

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 9765]

RIN 1545–BM66, RIN 1545–BM86

**Suspension of Benefits Under the Multiemployer Pension Reform Act of 2014****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final regulations and removal of temporary regulations.

**SUMMARY:** The Multiemployer Pension Reform Act of 2014 (“MPRA”), which was enacted by Congress as part of the Consolidated and Further Continuing Appropriations Act of 2015, relates to multiemployer defined benefit pension plans that are projected to have insufficient funds, within a specified timeframe, to pay the full plan benefits to which individuals will be entitled (referred to as plans in “critical and declining status”). Under MPRA, the sponsor of a plan in critical and declining status is permitted to reduce the pension benefits payable to plan participants and beneficiaries if certain conditions and limitations are satisfied (referred to in MPRA as a “suspension of benefits”). MPRA requires the Secretary of the Treasury (Treasury Department), in consultation with the Pension Benefit Guaranty Corporation (PBGC) and the Secretary of Labor (Labor Department), to approve or deny applications by sponsors of these plans to reduce benefits. These regulations affect active, retired, and deferred vested participants and beneficiaries of multiemployer plans that are in critical and declining status as well as employers contributing to, and sponsors and administrators of, those plans.

**DATES:** *Effective date:* These regulations are effective on April 28, 2016.

*Applicability date:* These regulations apply to suspensions for which the approval or denial is issued on or after April 26, 2016. In the case of a systemically important plan, the final regulations apply with respect to any modified suspension implemented on or after April 26, 2016.

**FOR FURTHER INFORMATION CONTACT:** The Department of the Treasury MPRA guidance information line at (202) 622–1559 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:****Paperwork Reduction Act**

The collection of information contained in these regulations has been

reviewed and approved by the Office of Management and Budget under control number 1545–2260.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Background**

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 432(e)(9) of the Internal Revenue Code (Code), as amended by the Multiemployer Pension Reform Act of 2014, Division O of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235 (128 Stat. 2130 (2014)) (MPRA).

**I. Statutory Provisions**

Section 412 of the Code contains minimum funding rules that generally apply to pension plans. Section 431 sets forth the funding rules that apply specifically to multiemployer defined benefit plans. Section 432 sets forth additional rules that apply to certain multiemployer plans in endangered or critical status and permits plans in critical status to be amended to reduce certain otherwise protected benefits (referred to as “adjustable benefits”). Section 305 of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829 (1974)), as amended (ERISA), sets forth rules that are parallel to those set forth in section 432 of the Code.

Section 201 of MPRA amended section 432 to add a new status, called critical and declining status, for multiemployer defined benefit plans. Section 432(b)(6) provides that a plan is treated as being in critical and declining status if the plan satisfies any of the specified criteria for the plan to be in critical status and, in addition, is projected to become insolvent within the meaning of section 418E during the current plan year or any of the 14 succeeding plan years (or 19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds two to one or if the funded percentage of the plan is less than 80 percent).

Section 201 of MPRA also amended section 432(e)(9) to prescribe benefit suspension rules for plans in critical

and declining status.<sup>1</sup> Section 432(e)(9)(A) provides that, notwithstanding section 411(d)(6) and subject to section 432(e)(9)(B) through (I), the plan sponsor of a plan in critical and declining status may, by plan amendment, suspend benefits that the sponsor deems appropriate. Section 411(d)(6) provides generally that a plan does not satisfy section 411 if an amendment to the plan decreases a participant’s accrued benefit. For this purpose, a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or eliminating an optional form of benefit with respect to benefits attributable to service before the amendment is treated as reducing accrued benefits.

A suspension of benefits is defined in section 432(e)(9)(B)(i) as the temporary or permanent reduction of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not the participant or beneficiary is in pay status at the time of the suspension of benefits. Under section 432(e)(9)(B)(ii), any suspension will remain in effect until the earlier of when the plan sponsor provides benefit improvements in accordance with section 432(e)(9)(E) or when the suspension expires by its own terms. Thus, if a suspension does not expire by its own terms, it continues indefinitely.

Under the statute, a plan will not be liable for any benefit payments not made as a result of a suspension of benefits. All references to suspensions of benefits, increases in benefits, or resummptions of suspended benefits with respect to participants also apply with respect to benefits of beneficiaries or alternative payees of participants. See section 432(e)(9)(B)(iv).

**A. Retiree Representative**

In the case of a plan with 10,000 or more participants, section 432(e)(9)(B)(v) requires the plan sponsor to select a plan participant in pay status to act as a retiree representative. The retiree representative is required to advocate for the interests of the retired and deferred vested participants and beneficiaries of the plan throughout the suspension approval process. The plan must provide for the retiree representative’s reasonable expenses,

<sup>1</sup> Section 201 of MPRA makes parallel amendments to section 305 of ERISA. The Department of the Treasury has interpretive jurisdiction over the subject matter of these provisions under ERISA as well as the Code. See also section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713). Thus, these regulations issued under section 432 of the Code apply as well for purposes of section 305 of ERISA.

including reasonable legal and actuarial support, commensurate with the plan's size and funded status.

#### B. Conditions for Suspensions

Section 432(e)(9)(C) sets forth conditions that must be satisfied before a plan sponsor of a plan in critical and declining status for a plan year may suspend benefits. One condition is that the plan actuary must certify, taking into account the proposed suspension of benefits (and, if applicable, a proposed partition of the plan under section 4233 of ERISA (partition)), that the plan is projected to avoid insolvency within the meaning of section 418E, assuming the suspension of benefits continues until it expires by its own terms or, if no such expiration date is set, indefinitely.

Another condition requires the plan sponsor to determine, in a written record to be maintained throughout the period of the benefit suspension, that although all reasonable measures to avoid insolvency have been taken (and continue to be taken during the period of the benefit suspension), the plan is still projected to become insolvent unless benefits are suspended. In making the determination that all reasonable measures have been taken to avoid insolvency, the plan sponsor may choose to take into account various factors that may include one or more of ten factors identified in the statute. See section 432(e)(9)(C)(ii).

#### C. Limitations on Suspensions

Section 432(e)(9)(D) contains limitations on the benefits that may be suspended, some of which apply to plan participants and beneficiaries on an individual basis and some of which apply on an aggregate basis. Under the statute, an individual's monthly benefit may not be reduced below 110 percent of the monthly benefit that is guaranteed by PBGC under section 4022A of ERISA on the date of the suspension. In addition, no benefits based on disability (as defined under the plan) may be suspended. In the case of a participant or beneficiary who has attained age 75 as of the effective date of a suspension, the statute provides that the suspension may not exceed the applicable percentage of the individual's maximum suspendable benefit (the age-based limitation). The maximum suspendable benefit is the maximum amount of an individual's benefit that would be suspended without regard to the age-based limitation. The applicable percentage is a percentage that is calculated by dividing (i) the number of months during the period that begins with the month after the month in which the suspension is effective and

ends with the month in which that participant or beneficiary attains the age of 80 by (ii) 60 months. Thus, the suspension cannot apply to the benefit of an individual who has attained age 80 as of the end of the month that includes the effective date of the suspension.

Section 432(e)(9)(D) also requires the aggregate benefit suspensions (considered, if applicable, in connection with a partition) to be reasonably estimated to achieve, but not materially exceed, the level that is needed to avoid insolvency. If a suspension of benefits is made in combination with a partition, the statute provides that the suspension may not occur before the effective date of the partition. Under the statute, any suspension of benefits must be equitably distributed across the participant and beneficiary population, taking into account various factors chosen by the plan sponsor that may include one or more of 11 factors identified in the statute. Section 432(e)(9)(D)(vii) provides additional rules that apply to certain plans.

#### D. Benefit Improvements

Section 432(e)(9)(E) sets forth rules relating to benefit improvements made while a suspension of benefits is in effect. Under this provision, a benefit improvement is defined as a resumption of suspended benefits, an increase in benefits, an increase in the rate at which benefits accrue, or an increase in the rate at which benefits become nonforfeitable under the plan.

