

Applicability of section 432(b)(7) following a merger involving a multiemployer defined benefit plan that has received special financial assistance

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I. ISSUE

If a multiemployer defined benefit pension plan that has received special financial assistance (SFA) from the Pension Benefit Guaranty Corporation (PBGC) is merged into a multiemployer defined benefit pension plan that has not received SFA, and the plan that has not received SFA is designated as the ongoing plan after the merger, is the ongoing plan deemed to be in critical status under section 432(b)(7) of the Internal Revenue Code (Code) solely as a result of the merger?

II. FACTS

Plan A, a multiemployer defined benefit pension plan with a calendar year plan year, is an eligible multiemployer plan under section 4262(b) of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406 (88 Stat. 829 (1974)), as amended (ERISA), and section 432(k)(3) of the Code. Plan A applies to PBGC for SFA and receives \$50 million of SFA in October 2022. On March 30, 2023, the actuary for Plan A makes the annual certification required under section 432(b)(3) of the Code and certifies that Plan A is in critical status for the 2023 plan year in accordance with section 432(b)(7).

Plan B, a multiemployer defined benefit pension plan that was in effect on July 16, 2006, has a calendar year plan year and is not an eligible multiemployer plan described in section 432(k)(3) that may apply for SFA. After January 1, 2023, the sponsors of Plan A and Plan B agree to merge Plan A and Plan B, effective as of January 1, 2024. Pursuant to the terms of the merger agreement, Plan B will be

designated as the ongoing plan after the merger and will obtain all the assets, and assume all the liabilities, of Plan A. Effective as of the date of the merger, all assets of the merged plan will be available to pay all benefits and plan expenses of the merged plan. In addition, with respect to plan years beginning on or after the merger, all plan-related documentation and reports, including Form 5500, Annual Return/Report of Employee Benefit Plan, and attachments (Form 5500), will use the name of Plan B and will be filed under the Employer Identification Number (EIN) and Plan Number of Plan B.

Plan A and Plan B request approval from PBGC for the merger pursuant to 29 CFR 4262.16(f), and PBGC approves the merger. Plan A and Plan B implement the merger as of January 1, 2024, in accordance with the merger agreement. Following the merger, Plan B complies with the restrictions and conditions that applied to Plan A before the merger to the extent required under 29 CFR 4262.16(f)(3). Thus, for example, pursuant to 29 CFR 4262.16(f)(3)(i), Plan B maintains a separate account for the SFA funds received by Plan A (adjusted to reflect earnings on those funds and payments for benefits and plan-related expenses from that separate account) in accordance with 29 CFR 4262.13(b) and invests the assets of that separate account in permissible investments in accordance with 29 CFR 4262.14.

III. LAW AND ANALYSIS

Section 432 imposes certain requirements on multiemployer defined benefit plans in effect on July 16, 2006. One of those is the requirement under section 432(a)(2), which provides that the sponsor of a plan in critical status within the meaning of section 432(b)(2) must adopt and implement a rehabilitation plan that satisfies the requirements of section 432(e)(3). In general, a multiemployer plan is in critical status

for a plan year if, as determined by the plan actuary, the plan is described in section 432(b)(2)(A), (B), (C), or (D) as of the beginning of the plan year.

Under section 432(b)(3), a multiemployer plan's actuary must certify the plan's status under section 432 to the Internal Revenue Service and to the plan sponsor not later than the 90th day of each plan year. The certification must state whether or not the plan is in endangered status for the plan year (or would be in endangered status for that plan year but for the application of section 432(b)(5)); whether or not the plan is or will be in critical status for the plan year or for any of the succeeding 5 plan years; and whether or not the plan is or will be in critical and declining status (within the meaning of section 432(b)(6)) for that plan year. For a plan that is in a funding improvement or rehabilitation period, the certification must also state whether or not the plan is making the scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.

