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BENEFITS BRIEF

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Treasury Issues Final Benefit Suspension Guidance under MPRA

On Thursday April 28, 2016, the Treasury Department and the Internal Revenue Service issued a final regulation (§ 1.432(e)(9)-1) (the "Final Regulation") regarding the suspension of benefits under the Multiemployer Pension Reform Act of 2014 ("MPRA"). The Final Regulation updates and consolidates prior guidance, components of which were issued in both proposed and temporary form (collectively, the "Proposed Regulation"). While the Final Regulation generally follows the Proposed Regulation, there are a number of changes.

Background on MPRA Benefit Suspensions

MPRA allows troubled multiemployer plans meeting certain requirements to apply for permission to suspend a portion of their benefits in order to avoid insolvency. Under MPRA, benefit suspensions may be temporary or permanent, and may apply to both retired and non-retired participants and beneficiaries. To be eligible, a plan must be in "critical and declining status," which typically includes plans that are projected to be insolvent within 20 years.

The suspensions must be projected to allow the plan to remain solvent, and are not permitted unless the plan sponsor has taken all reasonable measures to avoid insolvency. Suspensions must be distributed equitably across all participants and beneficiaries (taking into account specified factors) and cannot reduce benefits below 110% of the level guaranteed by the Pension Benefit Guaranty Corporation ("PBGC"). The suspensions, in the aggregate, must be reasonably estimated to achieve (but not materially exceed) the level necessary to allow the plan to stay solvent. Benefits of participants and beneficiaries who are 80 years or older must be excluded from the suspensions, with phased-in protection for participants who are at least age 75 but younger than age 80. Benefits attributable to disability must also be excluded from the suspensions.

Plan sponsors must apply to the Treasury Department for approval of benefit suspensions based on whether the plan meets the statutory limitations and conditions. Concurrently with submitting the application, the plan sponsor must provide a notice containing certain information to participants, beneficiaries, employee representatives (*i.e.*, unions) and contributing employers. Treasury, in consultation with the Department of Labor and PBGC, must either approve or deny the suspension within 225 days from the date of receipt of a complete application. If Treasury fails to act within that timeframe, the application is deemed approved. If Treasury approves the suspension, it must then administer a ratification vote within 30 days of the approval under which the suspension will go into effect unless a majority of all participants and beneficiaries vote to reject the suspension. Even if the suspension is rejected by a majority of all participants and beneficiaries, Treasury is still required to permit the plan sponsor to implement the proposed suspensions (or a

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modified version thereof) if the plan is so large that it is considered "systemically important." A systemically important plan is a plan that would result in the PBGC having to provide financial assistance in excess of $1 billion if the plan became insolvent.

Changes Reflected in the Final Regulation

Highlights of significant changes in the Final Regulation compared to the Proposed Regulation are as follows:

- Actuarial Assumptions – The Proposed Regulation required that all actuarial assumptions used in the solvency projection be reasonable in accordance with the rules of section 431(c)(3). Section 431 governs minimum funding requirements, and paragraph (c)(3) requires that the assumptions be individually reasonable, and in the aggregate represent the actuary's best estimate.

  The Final Regulation removes the reference to section 431(c)(3), and instead requires that the assumptions be individually reasonable and appropriate for the purpose of the measurement. In addition, the preamble to the Final Regulation highlights the fact that the actuarial assumptions in the solvency projections for critical and declining plans are expected to reflect consideration of the extent to which short-term asset return expectations differ from longer term projections. This change has the potential to be particularly significant, as the selection of the actuarial assumptions in the solvency projections has a direct impact on the size of the suspensions.

- Suspensions Contingent on Future Events – The Proposed Regulation prohibited suspension provisions that are contingent on future *events*, such as changes in the funded position of the plan. The Final Regulation notes that this restriction does not prohibit suspension provisions that are contingent on future *status* changes, such as retirement or disability, with respect to individual participants.

- Retiree Representative Expenses – Sponsors of large plans (at least 10,000 participants) that apply for benefit suspensions must appoint a "retiree representative" to advocate on behalf of the plan's retired and terminated participants, and must pay for the retiree representative's reasonable expenses. The Proposed Regulation cited fees charged by the retiree representative's legal and actuarial advisers as examples of reasonable expenses that the plan needs to reimburse. The Final Regulation expands this list to include expenses incurred to communicate with retirees and terminated participants, and states that such communication is a necessary component of the retiree representative's role.

- Limit on Aggregate Size of Suspensions – The statute states that in the aggregate, benefit suspensions must not materially exceed the level that is necessary to avoid insolvency. The Proposed Regulation established a numerical test for determining if this requirement is satisfied. A suspension plan satisfied the test in the Proposed Regulation if reducing the amount of each participant's suspension by 5% (of the suspension) would cause the plan to fail to be projected to be solvent. The Final Regulation adds a second way to satisfy this test. Under the second approach, a suspension plan will "not materially exceed the level that is necessary to avoid insolvency" if reducing the amount of each participant's suspension by 2% *of the pre-suspension benefit* would cause the plan to fail to be projected to be solvent.

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- Starting Point for Asset Projections – The Proposed Regulation specified that the asset values used as the basis for the solvency projections should be measured as of the end of the preceding calendar quarter. The Final Regulation clarifies that this provision refers to the calendar quarter preceding the date the application is submitted, as opposed to the quarter that precedes the preparation of the projections.

- Projection Sensitivity Analysis – The Proposed Regulation required that an application contain projections that illustrate the sensitivity of the results to changes in the level of industry activity. The Final Regulation provides that it is permissible for these sensitivity projections to disregard the impact that industry activity has on projected benefit payments, focusing only on the impact on projected contribution revenue.

- Equitable Distribution – The Proposed Regulation provided guidance on the determination of whether a suspension plan is equitably distributed across the participant population. The Final Regulation contains additional guidance that applies in situations where suspensions are calculated under a new benefit formula. This new guidance is illustrated with two examples that have been added to the examples in the Proposed Regulation. The Final Regulation also clarifies the manner in which the participants and beneficiaries subject to benefit suspensions must be divided into groups for purposes of evaluating whether benefit suspensions applicable to each group are equitably distributed.

- Disability Protections – The Proposed Regulation reflected the statutory provision that the disability limitation on suspensions applies only to benefits payable from the plan on account of disability, and not to all plan benefits that are payable to disabled participants. The Final Regulation contains an additional example that demonstrates that it would be equitable for a plan to voluntarily expand the mandatory disability limitation to include all benefits payable to disabled participants.

- Subsequent Increases in Benefit Accruals – The Proposed Regulation described the restrictions that apply when a plan that has implemented benefit suspensions adopts a benefit increase at a future date. The Proposed Regulation only addressed how this restriction applies with respect to an increase in the liabilities of the plan, while the Final Regulation also addresses how the restriction applies with respect to an increase in the future rate of benefit accrual.

- Electronic Format of Application – The Proposed Regulation required that benefit suspension applications be submitted electronically. The Final Regulation further requires that the electronic format be searchable.

- Revised Applications – The Proposed Regulation required that benefit suspension applications must contain a proposed effective date that it at least nine months following the application date, while giving Treasury the discretion to waive this requirement in appropriate circumstances. The Final Regulation does not change this requirement, but it does provide a framework for a streamlined process when an application is withdrawn and resubmitted.

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