The statute provides that a plan sponsor may, in its sole discretion, provide benefit improvements while a suspension of benefits is in effect. However, a plan sponsor may not increase plan liabilities by reason of any benefit improvement for any participant or beneficiary who is not in pay status (in other words, those who are not yet receiving benefits, such as active employees or deferred vested employees) unless (1) the benefit improvement is accompanied by an equitable distribution of benefit improvements for those who have begun to receive benefits (typically, retirees), and (2) the plan actuary certifies that, after taking the benefit improvement into account, the plan is projected to avoid insolvency indefinitely. Whether an individual is in pay status for this purpose is generally based on whether the individual's benefits began before the first day of the plan year for which the benefit improvement would take effect.

#### E. Notice of Proposed Suspension

A plan sponsor may not suspend benefits unless notice is provided in

accordance with section 432(e)(9)(F). Under this section, concurrently with an application to suspend benefits under section 432(e)(9)(G), the plan sponsor must give notice to: (1) Plan participants and beneficiaries who may be contacted by reasonable efforts, (2) each employer that has an obligation to contribute (within the meaning of section 4212(a) of ERISA) under the plan, and (3) each employee organization that represents plan participants employed by those employers for purposes of collective bargaining. The notice must contain sufficient information to enable individuals to understand the effect of any suspension of benefits, including an individualized estimate (on an annual or monthly basis) of the effect on each participant or beneficiary. The notice must also contain certain other specified information. The notice must be provided in a form and manner prescribed in guidance issued by the Treasury Department in consultation with PBGC and the Labor Department, written in a manner so as to be understood by the average plan participant, and may be provided in written, electronic, or other appropriate form to the extent it is reasonably accessible to those to whom notice must be furnished.

Any notice provided under section 432(e)(9)(F)(i) will satisfy the requirement for notice of a significant reduction in benefits described in section 4980F. See section 432(e)(9)(F)(iv).

#### F. Approval or Rejection of Proposed Suspension

Section 432(e)(9)(G) describes the process for approval or rejection of a plan sponsor's application for a suspension of benefits. Under the statute, the Treasury Department, in consultation with PBGC and the Labor Department, must approve an application upon finding that the plan is eligible for the suspension and has satisfied the criteria of sections 432(e)(9)(C), (D), (E), and (F). In evaluating whether a plan sponsor has met the criteria in section 432(e)(9)(C)(ii) (a plan sponsor's determination that, although all reasonable measures have been taken, the plan will become insolvent if benefits are not suspended), the plan sponsor's consideration of factors listed in that clause must be reviewed. The statute also requires that the plan sponsor's determinations in an application for a suspension of benefits be accepted unless they are clearly erroneous.

Section 432(e)(9)(G) also requires an application for a suspension of benefits

to be published on the Web site of the Department of the Treasury and requires the Treasury Department to publish a notice in the **Federal Register** within 30 days of receiving a suspension application. The notice must solicit comments from contributing employers, employee organizations, and participants and beneficiaries of the plan for which a suspension application was made, as well as other interested parties.

Within 225 days after an application for a suspension of benefits is submitted, the statute requires the Treasury Department, in consultation with PBGC and the Labor Department, to approve or deny the application. If the plan sponsor is not notified within that 225-day period that it has failed to satisfy one or more applicable requirements, then the application is deemed to be approved. If the application is rejected, then a notice to the plan sponsor must detail the specific reasons for the rejection, including reference to the specific requirement not satisfied. Approval or denial of an application is treated as final agency action for purposes of 5 U.S.C. 704 (that is, the approval or denial is treated as final agency action for purposes of the Administrative Procedure Act, Public Law 79-404 (60 Stat. 237 (1946), as amended (APA)).

#### G. Participant Vote on Proposed Benefit Reduction

If a suspension application is approved, it cannot take effect before a vote of plan participants and beneficiaries on the suspension is conducted. See section 432(e)(9)(H). The vote will be administered by the Treasury Department, in consultation with PBGC and the Labor Department, within 30 days after approval of the suspension application. The plan sponsor is required to provide a ballot for the vote (subject to approval by the Treasury Department, in consultation with PBGC and the Labor Department). The ballot must include certain information specified in the statute. If a majority of plan participants and beneficiaries do not vote to reject the suspension, then the statute requires the Treasury Department, in consultation with PBGC and the Labor Department, to issue a final authorization to suspend benefits within seven days after the vote.

If a majority of plan participants and beneficiaries vote to reject the suspension, then the statute requires the Treasury Department, in consultation with PBGC and the Labor Department, to determine whether the plan is a systemically important plan no later

than 14 days after the results of the vote are certified. A systemically important plan is a plan for which PBGC projects the present value of projected financial assistance payments to exceed \$1.0 billion, as indexed, if suspensions are not implemented.

If a majority of plan participants and beneficiaries vote to reject the suspension and the plan is not a systemically important plan, a final authorization to suspend benefits will not be issued. In such a case, the statute provides that the plan sponsor may submit a new application for approval of a suspension of benefits to the Treasury Department.

If it is determined that the plan is systemically important, then the Participant and Plan Sponsor Advocate selected under section 4004 of ERISA<sup>2</sup> has a 30-day period to submit recommendations to the Treasury Department with respect to the suspension that was rejected by the vote or recommendations for any modifications to that suspension. Even if that suspension was rejected by the vote, the statute requires the Treasury Department to permit the implementation of either: (1) The proposed benefit suspension, or (2) a modification of that suspension made by the Treasury Department in consultation with PBGC and the Labor Department. The Treasury Department must complete this requirement within 90 days after certification of the results of a vote rejecting a suspension for a systemically important plan (and a modification of the suspension by the Treasury Department is permitted only if the plan is projected to avoid insolvency under the modification). In such a case, the statute requires the Treasury Department to issue the final authorization to suspend in sufficient time to allow the suspension or a modified suspension to be implemented by the end of the 90-day period following certification of the results of that vote.

Section 432(e)(9)(I)(i) allows a plan sponsor to challenge a denial of an application for suspension only after the application is denied. Under the statute, an action challenging the approval of a suspension may be brought only following the issuance of a final authorization to suspend. The statute also provides that a court will review an action challenging approval of a suspension of benefits in accordance

with 5 U.S.C. 706 (which sets forth the standard of review applicable for purposes of the APA) and will not grant a temporary injunction with respect to a suspension unless it finds a clear and convincing likelihood that the plaintiff will prevail on the merits. Under section 432(e)(9)(I)(iii), participants and beneficiaries affected by a suspension “shall not have a cause of action under this title.” An action challenging either the approval of a suspension of benefits or the denial of an application for a suspension of benefits may not be brought more than one year after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of the cause of action. See section 432(e)(9)(I)(iv).

#### II. Regulatory and Other Administrative Guidance

On February 18, 2015, the Department of the Treasury issued a Request for Information on Suspensions of Benefits under the Multiemployer Pension Reform Act of 2014 in the **Federal Register** (80 FR 8578) (request for information). The request for information included questions focusing on certain matters to be addressed in guidance implementing section 432(e)(9) and indicated that multiemployer plans should not submit applications for suspensions of benefits prior to a date specified in such future guidance.

On June 19, 2015, the Treasury Department and the IRS published temporary (TD 9723) and proposed regulations (REG-102648-15) under section 432(e)(9) in the **Federal Register** at 80 FR 35207 and 80 FR 35262, respectively (June 2015 regulations). The June 2015 regulations provide guidance regarding section 432(e)(9), setting forth the requirements for a plan sponsor to apply for a suspension of benefits and for the Treasury Department to process such an application. The June 2015 regulations reflect consideration of comments received in response to the request for information. The preamble to the June 2015 temporary regulations states that it is expected that no application proposing a benefit suspension will be approved prior to the issuance of final regulations, and that, if a plan sponsor chooses to submit an application for approval of a proposed benefit suspension before the issuance of final regulations, then the plan sponsor may need to revise the proposed suspension (and potentially the related notices to plan participants) or supplement the application to take into account any differences in the final regulations.

