Part III. Administrative, Procedural, and Miscellaneous

Notice 2008-87

I. PURPOSE

The Internal Revenue Service, the Department of Labor's Employee Benefits Security Administration ("EBSA"), and the Pension Benefit Guaranty Corporation ("PBGC") are providing relief in connection with certain employee benefit plans because of damage caused by Hurricane Ike ("Ike"). The relief provided by this notice is in addition to the relief already provided by the Service, EBSA, and the PBGC to victims of Ike.

II. BACKGROUND

A. Provisions Relating to Disaster Relief.

Section 7508A(b) of the Code provides that, in the case of a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a Presidentially declared disaster or a terroristic or military action, the Secretary of the Treasury may prescribe a period of up to 1 year which may be disregarded in determining the date by which any action is required or permitted to be completed. No plan is to be treated as failing to be operated in accordance with its terms solely because the plan disregards any period by reason of such relief. Sections 518 and 4002(i) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 ("ERISA") authorize the provision of parallel relief under Titles I and IV of ERISA.

B. Pre-Pension Protection Act of 2006. The following provisions apply to periods for which relevant changes made by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) ("PPA"), do not apply (generally plan years beginning before January 1, 2008).

Section 412(a) of the Code and section 302(a) of ERISA provide that, in order for a plan to meet the minimum funding standards of the Code and ERISA, the plan must not have an accumulated funding deficiency as of the end of any plan year. Section 412(c)(10) of the Code and section 302(c)(10) of ERISA provide that, for purposes of satisfying the minimum funding requirements of the Code and ERISA, any contributions for a plan year made by an employer by the end of the 8½-month period following the end of such plan year are deemed to have been made on the last day of the plan year. For a plan with a 2007 calendar-year plan year, this 8½-month period ends on September 15, 2008.

Section 412(d) of the Code and section 303 of ERISA provide for waivers of the minimum funding requirements in the event of temporary substantial business hardship. In order for a plan other than a multiemployer plan to receive such a waiver, § 412(d)(4) of the Code and section 303(d)(1) of ERISA provide that an application for such a waiver must be submitted no later than the 15th day of the 3rd month beginning after the close of the plan year for which the waiver is sought. Thus, for example, in order for a plan to receive a waiver of the minimum funding requirements for a plan year that ended on June 30, 2008, the sponsor of the plan must have submitted an application by September 15, 2008.

Section 412(m)(1) of the Code and section 302(e)(1) of ERISA impose a higher rate of interest on any unpaid required quarterly installments for certain plans with a funded current liability percentage of less than 100 percent for the preceding plan year. Section 412(m)(5) of the Code and section 302(e)(5) of ERISA increase the required quarterly installments to the amount needed to prevent a liquidity shortfall (as defined in those sections). For a 12-month plan year beginning on October 1, 2007, the due dates for the required installments are January 15, 2008, April 15, 2008, July 15, 2008, and October 15, 2008.

Section 412(n) of the Code and section 302(f) of ERISA provide, for certain plans with a funded current liability percentage of less than 100 percent for the plan year, that a lien arises in favor of the plan if the required installments or any other payment required under those sections are not made to the plan before the due date for such installment or other payment and if the aggregate unpaid balance of such installments or other payments exceeds $1,000,000. The lien may be perfected by the PBGC.

Under the PBGC's premium regulations, contributions may be taken into account for determining a plan's unfunded vested benefits for a premium payment year or a plan's entitlement to the full funding limit exemption from the variable-rate premium for a premium payment year if the contributions (1) are for a plan year before the premium payment year and (2) are made on or before the earlier of (a) the due date for payment of the variable-rate premium or (b) the date the variable-rate premium is paid (29 CFR §§ 4006.4(b)(2)(iv) and 4006.5(a)(5)). In addition, there are Title IV reporting requirements arising from certain late contributions (e.g., 29 CFR § 4043.25).

C. Post-PPA (Single Employer Pension Plans). The following provisions apply to periods for which relevant changes made by PPA apply (generally plan years beginning after December 31, 2007).

Section 412(a) of the Code and section 302(a) of ERISA require that an employer that sponsors a single employer pension plan contribute the minimum required contribution determined under § 430 of the Code and section 303 of ERISA (or, in the case of a money purchase plan, as required under the terms of the plan) for the plan year. Section 430(j)(1) of the Code and section 303(j)(1) of ERISA provide that the due date for payment of the minimum required contribution for a plan year is 8½-months after the close of the plan year.

Section 412(c) of the Code and section 302(c) of ERISA provide for waivers of the minimum funding requirements in the event of temporary substantial business hardship. In order for a plan other than a multiemployer plan to receive such a waiver, § 412(c)(5) of the Code and section 302(c)(5) of ERISA provide that an application for such a waiver must be submitted no later than the 15^{th} day of the 3rd month beginning after the close of the plan year for which the waiver is sought. Thus, for example, in order for a plan to receive a waiver of the minimum funding requirements for the plan year beginning January 1, 2008, and ending June 30, 2008, the sponsor of the plan must have submitted an application by September 15, 2008.

