July 22, 2021

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[Submitted electronically]

RE: Comments on Temporary Funding Relief Under the American Rescue Plan Act of 2021

Dear Ms. Weiser and Ms. Levy:

The Multiemployer Plans Committee of the American Academy of Actuaries[1] respectfully submits the following comments on the multiemployer pension plan provisions of the American Rescue Plan Act of 2021 ("ARPA"), which was signed into law on March 11, 2021. Our comments pertain to interpretive issues and considerations for the temporary funding relief provisions outlined in sections 9701, 9702, and 9703 of ARPA.[2] We hope these comments will be helpful as the Internal Revenue Service ("IRS") develops guidance for plan sponsors and practitioners on these relief provisions.

Several of our comments focus on how to interpret the temporary funding relief under ARPA in combination with previous temporary funding relief elections. We also make comments regarding the process for electing relief, including whether there will be similar election forms, what the deadline requirements will be, who can sign the election, how to file, etc.

Previous Temporary Funding Relief

[1] The American Academy of Actuaries is a 19,500-member professional association whose mission is to serve the public and the U.S. actuarial profession. For more than 50 years, the Academy has assisted public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

[2] The Multiemployer Plans Committee previously commented on the special financial assistance provisions under section 9704 of ARPA in a meeting with representatives from the Pension Benefit Guaranty Corporation, the Department of Treasury, and the Department of Labor on March 17, 2021. An outline of the discussion topics from that meeting can be found here.

The multiemployer plan temporary funding relief provisions under ARPA are similar to the provisions under the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA") and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 ("PRA"). For WRERA, election rules were outlined in IRS Notice 2009-31. For PRA, guidance was provided in IRS Notice 2010-83. In several instances, our comments on the temporary funding relief provisions in ARPA reference previous guidance on WRERA and PRA.

We note that the Pension Benefit Guaranty Corporation ("PBGC") allowed plan sponsors to provide notices of election under WRERA and PRA via email at MultiemployerProgram@PBGC.gov. Since then, PBGC has launched an e-filing portal for many electronic submissions. We also note that the Department of Labor ("DOL") allowed WRERA election notices to be provided via email at wreranotice@dol.gov.

Section 9701. Temporary Delay of Designation of Multiemployer Plans as in Endangered, Critical, or Critical and Declining Status

Summary

Plan sponsors may elect to "pause" their plan's status under section 432 of the Internal Revenue Code, (i.e., the plan's "zone status") for the first plan year beginning in the period March 1, 2020, to February 28, 2021, or for the next succeeding plan year. In addition, plan sponsors are not required to update their funding improvement plan or rehabilitation plan until the plan year following the election. ARPA section 9701 includes provisions for election and notice requirements.

Interpretive Issues and Other Considerations

- The statutory language broadly references section 432(b)(3) of the Code. We believe, therefore, a plan sponsor's election to freeze applies to both the plan's zone status and the certification as to whether the plan is making scheduled progress toward its funding improvement plan or rehabilitation plan.[3] The IRS may wish to clarify this point in any future guidance.

- For a plan in critical status, the plan sponsor is not required to update the rehabilitation plan for the year relief is elected, and the relief provisions provide an exemption regarding potential excise taxes if the plan has an accumulated funding deficiency. The statute, however, does not include a similar exemption for a plan in critical status that is certified as not making scheduled progress in meeting the requirements of its rehabilitation plan for three years in a row. The IRS may wish to address this issue through guidance, especially to the extent that the election to freeze does not apply to the certification of scheduled progress.

- The IRS may wish to consider clarifying the extent to which an election of temporary funding relief affects a plan's eligibility for special financial assistance under section 9704 of ARPA. For example, if a plan would otherwise be certified in critical and declining status, would a decision to freeze its prior year status result in the plan being ineligible for special financial assistance?

[3] Understandably, Notice 2009-31 did not address this interpretive issue regarding scheduled progress; in late 2008 and early 2009, very few plans (if any) would have begun their funding improvement periods or rehabilitation periods.

(This example assumes that if the plan's prior year status was critical but not declining, it would not meet the eligibility requirements regarding modified funded percentage and ratio of active to inactive participants.)

- Conceivably, a plan that would otherwise be in critical status may have already begun assessing surcharges on employer contributions before the plan sponsor elects to freeze the prior year status. It is unclear whether the plan in this situation would be required to refund any surcharges it had already collected. The IRS may wish to clarify this ambiguity in its guidance.

- While the statutory intent may have been to allow plans to avoid the hardship of temporarily entering a "worse" zone status, some plans sponsors are considering using this relief provision to remain in critical status for an additional plan year. For example, delaying emergence from critical status by one year could provide bargaining parties more time to adopt a rehabilitation plan that includes a reduction in adjustable benefits. Delaying emergence could also avoid a situation in which a plan passes through endangered status for one year before eventually returning to the "green zone." The IRS may wish to acknowledge in its guidance that plan sponsors can elect to use the relief provisions in this manner.