<sup>2</sup> Pursuant to section 4004 of ERISA, the Participant and Plan Sponsor Advocate acts as a liaison between PBGC, sponsors of defined benefit pension plans insured by PBGC, and participants in plans insured by PBGC, and performs related duties.

On June 19, 2015, the IRS also released Rev. Proc. 2015–34, 2015–27 I.R.B. 4. The revenue procedure details application procedures for a proposed suspension of benefits and also contains a model notice under section 432(e)(9)(F).

On September 2, 2015, the Treasury Department and the IRS published temporary (TD 9735) and proposed regulations (REG–123640–15) on the voting provisions under section 432(e)(9)(H) in the **Federal Register** at 80 FR 52972 and 80 FR 53068, respectively (September 2015 regulations). The September 2015 regulations reflect consideration of comments received pursuant to the request for information.

On September 10, 2015, the Treasury Department and the IRS conducted a public hearing on the June 2015 regulations, at which speakers also commented on the September 2015 regulations. A public hearing on the September 2015 regulations was held on December 18, 2015.

On February 11, 2016, the Treasury Department and the IRS published proposed regulations (REG–101701–16) regarding the specific limitation on a suspension of benefits under section 432(e)(9)(D)(vii) in the **Federal Register** at 81 FR 7253 (February 2016 regulations). This specific limitation governs the application of a suspension of benefits under any plan that includes benefits directly attributable to a participant's service with any employer that has, prior to December 16, 2014, withdrawn from the plan in a complete withdrawal, paid its full withdrawal liability, and, pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries equal to any benefits for such participants and beneficiaries reduced as a result of the financial status of the plan. A public hearing on the February 2016 regulations was held on March 22, 2016.

After consideration of the comments received, the provisions of the June 2015 proposed regulations and the September 2015 proposed regulations (collectively, “2015 regulations”) are adopted by this Treasury decision, subject to certain changes that are summarized in this preamble. This Treasury decision also removes the temporary regulations under 432(e)(9) that were published in June 2015 and September 2015. This Treasury decision does not contain final action on the February 2016 regulations. On April 26, 2016 the IRS released Rev. Proc. 2016–27, 2016–19 I.R.B. \_\_\_, which updates the application procedures and model notice set forth in Rev. Proc. 2015–34.

The Treasury Department consulted with PBGC and the Labor Department in developing these regulations and other guidance.

## Explanation of Provisions

### I. Overview

These final regulations provide guidance on requirements under section 432(e)(9) regarding a suspension of benefits under a multiemployer defined benefit plan that is in critical and declining status. Except as otherwise provided, these final regulations adopt the provisions of the 2015 regulations.

### II. General Rules on Suspension of Benefits

These final regulations provide that, subject to section 432(e)(9)(B) through (I), the plan sponsor of a multiemployer plan that is in critical and declining status within the meaning of section 432(b)(6) for a plan year may, by plan amendment, implement a suspension of benefits that the plan sponsor deems appropriate. Such a suspension is permitted notwithstanding the generally applicable anti-cutback provisions of section 411(d)(6). The final regulations clarify that, as amended, the terms of the plan must satisfy the requirements of section 401(a). For example, after the effective date of a plan amendment imposing a suspension of benefits, the plan must satisfy the requirements of section 411 with respect to the accrued benefit as reduced, if applicable, pursuant to that amendment. The plan amendment implementing a suspension of benefits must be adopted in a plan year in which the plan is in critical and declining status.

#### A. Contingent Suspensions

The 2015 regulations provide that once a plan is amended to suspend benefits, the plan may pay or continue to pay a reduced level of benefits pursuant to the suspension only if the terms of the plan are consistent with the requirements of section 432(e)(9) and the regulations. The 2015 regulations state that a plan's terms are consistent with the requirements of section 432(e)(9) even if they provide that, instead of a suspension of benefits occurring in full on a specified effective date, the amount of a suspension will phase in or otherwise change in a definite, pre-determined manner as of a specified future effective date or dates. The 2015 regulations indicate that a plan's terms are inconsistent with the statutory requirements, however, if they provide that the amount of a suspension will change contingent upon the occurrence of any other specified future

event, condition, or development. For example, a plan is not permitted to provide that an additional or larger suspension of benefits is triggered if the plan's funded status deteriorates. Similarly, the 2015 regulations provide that a plan is not permitted to provide that, contingent upon a specified future event, condition, or development, a suspension of benefits will be automatically reduced (except if the plan sponsor fails to make the annual determination that the plan would not be projected to avoid insolvency unless benefits are suspended).

Some commenters objected to the provisions of the 2015 regulations that treat contingencies as inconsistent with the requirements of section 432(e)(9) and asked that certain types of contingencies, such as contingencies based on actuarial gain or loss, be allowed. These commenters assert that permitting these types of contingent suspensions would be consistent with the policy underlying the rule that the aggregate suspension be reasonably estimated to achieve, but not materially exceed, the level necessary to avoid plan insolvency.

Permitting benefits to be reduced or increased on the occurrence of future contingencies, however, would raise a number of difficult challenges in complying with statutory requirements: The additional complexity of the calculations relating to whether the solvency requirements are satisfied and whether the distribution of the suspension is equitable; the inability of the suspension notice to sufficiently inform affected individuals of the actual reduction to their benefits; and the potential that the contingent suspension could effectively result in benefit increases that fail to comply with the statutory requirements relating to benefit increases. Therefore, the final regulations retain the general rule that contingent suspensions are inconsistent with the requirements of section 432(e)(9).

However, individual-level contingencies do not raise the same concerns as other post-suspension contingencies. Accordingly, the final regulations clarify that a suspension can take into account individual-level contingencies (such as retirement, death, or disability) for individuals who have not commenced benefits before the effective date of the suspension. For example, a suspension of benefits can reduce early retirement subsidies with respect to participants who have not commenced benefits before the effective date of the suspension. Without this clarification, this type of reduction could be viewed as impermissible

(because the level of the suspension would be based on whether and when an individual chooses to retire early).

Although the final regulations permit certain individual-level contingencies, the post-suspension terms of the plan must satisfy all of the qualification requirements of section 401(a). Thus, for example, an individual-level, post-suspension contingency that reduces an early retirement subsidy would be permitted, provided that the suspension does not result in an early retirement benefit that is less valuable than the post-suspension accrued benefit.

#### B. Definitions

As under the 2015 regulations, these final regulations apply the section 432(j)(6) definition of a person in pay status under a multiemployer plan. Under that definition, a person is in pay status if, at any time during the current plan year, the person is a participant, beneficiary, or alternate payee under the plan and is paid an early, late, normal, or disability retirement benefit under the plan (or a death benefit under the plan related to a retirement benefit).

These final regulations define the term plan sponsor to mean the association, committee, joint board of trustees, or other similar group of representatives of the parties that establishes or maintains the multiemployer plan. However, in the case of a plan described in section 404(c), or a continuation of such a plan, the term plan sponsor means the association of employers that is the employer settlor of the plan.

In the case of an individual who is receiving benefits when the suspension is implemented, the final regulations provide that the effective date of suspension is the first date as of which any of the individual's benefits are not paid as a result of the suspension.