Section 430(j)(3) of the Code and section 303(j)(3) of ERISA impose a higher rate of interest with respect to late quarterly installments for a plan with a funding shortfall for the prior plan year. Section 430(j)(4) of the Code and section 303(j)(4) of ERISA increase the quarterly installments to the amount needed to prevent a liquidity shortfall (as defined in those sections). For a plan with a calendar-year plan year, the due dates for the required quarterly installments for the 2008 plan year are April 15, 2008, July 15, 2008, October 15, 2008, and January 15, 2009.

Section 430(k) of the Code and section 303(k) of ERISA provide, for certain plans with a funding target attainment percentage of less than 100 percent for the plan year, that a lien arises in favor of the plan if the required installments or any other payment required under those sections are not made to the plan before the due date for such installment or other payment and if the aggregate unpaid balance of such installments or other payments exceeds $1,000,000. The lien may be perfected by the PBGC.

Section 436 of the Code and section 206(g) of ERISA impose certain benefit restrictions that are applied based on a plan's adjusted funding target attainment percentage for the plan year. For this purpose, § 436(h)(2) of the Code and section 206(g)(7)(B) of ERISA provide that a plan's adjusted funding target attainment percentage for the plan year is conclusively presumed to be less than 60 percent from the first day of the 10^{th} month of the plan year through the end of the plan year if no certification of the adjusted funding target attainment percentage for the plan year is made before the first day of the 10^{th} month of the plan year. For a plan with a 2008 calendar-year plan year, the deadline for this certification is September 30, 2008. Section 436(h)(3) of the Code and section 206(g)(7)(C) of ERISA require, in certain cases in which no certification of the adjusted funding target attainment percentage for a plan year is made before the first day of the 4^{th} month of such year, that the plan's adjusted funding target attainment percentage is presumed to be equal to 10 percentage points less than the adjusted funding target attainment percentage for the preceding plan year for a period of time beginning on the first day of the 4^{th} month. For a plan year beginning July 1, 2008, the deadline for this certification is September 30, 2008.

Section 101(j)(1) of ERISA provides that the plan administrator of a single employer plan is required to provide written notice to participants and beneficiaries within 30 days after the date the plan has become subject to a benefit restriction under section 206(g)(1) of ERISA (under which the payment of certain unpredictable contingent event benefits is restricted) or section 206(g)(3) of ERISA (under which the payment of certain accelerated benefit distributions is restricted). Section 101(j)(2) of ERISA provides that, for a single employer plan under which benefit accruals are restricted under section 206(g)(4) of ERISA because the plan's adjusted funding target attainment percentage is less than 60 percent, the plan administrator is required to provide written notice to participants and beneficiaries within 30 days after the earlier of the plan's valuation date or the date the adjusted funding target attainment percentage is presumed to be less than 60 percent for the plan year pursuant to section 206(g)(7)(B) of ERISA.

Under the PBGC's premium regulations, contributions may be taken into account for determining a plan's unfunded vested benefits for a premium payment year if the contributions (1) are for a plan year before the premium payment year and (2) are made on or before the earlier of (a) the due date for payment of the variable-rate premium or (b) the date the variable-rate premium is paid (29 CFR § 4006(c)). In addition, there are Title IV reporting requirements arising from certain late contributions (e.g., 29 CFR § 4043.25).

D. Post-PPA (Multiemployer Defined Benefit Plans). The following provisions apply to periods for which relevant changes made by PPA apply.

Section 432(b)(3)(A) of the Code and section 305(b)(3)(A) of ERISA provide special rules for certain multiemployer defined benefit plans. For a plan that is subject to those requirements, the plan actuary must certify whether or not the plan is in endangered status for the plan year, whether or not the plan is or will be in critical status for the plan year, and, in the case of a plan which is in a funding improvement or rehabilitation period, whether or not the plan is making the scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan. The deadline for this certification for a plan year is the 90th day of the plan year. Section 432(c)(1) of the Code and section 305(c)(1) of ERISA require, for the first plan year that a multiemployer plan is in endangered status, that the plan sponsor adopt a funding improvement plan no later than 240 days following the required date for the actuarial certification of endangered status. Section 432(e)(1) of the Code and section 305(e)(1) of ERISA require, for the first plan year that a multiemployer plan is in critical status, that the plan sponsor adopt a rehabilitation plan no later than 240 days following the required date for the actuarial certification of critical status. For a multiemployer plan that is in endangered or critical status for its 2008 calendar-year plan year, this date is November 25, 2008.

III. RELIEF

Pursuant to § 7508A(b) of the Code, the relief set forth in this Part III applies to an Affected Plan. A plan is an Affected Plan only if any of the following were located in the counties of Brazoria, Chambers, Galveston, Harris, Jefferson, Liberty, Montgomery, or Orange in the State of Texas as of September 7, 2008: the principal place of business of the employer that maintains the plan (in the case of a single employer plan, determined disregarding the rules of § 414(b) and (c) of the Code); the principal place of business of employers that employ more than 50 percent of the active participants covered by the plan (in the case of a plan covering employees of more than one employer, determined disregarding the rules of § 414(b) and (c)); the office of the plan or the plan administrator; the office of the primary record keeper serving the plan; or the office of the enrolled actuary or other advisor that had been retained by the plan or the employer to make funding determinations or certifications for which the due date falls between the period beginning on September 7, 2008, and ending on December 15, 2008. For purposes of the preceding sentence, the term "office" includes only the worksite of those individuals, and the location of any records, necessary to determine the plan's funding requirements for the relevant period.