- Notice 2009-31 detailed the process for electing to freeze zone status (as well as to extend a funding improvement period or rehabilitation period) under WRERA, including the content for the submission to the IRS. We encourage the IRS to issue similar guidance on the election requirements for relief under ARPA. Other than changing statutory references, we do not have any suggested changes or updates to the content of the election submission, as described in Notice 2009-31.

- Notice 2009-31 also detailed the content of the notice that plans electing a freeze must send to participants, beneficiaries, the bargaining parties, PBGC, and the secretary of labor. We encourage the IRS to issue similar guidance on the notice requirements for relief under ARPA. Other than changing statutory references, we do not have any suggested changes or updates to the content of the notice, as described in Notice 2009-31.

Section 9702. Temporary Extension of the Funding Improvement and Rehabilitation Periods for Multiemployer Pension Plans in Critical and Endangered Status for 2020 or 2021

Summary

If a plan is in endangered status or critical status for a plan year beginning in 2020 or 2021, the plan sponsor may elect to extend its funding improvement period or rehabilitation period by five years. For this purpose, a plan's status takes into account any election under section 9701.

Interpretive Issues and Other Considerations

- The statutory title of this section begins with the words "temporary extension," which could be read to imply the extension will expire. Alternatively, the word "temporary" could be read to mean the extended funding improvement period or rehabilitation period will not continue

indefinitely and will eventually end. The IRS may wish to clarify any ambiguities related to this point in its guidance.[4]

- The statutory language states that, in order to be eligible for relief under this section, a multiemployer plan must be in endangered status or critical status. To avoid doubt, IRS may wish to clarify in its guidance that seriously endangered plans are also eligible for relief under this section.[5]

- We encourage the IRS to clarify through guidance how the availability of the five-year extension is affected by a change in a plan's zone status, as well as any election under section 9701. We have prepared the following hypothetical examples to highlight possible ambiguities in the statute. For simplicity, each example relates to possible calendar year plan years.

    - Example 1. A plan was certified to be in the "green zone" for 2020 and is subsequently certified to be in critical status for 2021. Because the plan is in critical status for 2021, it seems clear that the plan sponsor would be able to elect to extend its rehabilitation period from 10 years to 15 years.

    - Example 2. A plan is certified to be in endangered status for both 2020 and 2021. The plan is certified to be in critical status for the first time in 2022. Is the plan sponsor permitted to elect to extend its rehabilitation period from 10 years to 15 years? In this example, the plan may appear to be eligible for the extension because it was in endangered status in either 2020 or 2021. The plan's initial critical year was not until 2022, however, which could mean it is not eligible to extend its rehabilitation period.[6]

    - Example 3. A plan was certified to be in endangered status for 2020. The plan was certified to be in critical status for 2021, but the plan sponsor made an election under Section 9701 to remain in endangered status for that plan year. The plan is certified to be in critical status in 2022. Is the plan sponsor permitted to elect to extend its rehabilitation period from 10 years to 15 years?

    - Example 4. A plan is certified to be in endangered status in 2020, and it returns to the "green zone" in 2021. In 2024, the plan actuary certifies that the plan is projected to be in critical status within the next five plan years, and the plan sponsor elects for the plan to be considered in critical status for that plan year. Is the plan sponsor permitted to elect to extend its rehabilitation period from 10 years to 15 years?

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[4] We note section 205 of WRERA also began with the words "temporary extension." Nevertheless, clarification on section 9702 of ARPA may be desirable to avoid doubt.

[5] Notice 2009-31 acknowledged that seriously endangered plans were indeed eligible for an extension of their funding improvement period under WRERA.

[6] This footnote applies to Examples 2, 3, and 4. We acknowledge that Notice 2009-31 includes an example that indicates a plan would not be permitted to elect an extension of its rehabilitation period if its initial critical year is after the eligibility window. We encourage the IRS to clarify in its guidance if the same interpretations under WRERA also apply to the equivalent provisions under ARPA.

- Example 5. A plan is certified to be in critical status in both 2020 and 2021. The plan sponsor elects to extend its rehabilitation period from 10 years to 15 years. In 2025, the plan is certified to emerge from critical status and enter endangered status. Is the plan sponsor permitted to make a second election in 2025 to extend its funding improvement period from 10 years to 15 years?[7]

- We encourage the IRS to clarify through guidance how a five-year extension under section 9702 of ARPA interacts with a three-year extension that was previously elected under WRERA. We note that the statutory language references an extension of the applicable period by five years, rather than specifying the duration of the period after extension.

    - Hypothetical example: A plan has been certified to be in endangered status in each plan year from 2008 through 2021. The plan sponsor previously elected to extend the funding improvement period from 10 years to 13 years under WRERA. If the plan sponsor makes an election under section 9702, it appears that the further-extended period would be 18 years: 13 years plus the five-year extension. We acknowledge, however, that the statute could be interpreted such that the further-extended period would be 15 years: the original 10-year period plus the five-year extension.