In the case of an individual who is not receiving benefits as of the date a suspension is implemented, the 2015 regulations define the effective date of suspension as the first date as of which the individual's accrued benefit is reduced as a result of the suspension. In connection with the new provision in the final regulations permitting suspensions with individual-level contingencies, the final regulations provide a revised definition of effective date of suspension that applies with respect to an individual who is not receiving benefits as of the date the suspension is implemented and for whom the suspension reduces benefits that are not accrued benefits. For such an individual, the effective date of suspension is the first date as of which the individual's entitlement to benefits

is reduced as a result of the implementation of the suspension, regardless of whether the individual is eligible to commence benefits at that date. This change to the definition of effective date of suspension will affect situations in which early retirement factors are changed in a manner that reduces the early retirement benefit (independent of any reduction of the accrued benefit) and the final regulations include an example of a suspension that provides for the reduction of an early retirement benefit effective January 1, 2019. In that case, the effective date of the suspension is January 1, 2019, even for a participant who does not commence benefits until a later year.

As under the June 2015 regulations, the final regulations provide that, if a suspension of benefits includes more than one reduction in benefits over time, such that benefits are scheduled to be reduced by an additional amount after benefits are first reduced pursuant to the suspension, then each date as of which benefits are reduced is treated as a separate effective date of the suspension. This requires, for example, that the age-based limitation be separately applied as of the effective date of each reduction under such a phased-in suspension. However, if the effective date of the final scheduled reduction in benefits in a series of reductions pursuant to a phased-in suspension is less than three years after the effective date of the first reduction then, in the interest of avoiding undue administrative complexity, the effective date of the first reduction will be treated as the effective date of all subsequent reductions pursuant to that suspension. For example, if a suspension provides that benefits will be reduced by a specified percentage effective January 1, 2017, by an additional percentage effective January 1, 2018, and by an additional percentage effective January 1, 2019, with no subsequent changes scheduled, it would meet the three-year condition to treat January 1, 2017, as the effective date for all three reductions. However, if the suspension provided for a further reduction effective January 1, 2020, the suspension would not be treated as satisfying the three-year condition and therefore would be treated under the regulations as having four separate effective dates.

The final regulations define the term suspension of benefits to mean the temporary or permanent reduction, pursuant to the terms of the plan, of any current or future payment obligation of the plan with respect to any plan participant. A suspension of benefits can apply with respect to a plan

participant regardless of whether the participant, beneficiary, or alternate payee has commenced receiving benefits before the effective date of the suspension of benefits. If a plan pays a reduced level of benefits pursuant to a suspension of benefits that complies with the requirements of section 432(e)(9), then the plan is not liable for any benefits not paid as a result of the suspension.

A suspension of benefits may be of indefinite duration or may expire as of a certain date, and any expiration date for a suspension of benefits must be specified in the plan amendment implementing the suspension. The final regulations provide that a plan sponsor may amend the plan to eliminate some or all of a suspension of benefits, provided that the amendment satisfies the requirements that apply to benefit improvements under section 432(e)(9)(E) (see section VI of this preamble). The final regulations also provide that, except as otherwise specified, all references to suspensions of benefits, increases in benefits, or resumptions of suspended benefits with respect to participants also apply with respect to benefits of beneficiaries or alternate payees (as defined in section 414(p)(8)) of participants.

#### III. Retiree Representative

The final regulations generally adopt, with some clarifications, the provisions of the 2015 regulations with respect to the retiree representative. The retiree representative, who must be a plan participant in pay status, is selected by the plan sponsor to advocate for the interests of the retired and deferred vested participants and beneficiaries of the plan throughout the suspension approval process.

The final regulations implement the requirement that a retiree representative must be selected for a plan with 10,000 or more participants. For purposes of determining whether a plan has 10,000 or more participants, the final regulations provide that the number of participants is the number reported on the most recently filed Form 5500, "Annual Return/Report of Employee Benefit Plan."<sup>3</sup> The final regulations also provide that the plan sponsor must select the retiree representative at least 60 days before the plan sponsor submits an application to suspend benefits and that the retiree representative must be a plan participant who is in pay status and may or may not be a plan trustee.

<sup>3</sup> On the Form 5500 for the 2015 plan year, this is the total number of participants as of the end of the plan year that is reported on Part II, Line 6f.

In order to increase retiree representation in connection with applications to suspend benefits, the final regulations permit a plan sponsor of a plan that has fewer than 10,000 participants to select a retiree representative in connection with such an application and plan sponsors are encouraged to do so. If a retiree representative is selected for such a plan, the rules that apply to retiree representatives for plans with 10,000 or more participants (other than the rule concerning the size of the plan and the timing of the appointment) will apply.

The final regulations require that, upon request, the plan sponsor must promptly provide the retiree representative with relevant information (such as plan documents and data) that is reasonably necessary to enable the retiree representative to perform the retiree representative's role, which includes, for example, the retiree representative's attendance at trustee meetings at which the suspension design is being developed. This requirement applies both while the suspension is being developed and during the period while the suspension application is pending with the Treasury Department. The final regulations provide for the retiree representative to serve in this role beginning before the plan sponsor submits this application and to continue in this role, at the discretion of the plan sponsor, throughout the entire period of the benefit suspension, rather than only until the completion of the suspension approval process. Such an extension would enable the retiree representative to monitor compliance with the ongoing requirements relating to the suspension, such as the requirement that the plan sponsor make annual determinations that all reasonable measures to avoid insolvency have been taken and continue to be taken but that a suspension is necessary to avoid insolvency, and that the plan sponsor follow the rules relating to benefit improvements.

The final regulations adopt the provision from the 2015 regulations that requires the plan to pay reasonable expenses incurred by the retiree representative, commensurate with the plan's size and funded status, with slight modifications. The expenses that must be paid by the plan include reasonable expenses for legal and actuarial support, which may be obtained to influence the design of a suspension, to analyze a proposed suspension contained in an application, or for other advocacy purposes. Numerous commenters noted the importance of communication between

the retiree representative and retired and deferred vested participants and beneficiaries. In response, the final regulations clarify that the plan must pay other reasonable expenses incurred by the retiree representative, such as any reasonable expenses incurred in communicating with the retired and deferred vested participants and beneficiaries of the plan about the proposed suspension (because communication with these individuals is generally necessary to advocate for their interests). The final regulations include, as an example of a type of expense that the plan must pay, any reasonable expense incurred in communicating with retired and deferred vested participants and beneficiaries of the plan. This clarification was made to reflect that communicating with these individuals is a necessary component of advocating for their interests.

The types of communication that are necessary to enable the retiree representative to advocate for the interests of retired and deferred vested participants and beneficiaries typically include soliciting input directly from these individuals that could be used to influence the design of a suspension before the plan sponsor applies for approval of a suspension. After an application for suspension has been submitted for approval, necessary communication would generally include providing these individuals with additional information regarding the proposed suspension and the suspension approval process so that they can submit comments. Communication also includes meeting with groups of affected individuals (either in person or telephonically), so that the retiree representative can better understand their concerns and the potential effects of a proposed suspension in order to advocate on behalf of the retired and deferred vested participants and beneficiaries when preparing a comment or in recommending that the plan sponsor withdraw the application and submit a revised suspension. To further this communication, the plan sponsor should inform the retiree representative of, and invite the retiree representative to, any meetings between the plan sponsor and the retirees, deferred vested participants and beneficiaries regarding the proposed suspension.

If a retiree representative is unwilling or unable to fulfill his or her obligations, then the retiree representative can be replaced so that the retirees, deferred vested participants and beneficiaries have representation throughout the process.

The final regulations refer to section 432(e)(9)(B)(v)(III) for rules relating to the fiduciary status of a retiree representative, but do not provide additional guidance with respect to this provision.

#### *IV. Conditions for Suspensions*

A plan sponsor of a plan in critical and declining status may suspend benefits only if the actuarial certification requirement in section 432(e)(9)(C)(i) and the plan sponsor determinations requirements in section 432(e)(9)(C)(ii) are satisfied. Under the final regulations, a plan sponsor may not suspend benefits unless the plan sponsor makes initial and annual determinations that the plan is projected to become insolvent unless benefits are suspended, although all reasonable measures to avoid insolvency have been taken. These determinations are based on the non-exclusive list of factors described in section 432(e)(9)(C)(ii).