A. Pre-PPA. The following relief applies to periods for which relevant changes made by PPA do not apply (generally plan years beginning before January 1, 2008).

For any plan that is an Affected Plan, if the date described in § 412(c)(10) or 412(m) of the Code and section 302(c)(10) or 302(e) of ERISA for making a contribution falls within the period beginning on September 7, 2008, and ending on December 15, 2008, then the deadline for that contribution is postponed to December 15, 2008. If the deadline described in § 412(d)(4) of the Code and section 303(d)(1) of ERISA for applying for a waiver for an Affected Plan falls within the period beginning on September 7, 2008, and ending on December 15, 2008, then that deadline is postponed to December 15, 2008.

The relief set forth in this paragraph applies under Title IV of ERISA for purposes of determining a plan's unfunded vested benefits for a premium payment year or entitlement to the full funding limit exemption from the variable-rate premium for a premium payment year. For any plan for which this notice extends a date described in § 412(c)(10) of the Code and section 302(c)(10) of ERISA, a contribution for any plan year before the premium payment year may be taken into account if it is made on or before the earlier of (1) the extended § 412(c)(10)/ section 302(c)(10) date under this notice or (2) the date of the plan's variable-rate premium filing (or, if applicable, the plan's amended variable-rate premium filing) for the premium payment year.

B. Post-PPA (Single Employer Pension Plans). The following relief applies to periods for which relevant changes made by PPA apply (generally plan years beginning after December 31, 2007).

For any plan that is an Affected Plan, if the date described in § 430(j)(1) or 430(j)(3) of the Code and section 303(j)(1) or 303(j)(3) of ERISA for making a contribution falls within the period beginning on September 7, 2008, and ending on

December 15, 2008, then the date for that contribution is postponed to December 15, 2008. If the date described in § 412(c)(5) of the Code and section 302(c)(5) of ERISA for applying for a waiver for an Affected Plan falls within the period beginning on September 7, 2008, and ending on December 15, 2008, then that deadline is postponed to December 15, 2008. If the date described in § 436(h)(2) or 436(h)(3) of the Code and section 206(g)(7)(B) or 206(g)(7)(C) of ERISA for certification of the adjusted funded target attainment percentage falls within the period beginning on September 7, 2008, and ending on December 15, 2008, then the date by which such certification must be made is postponed to December 15, 2008.

With respect to any plan that is an Affected Plan, if the deadline for furnishing a notice required under section 101(j)(1) or (2) of ERISA falls within the period beginning on September 7, 2008, and ending on December 15, 2008, then the date by which such notice must be furnished is postponed to December 15, 2008.

The relief set forth in this paragraph applies under Title IV of ERISA for purposes of determining a plan's unfunded vested benefits for a premium payment year or the variable-rate premium for a premium payment year. For any plan for which this notice extends a date described in § 430(j)(1) of the Code and section 303(j)(1) of ERISA, a contribution for any plan year before the premium payment year may be taken into account if it is made on or before the earlier of (1) the extended § 430(j)(1)/section 303(j)(1) contribution due date under this notice or (2) the date of the plan's variable-rate premium filing (or, if applicable, the plan's amended variable-rate premium filing) for the premium payment year.

C. Post-PPA (Multiemployer Defined Benefit Plans).

If the deadline described in § 432(c)(1) or 432(e)(1) of the Code and section 305(c)(1) or 305(e)(1) of ERISA by which a plan sponsor of an Affected Plan that is in endangered or critical status must adopt a funding improvement plan or a rehabilitation plan falls within the period beginning on September 7, 2008, and ending on December 15, 2008, then that deadline is postponed to December 15, 2008. For any plan that is an Affected Plan, if the date described in § 432(b)(3)(A) of the Code and section 305(b)(3)(A) of ERISA by which the plan actuary must certify whether or not the plan is in endangered status for the plan year and whether or not the plan is or will be in critical status for the plan year falls within the period beginning on September 7, 2008, and ending on December 15, 2008, then the date by which that certification must be made is postponed to December 15, 2008. If the date by which a certification of an Affected Plan's status is postponed in accordance with the preceding sentence, the date described in § 432(c)(1) or 432(e)(1) of the Code and section 305(c) or 305(e) of ERISA by which the plan sponsor of an Affected Plan that is in critical or endangered status must adopt a funding improvement plan or a rehabilitation plan nonetheless continues to be determined based on the original deadline for the certification of the plan's status.

DRAFTING INFORMATION

The principal authors of this notice are David Ziegler and Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1-877-829-5500, between the hours of 8:00 a.m. and 4:30 p.m. Eastern Time, Monday through Friday (a toll-free number). Mr. Ziegler and Mr. Kuehnle can be contacted via e-mail at RetirementPlanQuestions@irs.gov.