Section 432(b)(7), which was added to the Code by section 9704(d)(2) of the American Rescue Plan Act of 2021, Pub. L. 117-2 (135 Stat. 4 (2021)), is one of several provisions under which a multiemployer plan is treated as being in critical status for a plan year even if the plan is not described in section 432(b)(2)(A), (B), (C) or (D) of the Code.¹ Specifically, section 432(b)(7) provides that if an eligible multiemployer plan that receives SFA under section 4262 of ERISA meets the requirements of section 432(k)(2) of the Code, then, notwithstanding the preceding paragraphs of section 432(b), the plan

¹ Other provisions under which this occurs include section 432(b)(4) (which permits the sponsor of a multiemployer plan that is projected to enter critical status within 5 years to elect to be treated as being in critical status effective for the current plan year) and section 432(e)(4)(B) (which provides that a plan in critical status remains in critical status until a plan year for which the actuary certifies that the plan is not described in any of the subparagraphs of section 432(b)(2) and meets certain other indicia of financial health).

is deemed to be in critical status for plan years beginning with the plan year in which the effective date of the SFA occurs and ending with the last plan year ending in 2051.²

Under section 432(e), if a plan is in critical status, the sponsor is required to adopt a rehabilitation plan. As described in section 432(e)(3)(A)(i), the rehabilitation plan must be reasonably expected to enable the plan to emerge from critical status by the end of its 10-year rehabilitation period described in section 432(e)(4) (unless, as described in section 432(e)(3)(A)(ii), the plan sponsor determines that the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period using all reasonable measures). Subject to certain exceptions, section 432(f) provides that a plan in critical status may not be amended to increase benefits and may not make lump-sum or similar payments. Pursuant to section 4971(g)(1), the excise tax under section 4971(a) would not apply to any accumulated funding deficiency under a plan in critical status, but the plan sponsor and contributing employers could be subject to other excise taxes under section 4971(g)(2), (3) and (4).

The merger agreement between Plan A and Plan B designates Plan B as the ongoing plan for the plan years beginning on or after January 1, 2024 (the effective date of the merger) and provides that Plan B will obtain all of Plan A's assets and assume all of its liabilities. In accordance with the designation of Plan B as the ongoing plan, all plan-related documentation and reports with respect to all plan years beginning on or after January 1, 2024, including Form 5500, are in the name of Plan B and use Plan B's EIN and Plan Number.

² See also section 4262(m)(4) of ERISA ("An eligible multiemployer plan that receives special financial assistance shall be deemed to be in critical status within the meaning of section 305(b)(2) [of ERISA] until the last plan year ending in 2051.").

Section 432(b)(7), which provides for deemed critical status, applies only to an eligible multiemployer plan described in section 432(k)(3) that applies for and receives SFA. Thus, if a multiemployer plan that is eligible for and has received SFA merges into a plan that did not receive SFA, and, under the terms of the merger, the plan that did not receive SFA is designated as the ongoing plan, that ongoing plan is not deemed to be in critical status under section 432(b)(7). Under the facts of this revenue ruling, because Plan B is not an eligible multiemployer plan described in section 432(k)(3) that may apply for and receive SFA under section 4262 of ERISA, section 432(b)(7) of the Code does not apply to Plan B. Accordingly, Plan B is not deemed to be in critical status pursuant to section 432(b)(7) as a result of the merger with Plan A for the plan years beginning on or after the effective date of the merger.

IV. HOLDING

After a merger of a multiemployer defined benefit pension plan that has received SFA from PBGC with a second multiemployer defined benefit pension plan that has not received SFA, with the second plan designated as the ongoing plan after the merger, the ongoing plan is not deemed to be in critical status under section 432(b)(7) of the Code solely as a result of the merger.

V. DRAFTING INFORMATION

The principal author of this revenue ruling is Diane S. Bloom of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information, please contact Ms. Bloom at (202) 317-6700. This telephone call is not toll-free.