##### *A. Actuarial Certification*

As under the 2015 regulations, the final regulations provide that the actuarial certification requirement in section 432(e)(9)(C)(i) is satisfied if, taking into account the proposed suspension of benefits (and, if applicable, a proposed partition of the plan), the plan's actuary certifies that the plan is projected to avoid insolvency within the meaning of section 418E,<sup>4</sup> assuming the suspension of benefits continues until it expires by its own terms or, if no such expiration date is set, indefinitely. The final regulations prescribe rules for the comparable requirement that the suspension (in combination with a partition, if applicable) be reasonably estimated to avoid insolvency under section 432(e)(9)(D)(iv).

##### *B. Plan Sponsor Determinations*

###### *1. Initial Plan Sponsor Determinations*

The final regulations adopt, with modifications described herein, the provisions of the 2015 regulations that a plan satisfies the initial plan sponsor determinations requirement only if the plan sponsor determines that: (1) All reasonable measures to avoid insolvency, within the meaning of section 418E, have been taken, and (2) the plan would not be projected to avoid insolvency if no suspension of benefits were applied under the plan.

The final regulations provide that a plan sponsor, in making its

<sup>4</sup> Under section 418E(b)(1), in general, a multiemployer plan is insolvent for a plan year if the plan's available resources are not sufficient to pay plan benefits when due for the plan year.

determination that all reasonable measures to avoid insolvency have been taken, may take into account the non-exclusive list of factors set forth in section 432(e)(9)(C)(ii). In addition, when making the initial determination that the plan would not be projected to avoid insolvency if no suspension of benefits were applied under the plan, the final regulations provide that a plan sponsor may rely on the actuarial certification made pursuant to section 432(b)(3)(A)(i) that the plan is in critical and declining status for the plan year.

## 2. Annual Plan Sponsor Determinations

Under the 2015 regulations, a plan sponsor would satisfy the annual plan sponsor determinations requirement for a plan year only if the plan sponsor determines, no later than the last day of that plan year, that: (1) All reasonable measures to avoid insolvency have been and continue to be taken, and (2) the plan is projected to become insolvent unless the suspension of benefits continues (or another suspension of benefits under section 432(e)(9) is implemented) for the plan. One commenter suggested that the language in the 2015 regulations was not clear as to what should occur in the event a plan's finances worsen significantly after a suspension is implemented, so that even if the maximum permissible suspension were implemented the plan would not be able to avoid insolvency. The commenter presented one potential interpretation, in which the worsened financial situation would prohibit the plan sponsor from making the required annual determination, and, as a result, the suspension could not remain in effect. The commenter observed that it would be illogical to interpret this requirement to mean that a plan sponsor could not meet the required certification in such a case, resulting in an end to the suspension. This was not the intent of the 2015 regulations. Accordingly, the final regulations clarify that the standard for this determination (as well as the initial plan sponsor determination) is whether, absent a suspension of benefits, the plan would not be projected to avoid insolvency.

As under the 2015 regulations, the final regulations require that the projection of the plan's avoidance of insolvency must be made using the standards that apply for purposes of determining whether a suspension is sufficient to avoid insolvency, as described in section V.B.1 of this preamble. The final regulations provide that the plan sponsor must maintain a written record of its annual determinations in order to satisfy the annual plan sponsor determinations

requirement. This written record must be included in an update to the rehabilitation plan (described in § 432(e)(3)), whether or not there is otherwise an update for that year or, if the plan is no longer in critical status, in the documents under which the plan is maintained (so that it is available to plan participants and beneficiaries). The plan sponsor's consideration of factors required for its determination of whether all reasonable measures have been taken must be reflected in that written record.

The final regulations provide that if a plan sponsor fails to satisfy the annual plan sponsor determinations requirement for a plan year (including maintaining the written record), then the suspension of benefits expires as of the first day of the next plan year. For example, if, in a plan year, the plan sponsor is unable to determine that all reasonable measures to avoid insolvency have been taken, then the plan sponsor must take those additional reasonable measures before the end of the plan year (and reflect those measures in the written record accordingly) in order to avoid the expiration of the suspension as of the first day of the next plan year.

If there is favorable actuarial experience, so that the plan could avoid insolvency even if the benefit suspension were reduced (but not eliminated), the plan sponsor may wish to adopt a benefit increase that partially restores suspended benefits in order to share that favorable experience with the participants. Section 432(e)(9)(E) sets forth the requirements for such a partial restoration of suspended benefits and for other benefit improvements. If favorable actuarial experience would allow the plan to avoid insolvency if the benefit suspension were eliminated entirely, the plan sponsor would be unable to make the determination that a suspension is necessary to avoid insolvency. In such a case, the plan sponsor's inability to make the annual plan sponsor determination would require the plan sponsor to eliminate the suspension as of the first day of the next plan year.

## V. Limitations on Suspensions

The final regulations generally adopt the individual and aggregate limitations on a suspension of benefits under section 432(e)(9)(D) as provided under the 2015 regulations, with minor clarifications. The regulations provide that after applying the individual limitations, the overall size and distribution of the suspension is subject to the aggregate limitations.

## A. Individual Limitations on Suspensions

### 1. Guarantee-Based Limitation

The final regulations provide that the monthly benefit payable to a participant, beneficiary, or alternate payee may not be less than 110 percent of the monthly benefit that would be guaranteed by PBGC under section 4022A of ERISA if the plan were to become insolvent as of the effective date of the suspension (the guarantee-based limitation). Under section 4022A(c)(1) of ERISA, that guaranteed amount is a dollar amount multiplied by the participant's years and months of credited service as of the relevant date (in this case, the effective date of the suspension). The dollar amount is 100 percent of the accrual rate up to \$11 per month, plus 75 percent of the lesser of (1) \$33, or (2) the accrual rate, if any, in excess of \$11. The accrual rate is a participant's or beneficiary's monthly benefit (described in section 4022A(c)(2)(A) of ERISA) divided by the participant's years of credited service (described in section 4022A(c)(3) of ERISA) as of the effective date of the suspension. The final regulations include examples demonstrating how the PBGC guarantee is calculated, which reflect PBGC's interpretation of section 4022A of ERISA.

In determining the participant's monthly benefit for purposes of the accrual rate, only nonforfeitable benefits (other than benefits that become nonforfeitable on account of plan termination) are taken into account, pursuant to section 4022A(a) of ERISA. The final regulations treat benefits that are forfeitable on the effective date of a suspension as nonforfeitable, provided the participant is in covered employment on that date and would have a nonforfeitable right to those benefits upon completion of vesting service following that date. For example, if an active participant had only three out of five years of service necessary for the participant's benefit to become 100 percent vested under a plan as of the effective date of a suspension, the participant's accrued benefit will be treated as 100 percent vested as of that date.

### 2. Disability-Based Limitation

The final regulations incorporate the statutory requirement that benefits based on disability as defined under the plan may not be suspended. Like the 2015 regulations, the final regulations provide that the term "benefits based on disability" means the entire amount paid by the plan to a participant pursuant to the participant becoming

disabled, regardless of whether a portion of that amount would have been paid if the participant had not become disabled. For example, assume that a participant with an accrued benefit of \$1,000 per month, payable at age 65, becomes entitled under the plan to a benefit in that amount beginning at age 55 on account of a disability (as defined in the plan) and elects to commence that benefit. Under the plan, absent disability, the participant would have been entitled only to a reduced early retirement benefit of \$600 per month commencing at age 55, but the reduction for early retirement does not apply because the participant has elected to commence a benefit on account of a disability. The participant's entire benefit payment of \$1,000 per month commencing at age 55 is a benefit based on disability, even though the participant would have received a portion of these benefits at retirement regardless of the disability.