- As noted earlier, Notice 2009-31 detailed the process for electing temporary funding relief under WRERA, including the content for the submission to the IRS, and how to coordinate elections to freeze zone status with elections to extend a funding improvement period or rehabilitation period. We encourage the IRS to issue similar guidance on the election requirements for relief under ARPA. Other than changing statutory references, we do not have any suggested changes or updates to the content of the election submission, as described in Notice 2009-31.

- There is no statutory notice requirement associated with an election to extend a funding improvement period or rehabilitation period under this section. That said, the IRS may wish to consider providing guidance for updating the applicable funding improvement plan or rehabilitation plan to acknowledge the election of the extension.

Section 9703. Adjustments to Funding Standard Account Rules

Summary

Most of the temporary funding relief provisions afforded by section 9703 of ARPA are similar to the funding relief provisions in PRA. These provisions include the extended amortization of a plan's eligible net investment losses in the funding standard account and expanded smoothing period for a plan's actuarial value of assets. The IRS could issue guidance similar to Notice 2010-83.

Questions / Interpretive Issues

[7] Notice 2009-31 does not include an example of a plan that emerges from critical status into endangered status outside the eligibility window. Presumably, the plan would not be permitted to extend its funding improvement period, but the IRS may wish to clarify or confirm this point in its guidance.

Guidance in Notice 2010-83 notwithstanding, some provisions in section 9703 of ARPA do not have an analog in PRA and would benefit from IRS guidance. We describe these issues below.

- **Other Losses Related to COVID-19 (Reductions in Contributions)**

  ARPA allows a plan sponsor meeting certain eligibility conditions to elect to amortize "other losses related to the virus SARS–CoV–2 or coronavirus disease 2019 (COVID–19) (including experience losses related to reductions in contributions, reductions in employment, and deviations from anticipated retirement rates, as determined by the plan sponsor)" over an extended time period in the funding standard account.

  Reductions in employment and deviations from anticipated retirement rates that occur between valuation dates naturally create gains or losses in the funding standard account that can be identified and amortized appropriately. However, contributions—whether higher or lower than expected—are directly reflected in a plan's credit balance (or funding deficiency) and usually do not generate a gain or loss in the funding standard account. As a result, there is discussion around how to create losses in the funding standard account related to reductions in contributions.

  ARPA notes that "…the Secretary shall rely on the plan sponsor's calculations of plan losses unless such calculations are clearly erroneous." While the IRS is required to rely on the plan sponsor's calculations, it would be helpful for the IRS to provide an approved method for determining losses related to reductions in contributions. Providing a framework for actuaries to follow would remove uncertainty and bring consistency on how to apply this provision. In addition, it will provide comfort to plan sponsors adopting this provision that the methodology being used will not later be considered "clearly erroneous" by the IRS.

  For consideration, we offer the following methodology: For purposes of calculating the experience loss for a plan year, calculate the plan's expected asset value using expected contributions; actual contributions would be included in the plan's actual asset value. The difference in actual and expected contributions (with interest) will create an experience loss that can be amortized in the funding standard account in the following plan year.

  The IRS may wish to specify an appropriate basis for determining expected contributions for the applicable plan year. For example, a safe harbor approach could be to use the expected contributions consistent with the zone status certification for that plan year.

- **Coordination With Special Financial Assistance**

  The temporary funding relief provisions in section 9703 of ARPA do "not apply to a plan to which special financial assistance is granted under section 4262 of the Employee Retirement Income Security Act of 1974." It is important to note that some plan sponsors may elect to apply the funding relief provisions in this section and subsequently be granted special financial assistance.

  For example, consider a hypothetical plan sponsor that elects to apply the funding relief provisions to losses occurring during the plan year beginning April 1, 2019, and ending March

31, 2020. At the time of election, the plan is not eligible for special financial assistance, and the plan sponsor does not anticipate that the plan will become eligible for special financial assistance in the future. However, due to unanticipated poor future experience, the plan eventually becomes eligible for and is granted special financial assistance.

We encourage the IRS to consider providing guidance on how plans in this situation (or a similar situation) should handle their prior elections for temporary funding relief. For example, the IRS may clarify through guidance how to unwind the extended loss recognition in the funding standard account if a plan is later granted special financial assistance. Guidance should also specify whether the unwinding of relief should be made prospectively or retroactively.

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The Multiemployer Plans Committee appreciates the opportunity to provide this input. We would be happy to discuss any of the issues raised in this letter at your convenience. Please contact Philip Maguire, the Academy's pension policy analyst (maguire@actuary.org), if you have any questions or would like to discuss these issues further.

Sincerely,

Christian Benjaminson, MAAA, FSA, EA
Chairperson, Multiemployer Plans Committee
American Academy of Actuaries