sponsor to submit copies of any ad hoc COLA amendments to the plan that might not otherwise be included in the restated plan. If the plan has offered an ad hoc COLA for at least three years and then fails to offer a COLA in the subsequent year, the plan may have violated § 411(d)(6).

I. Limitations of section 415 of the Code

There are special rules for applying § 415 limits to multiemployer plans:

1. Benefits attributable to service with more than one employer. For limitation years prior to July 1, 2007, Section 1.415-1(e) of the prior regulations provided two alternatives for applying the § 415 limits to participants in a multiemployer plan:

   > Under the first alternative, for purposes of applying the limitations of § 415 with respect to a participant of an employer maintaining the plan, benefits or contributions attributable to the participant from all of the employers maintaining the plan must be taken into account. The total compensation received by the participant from all of the employers maintaining the plan may be taken into account.
   >
   > Under the second alternative, the § 415 limits are applied separately to the benefit or contribution attributable to each employer for whom the participant worked. The benefit provided by the employer equals the excess of the plan benefit over the plan benefit computed as if the participant had no covered service with that employer

   Effective for limitation years beginning on or after July 1, 2007, section 1.415(a)-1(e) of the section 415 regulations provides that for purposes of applying the limitations of

section 415 with respect to a participant in a plan maintained by more than one employer, benefits or contributions attributable to the participant from all of the employers maintaining the plan must be taken into account. The total compensation received by the participant from all of the employers maintaining the plan is taken into account, unless the plan specifies otherwise.

2. Aggregation of benefits under more than one plan. Under § 415(f)(3), multiemployer plans are not aggregated with other multiemployer plans for determining the benefits limited under § 415(b) or the contributions limited under § 415 (c). Effective for limitation years beginning after 12/31/01, a defined benefit multiemployer plan is also not aggregated with a defined benefit non-multiemployer plan for purposes of applying the compensation limit of § 415(b)(1)(B) to the non-multiemployer plan. However, benefits under a defined benefit multiemployer plan are aggregated with benefits under a defined benefit non-multiemployer plan for purposes of applying the dollar limitation of § 415(b)(1)(A). Likewise, contributions to a defined contribution multiemployer plan are aggregated with contributions to a defined contribution non-multiemployer plan for purposes of applying the limitations of § 415(c).

3. Aggregation only for benefits provided by the employer. Notwithstanding the rule of § 1.415(a)-1(e), section 1.415(f)-1(g)(2)(i) of the section 415 regulations provides that a multiemployer plan is permitted to provide that only the benefits under that multiemployer plan that are provided by an employer are aggregated with benefits under plans maintained by that employer that are not multiemployer plans. If the multiemployer plan so provides, then, where an employer maintains both a plan which is not a multiemployer plan and a multiemployer plan, only the benefits under the multiemployer plan that are provided by the employer are aggregated with benefits under the employer's plans other than multiemployer plans (in lieu of including benefits provided by all employers under the multiemployer plan pursuant to the generally applicable rule of § 1.415(a)-1(e)).

4. Compensation limit. Pursuant to § 415(b)(11), the compensation limit of § 415(b)(1)(B) does not apply to multiemployer defined benefit plans for limitation years beginning after 12/31/01.

J. Top-heavy

All plan language requirements apply to multiemployer plans. However, a collectively bargained plan (whether a single-employer plan or a multiemployer plan) is not required to contain top-heavy language if, 1) the plan covers only collectively bargained employees or employees of the sponsoring union (employees of related funds are included in this category), and 2) the plan in operation is not top-heavy. See 1.416-1, T-38. Check the plan document to see if it permits non-collectively bargained employees to participate. If any non-collectively bargained employees are covered by the plan, then the plan document must include top-heavy language.

K. Defined Contribution Plan

A defined contribution plan must designate whether it is a profit-sharing plan. Section 401(a)(27)(B) of the Code requires that a profit-sharing plan must be so designated in order to be qualified. In addition, pursuant to Rev. Rul. 94-76, 1994-2 C.B. 46, any money purchase plan that is amended to become a profit-sharing plan must ensure that prior allocations remain subject to the same distribution restrictions as applied to the plan prior to its amendment.

L. Cash or Deferred Arrangements (CODAs)

Plans or CBAs may contain provisions that, although not described as such, result in elective deferrals. For example, a CBA providing bargaining unit employees the option of retaining, decreasing, or increasing plan contribution rates in lieu of corresponding wage rate

adjustments is effectively providing a CODA. Unless this arrangement is part of a profit-sharing plan and satisfies the requirements of § 401(k), the CODA will not be qualified.

Multiemployer plans that incorporate tiered contribution or allocation formulas should be scrutinized to determine whether such formula provides for an election and, as such, constitutes a CODA. To detect this type of arrangement, the specialist may need to consider language incorporated in the CBAs as well as appropriate plan provisions. See Determination Alert of August 19, 2005 for further guidance. (For the employer to have reliance on the language that is incorporated into the plan through the CBA, the exact language must be provided as an appendix to the plan. See Section IV A above.)

A determination letter will only provide reliance for any portion of an auxiliary agreement that is incorporated by reference if the employer includes the exact language of the portion of the auxiliary agreement that is being incorporated by reference into the plan document as an appendix to the plan document.