The final regulations provide that if a participant begins receiving an auxiliary or other temporary disability benefit and the sole reason the participant ceases receiving that benefit is commencement of retirement benefits, the benefit based on disability after commencement of retirement benefits is the lesser of: (1) The periodic payment the participant was receiving immediately before the participant's retirement benefits commenced, or (2) the periodic payment to the participant of retirement benefits under the plan.

For example, assume that a participant begins receiving a disability benefit under the plan of \$1,000 per month payable at age 55. When the participant attains age 65, the participant's disability benefit is discontinued and the participant elects to commence payment of the participant's accrued benefit in the form of an actuarially equivalent joint and survivor annuity payable in the amount of \$850 per month. Alternatively, if the participant had elected to commence payment of the participant's accrued benefit in the form of a single life annuity, the amount payable would be \$1,000 per month. The benefit based on disability is \$1,000 per month before age 65 and, depending on the participant's election, either \$850 per month or \$1,000 per month beginning at age 65. A suspension of benefits is not permitted to apply to any portion of those benefits at any time.

A number of commenters suggested that benefits based on disability should also include retirement benefits elected by participants who, despite qualifying for benefits based on disability under the plan, elected retirement benefits that

were greater than the disability benefits available under the plan. The final regulations do not adopt this suggestion because the disability-based limitation applies only to benefits based on disability (as defined under the plan). Accordingly, because these individuals did not elect disability benefits under the plan, they are not considered to have benefits based on disability for purposes of the disability-based limitation. Similarly, the beneficiary of an individual who had benefits based on disability is not considered to be receiving benefits based on disability under the plan for purposes of the disability-based limitation. Nonetheless, a plan sponsor is permitted to use a broader definition of disability (or to protect beneficiaries of disabled individuals) when designing a suspension of benefits, provided that the suspension otherwise meets the applicable requirements. The regulations include examples of such suspension designs, including a new example that is discussed in section V.B.4 of this preamble.

### 3. Age-Based Limitation

The final regulations generally adopt the provisions of the 2015 regulations with respect to the age-based limitations with minor clarifications. The final regulations provide that no suspension of benefits is permitted to apply to a participant or beneficiary who has commenced receiving benefits as of the effective date of the suspension and has attained age 80 no later than the end of the month that includes the effective date of the suspension. For example, if a suspension of benefits has an effective date of December 1, 2017, then the suspension cannot apply to the monthly benefit of a retiree who is 79 on December 1, 2017 and who attains age 80 on December 15, 2017. In addition, the final regulations provide that no more than the applicable percentage of the maximum suspendable benefit may be suspended for a participant or beneficiary who has commenced receiving benefits as of the effective date of the suspension and has reached age 75 by the end of the month that includes the effective date of the suspension.

The final regulations provide that the maximum suspendable benefit is the portion of an individual's benefits that would be suspended without regard to the age-based limitation, after the application of the guarantee-based limitation and the disability-based limitation, described earlier in this preamble.

The applicable percentage is the percentage obtained by dividing: (1) The number of months during the period

beginning with the month after the month in which the suspension of benefits is effective and ending with the month during which the participant or beneficiary attains the age of 80, by (2) 60.

The final regulations explain how to apply the age-based limitation if benefits have not commenced to either a participant or beneficiary as of the effective date of the suspension. If the participant is alive on the effective date, the participant is treated as having commenced benefits on the effective date. If the participant is deceased on the effective date, the beneficiary is treated as having commenced benefits on the effective date.

The final regulations provide that if the age-based limitation applies to a participant on the effective date of the suspension then the age-based limitation also applies to the beneficiary of the participant. For purposes of this rule, the age-based limitation applies to the beneficiary based on the age of the participant as of the end of the month that includes the effective date of the suspension.

The final regulations provide that the age-based limitation applies to a suspension of benefits in which an alternate payee has an interest, whether or not the alternate payee has commenced benefits as of the effective date of the suspension. If the alternate payee's right to the suspended benefits derives from a qualified domestic relations order within the meaning of section 414(p)(1)(A) (QDRO) under which the alternate payee shares in each benefit payment but the participant retains the right to choose the time and form of payment with respect to the benefit to which the suspension applies (shared payment QDRO), the final regulations provide that the applicable percentage for the alternate payee is calculated by using the participant's age as of the end of the month that includes the effective date of the suspension. If the alternate payee's right to the suspended benefits derives from a QDRO under which the alternate payee has a separate right to receive a portion of the participant's retirement benefit to be paid at a time and in a form different from that chosen by the participant (separate interest QDRO), the final regulations provide that the applicable percentage for the alternate payee is calculated by substituting the alternate payee's age as of the end of the month that includes the effective date of the suspension for the participant's age.

The provisions of the final regulations regarding the age-based limitation are generally the same as provisions of the 2015 regulations, except that the final

regulations clarify that, with respect to a benefit payable to a beneficiary or alternate payee the relevant date for determining the age of a participant, beneficiary, or alternate payee, as applicable, is the end of the month that includes the effective date of the suspension, rather than the effective date of the suspension.

## B. Aggregate Limitations

### 1. Suspension Necessary To Avoid Insolvency

The final regulations reflect the statutory requirement in section 432(e)(9)(D)(iv) that any suspension of benefits in the aggregate (considered, if applicable, in combination with a partition of the plan) must be at a level that is reasonably estimated to enable the plan to avoid insolvency. With respect to this requirement, the final regulations are the same as the 2015 regulations, with a minor clarification.

The final regulations provide that a suspension of benefits (considered, if applicable, in combination with a partition of the plan) satisfies the requirement that it is at a level that is reasonably estimated to enable the plan to avoid insolvency if: (1) For each plan year throughout an extended period beginning on the first day of the plan year that includes the effective date of the suspension, the plan's solvency ratio is projected on a deterministic basis to be at least 1.0; (2) based on stochastic projections reflecting variance in investment return, the probability that the plan will avoid insolvency throughout the extended period is more than 50 percent; and (3) unless the plan's projected funded percentage at the end of the extended period using the deterministic projection exceeds 100 percent, the projection shows that during each of the last five plan years of that period, neither the plan's solvency ratio nor its available resources is projected to decrease.<sup>5</sup> In the case of a plan that is not large enough to be required to select a retiree representative (that is, a plan with fewer than 10,000 participants), the stochastic projection is not required.

For these purposes, a plan's solvency ratio for a plan year means the ratio of the plan's available resources for the plan year to the scheduled benefit payments under the plan for the plan year. An extended period means a period of at least 30 plan years.

However, in the case of a temporary suspension of benefits that is scheduled to cease as of a date that is more than 25 years after the effective date of the suspension, the extended period must be lengthened so that it ends no earlier than five plan years after the cessation of the suspension.

### 2. Suspension Not Materially in Excess of Level Necessary To Avoid Insolvency

The final regulations provide rules for applying the statutory requirement under section 432(e)(9)(D)(iv) that any suspension of benefits must be at a level that does not materially exceed the level necessary to enable the plan to avoid insolvency. Under the 2015 regulations, a proposed suspension of benefits would satisfy this requirement only if an alternative, similar but smaller, suspension of benefits would not be sufficient to enable the plan to satisfy the requirement that the suspension be at a level that is reasonably estimated to enable the plan to avoid insolvency. This alternative suspension would be one under which the dollar amount of the suspension for each participant and beneficiary is reduced by five percent.

For example, if, under the original proposed suspension, a participant's benefit were reduced by \$1,400, from \$3,000 per month to \$1,600 per month, then the amount of the alternative similar, but smaller suspension would be \$1,330 (\$1,400 minus 5% of \$1,400) and the resulting monthly benefit would be \$1,670 (\$3,000 minus \$1,330). As another example, if, under the original proposed suspension, a participant's benefit were reduced by \$500, from \$3,000 per month to \$2,500 per month, then the amount of the alternative similar, but smaller suspension would be \$475 (\$500 minus 5% of \$500) and the resulting monthly benefit would be \$2,525 (\$3,000 minus \$475).

The use of five percent for this purpose is roughly comparable to the common use in accounting standards of a five-percent threshold for materiality and strikes a balance between two policy concerns raised by commenters. One concern is that, if a suspension ultimately proves larger than necessary to avoid insolvency, then a smaller suspension could have preserved the solvency of the plan while imposing less onerous benefit cuts. Another concern is that, if a suspension proves insufficient to allow the plan to avoid insolvency, then a second suspension may be needed. The margin by which a suspension can exceed the amount necessary to avoid insolvency while not materially exceeding that amount reflects a balancing of these two concerns. Some commenters maintained

that the five-percent margin in the 2015 regulations is too large and would have the effect of permitting excessive suspensions. Other commenters maintained that the five-percent margin is too narrow, especially in the case of a smaller benefit suspension, because a narrow margin increases the risk that actuarial losses will cause a suspension to prove insufficient for the plan to avoid insolvency.

After consideration of these comments, the Treasury Department and the IRS believe that a five percent margin generally strikes a reasonable balance between the competing policy concerns, but that a better balance between these policy concerns is achieved by increasing the margin in the case of a suspension below a certain size. Accordingly, the final regulations modify this standard by adding a floor to the five-percent margin of two percent of the periodic payment determined without regard to the proposed reduction, a change which will increase the margin in the case of a somewhat smaller benefit suspension. Thus, under the final regulations the alternative, similar but smaller suspension that is used for this purpose is one in which the amount of the proposed reduction in the periodic payment (determined after application of the individual limitations) is decreased (but not below zero) by the greater of five percent of the proposed reduction or two percent of the periodic payment determined without regard to the proposed reduction. Applying this standard to the earlier example under which a participant's benefit was reduced by \$500, from \$3,000 per month to \$2,500 per month, then the amount of the alternative, similar but smaller suspension would be \$440 (\$500 minus 2% of \$3,000), rather than \$475 (\$500 minus 5% of \$500), and the resulting monthly benefit would be \$2,560 (\$3,000 minus \$440), rather than \$2,525. Thus, the difference between the monthly benefit under proposed suspension and the monthly benefit under the alternative, similar but smaller suspension would be \$60 (rather than \$25).

In addition, the final regulations clarify that the extended period used to demonstrate that the proposed suspension does not materially exceed the level that is reasonably estimated to enable the plan to avoid insolvency must be no shorter than the period used for the demonstration that the proposed suspension is reasonably estimated to avoid insolvency.

<sup>5</sup> The term "available resources" is defined in section 418E(b)(3). Under that provision, a plan's available resources are generally equal to the beginning-of-year assets adjusted for the expected cash flow for the plan year (other than benefit payments).

### 3. Actuarial Basis for Projections

The final regulations generally adopt the provisions of the 2015 regulations regarding the actuarial basis for projections, with certain clarifications in response to comments. The final regulations require the actuarial projections used for purposes of these requirements to reflect the assumption that the suspension of benefits continues indefinitely (or, if the suspension expires on a specified date by its own terms, until that date). Further, the final regulations provide that the actuary's selection of assumptions about future covered employment and contribution levels (including contribution base units and average contribution rate) is permitted to be based on information provided by the plan sponsor, which must act in good faith in providing the information. Finally, the final regulations provide that, to the extent that an actuarial assumption used for the projections differs from that used to certify whether the plan is in critical and declining status pursuant to section 432(b)(3)(B)(iv), an explanation of the information and analysis that led to the selection of that different assumption must be provided.

The final regulations clarify the standards that apply to actuarial assumptions to be used in actuarial projections. The 2015 regulations require that the actuarial assumptions and methods used for the actuarial projections be reasonable in accordance with the rules of section 431(c)(3). The final regulations replace that reference with a specific requirement that each of the actuarial assumptions and methods used, and the combination of those actuarial assumptions and methods, must be reasonable, taking into account the experience of the plan and reasonable expectations. This standard is similar to the standard under section 431(c)(3) requiring that each of the actuarial assumptions and methods be reasonable and that the combination of those assumptions and methods offer the actuary's best estimate of anticipated experience.

The final regulations also specify that, to be reasonable, the actuarial assumptions and methods must be appropriate for the purpose of the measurement.<sup>6</sup> This means, among other things, that factors specific to the measurements must be taken into

account in selecting the assumptions and methods. These measurements (that is, the cash flow projections) will be used to demonstrate compliance with a requirement that must be satisfied before a plan in critical and declining status is permitted to reduce participant and beneficiary benefits, under circumstances in which the reduction will not automatically be adjusted if actual experience differs from projections. Moreover, such a plan's asset levels typically are projected to decline during the earlier years of the projections, even after reflecting the proposed benefit suspension. For example, actuarial assumptions for the rate of investment return normally would not be appropriate for the purpose of projecting cash flows in order to estimate whether a plan in critical and declining status will avoid insolvency if those assumptions were developed in a manner that fails to take into account the anticipated pattern and magnitude of changes in the level of plan assets during the projection period. This is because the use of an investment return assumption derived from a time-weighted average of the expected rates of return for the entire projection period would not result in an appropriate projection of the expected dollar amount of investment return over that period to the extent anticipated rates of return are expected to be smaller or larger during the portion of that period when the level of plan assets is expected to be relatively higher. Thus, it would not be appropriate to develop an actuarial assumption for the rate of investment return based solely on long-term expectations without taking these differences into account.<sup>7</sup>

Like the 2015 regulations, the final regulations require cash flow projections to be based on the fair market value of assets as of the end of the calendar quarter immediately preceding the date the application is submitted, projected benefit payments that are consistent with the projected benefit payments under the most recent actuarial valuation, and appropriate adjustments to projected benefit payments to include benefits for new hires that are reflected in the projected contribution amounts. The final regulations provide that the projected cash flows relating to contributions, withdrawal liability payments, and

benefit payments must also be adjusted to reflect significant events that occurred after the most recent actuarial valuation. For this purpose, significant events include: (1) A plan merger or transfer; (2) the withdrawal or the addition of employers that changed projected cash flows relating to contributions, withdrawal liability payments, or benefit payments by more than five percent; (3) a plan amendment, a change in a collective bargaining agreement, or a change in a rehabilitation plan that changed projected cash flows relating to contributions, withdrawal liability, or benefit payments by more than five percent; or (4) any other event or trend that resulted in a material change in those projected cash flows.

A number of comments were received regarding the actuarial projections required as part of the application for suspension. As described subsequently, these projections include not only a demonstration that the plan would avoid insolvency but also a demonstration of what would happen if the plan were to have less favorable experience, such as a lower investment return.

Some commenters thought too much information was required, resulting in the expenditure of excessive time and plan resources. Others thought too little information was required and suggested requiring additional information (such as the extent to which contributions are used to pay for past benefits rather than for current accruals). The Treasury Department and the IRS have reviewed these comments and have concluded that this information is valuable to the Treasury Department for purposes of evaluating whether a suspension is reasonably estimated to enable the plan to avoid insolvency. This information is also informative for participants and beneficiaries in deciding whether to vote to accept or reject the suspension.<sup>8</sup> The value of this information to the Treasury Department and to participants and beneficiaries outweighs the burden of providing this information. Accordingly, no changes have been made to the regulations with respect to the scope of the required actuarial projections.

Under the final regulations, an application for suspension must include a disclosure of the total contributions, total contribution base units and average contribution rate, withdrawal liability payments, and the rate of return on plan

<sup>6</sup> Actuarial Standards of Practice (ASOPs) are issued by the Actuarial Standards Board and are available at <http://www.actuarialstandardsboard.org/standards-of-practice>. Certain ASOPs, including ASOPs Nos. 4, 27, and 35, are relevant to the actuary's selection of assumptions.

<sup>7</sup> Methods for developing an assumption for the rate of return that would be appropriate for purposes of the measurement include: (1) Using a select and ultimate assumption that includes different assumptions of investment returns for different portions of the projection period, or (2) developing a return assumption based on dollar-weighted returns over the projection period.

<sup>8</sup> For example, a projection demonstrating that the plan would not avoid insolvency if it were to experience a lower rate of return helps participants to understand that the actuarial projections in the application are subject to uncertainty.

assets for each of the 10 plan years preceding the plan year in which the application is submitted. In addition, an application must include an illustration, prepared on a deterministic basis, of the projected value of plan assets, the accrued liability of the plan (calculated using the unit credit funding method), and the funded percentage for each year in the extended period.

The final regulations also require that an application include deterministic projections of the plan's solvency ratio over the extended period using two alternative assumptions that the plan's future rate of return was lower than the assumed rate of return by (1) one percentage point and (2) two percentage points. In addition, the final regulations adopt the provisions from the 2015 regulations that provide that an application must include deterministic projections of the plan's solvency ratio over the extended period using two alternative assumptions for future contribution base units. These alternatives are that future contribution base units: (1) Continue under the same trend as the plan experienced over the past 10 years, and (2) continue under that 10-year trend reduced by one percentage point. However, with respect to calculating the sensitivity of actuarial projections to the assumptions of future contribution base units, the final regulations clarify that it is permissible for the projections to be made without reflecting any adjustments to the projected benefit payments that result from those alternative assumptions regarding future contribution base units.

#### 4. Equitable Distribution of Suspension

The rules under the final regulations regarding the equitable distribution requirement are generally the same as the rules under the 2015 regulations. The final regulations require any suspension of benefits to be equitably distributed across the participant and beneficiary population. If a suspension of benefits provides for different treatment for different participants and beneficiaries, then the suspension of benefits is equitably distributed across the participant and beneficiary population only if: (1) Under the suspension, the participants and beneficiaries are divided into separate categories or groups that are defined by the consistent treatment of individuals within each separate category or group; (2) any difference in the treatment under the suspension among the different categories or groups is based on relevant factors reasonably selected by the plan sponsor; and (3) any such difference in treatment is based on a reasonable application of those relevant factors.

With respect to a reasonable application of the relevant factors, the final regulations provide that it would be unreasonable to apply a factor or factors in a manner that is inconsistent with the protections provided by the individual limitations under section 432(e)(9)(D), such as protections for older individuals or individuals with benefits that are closer to the PBGC guarantee level.

The final regulations contain new rules to clarify when different groups of participants and beneficiaries are treated as separate categories or groups for purposes of applying the equitable distribution requirement in the case of a proposed suspension of benefits under which an individual's benefits after suspension are calculated under a new benefit formula (rather than by reference to an individual's benefits before suspension). In this case, the evaluation of whether the proposed suspension is equitably distributed across the participant and beneficiary population is based on a comparison of an individual's pre-suspension benefit to the individual's post-suspension benefit (determined without regard to the application of the individual limitations). Accordingly, all individuals whose pre-suspension benefits are determined under a uniform pre-suspension benefit formula and whose post-suspension benefits are determined under a different uniform post-suspension benefit formula are treated as a single group. The final regulations clarify the application of this rule in the case of different pre-suspension benefit formulas with respect to different plan years. In addition, the final regulations clarify that two individuals are not treated as having different pre-suspension or post-suspension benefit formulas merely because, as a result of the application of a uniform set of early retirement factors, their benefits differ because of retirement at different ages.

The final regulations include a number of examples that illustrate the equitable distribution rules, most of which were included in the 2015 regulations. One new example illustrates that plan sponsors may consider factors other than the statutory factors in determining whether a distribution of the suspension is equitable, provided that the factor is consistent with the general conditions and limitations required for a suspension to satisfy section 432(e)(9).<sup>9</sup> Under this example, a plan sponsor

applies a smaller reduction to individuals who are receiving disability benefits under the Social Security Act (even though they are not receiving benefits based on disability under the plan) than to similarly situated individuals. The example concludes that, under the facts, the suspension of benefits is equitably distributed. Although this example illustrates a suspension under which individuals receiving Social Security disability benefits receive favorable treatment (which is a standard that is easily administrable), a suspension could instead be designed using another reasonable definition of disability for this purpose.

#### 5. Specific Limitation on Suspension for Certain Plans

The final regulations reserve a paragraph for rules relating to the application of section 432(e)(9)(D)(vii), which contains a specific limitation on how a suspension of benefits must be applied under a plan that includes benefits that are directly attributable to a participant's service with any employer that has, prior to December 16, 2014, withdrawn from the plan in a complete withdrawal under section 4203 of ERISA, paid the full amount of the employer's withdrawal liability under section 4201(b)(1) of ERISA or an agreement with the plan, and, pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries of the plan under a separate, single-employer plan sponsored by the employer, in an amount equal to any amount of benefits for these participants and beneficiaries reduced as a result of the financial status of the plan. The Treasury Department and the IRS expect to adopt final regulations under section 432(e)(9)(D)(vii) after consideration of comments received in response to the 2016 regulations and the public hearing on those regulations.

#### VI. Benefit Improvements

The final regulations generally adopt the provisions set forth in the 2015 regulations for the application of section 432(e)(9)(E), regarding benefit improvements. Under the final regulations, a plan satisfies the criteria in section 432(e)(9)(E) only if, during the period that any suspension of benefits remains in effect, the plan sponsor does not implement any benefit improvement except as provided in the final regulations.

The final regulations define the term benefit improvement to mean, with respect to a plan, a resumption of suspended benefits, an increase in

<sup>9</sup> Thus, a suspension is permitted to provide for different treatment of participants whose employers are in different withdrawal liability pools that have been approved by PBGC.

benefits, an increase in the rate at which benefits accrue, or an increase in the rate at which benefits become nonforfeitable under the plan. In the case of a suspension of benefits that expires as of a date that is specified in the original plan amendment providing for the suspension, the resumption of benefits solely from the expiration of that period is not treated as a benefit improvement.

#### A. Limitations on Benefit Increases for Those Not in Pay Status

The final regulations provide that, during the period any suspension of benefits under a plan remains in effect, the plan sponsor may not increase the liabilities of the plan by reason of any benefit improvement for any participant or beneficiary who was not in pay status by the first day of the plan year for which the benefit improvement takes effect, unless several conditions are satisfied.

The final regulations include conditions that must be satisfied for the benefit improvement to take effect. The final regulations require that the present value of the total liabilities for a benefit improvement for participants and beneficiaries in pay status (that is, those whose benefit commencement dates occurred before the first day of the plan year for which the benefit improvement takes effect) is not less than the present value of the total liabilities for a benefit improvement for participants and beneficiaries who were not in pay status by that date. For this purpose, the final regulations provide that the present value is the present value as of the first day of the plan year in which the benefit improvement is proposed to take effect and clarify that the actuarial assumptions and methods used for the actuarial projections that are required must each be reasonable, and the combination of the actuarial assumptions and methods must be reasonable, taking into account the experience of the plan and reasonable expectations. In addition, the final regulations clarify that, in the case of a benefit increase that is an increase in the rate of future accrual, the calculation of present value of the liabilities for the benefit improvements must take into account the increase in accruals for current participants for all future years.

As under the 2015 regulations, the final regulations require that the plan sponsor must also equitably distribute the benefit improvement among participants and beneficiaries whose benefit commencement dates occurred before the first day of the plan year in which the benefit improvement is proposed to take effect. The evaluation

of whether a benefit improvement is equitably distributed must take into account the factors relevant to whether a suspension of benefits is equitably distributed, described elsewhere in this preamble, and the extent to which the benefits of the participants and beneficiaries were suspended.

Pursuant to section 432(e)(9)(E)(i)(II), the final regulations require the plan actuary to certify that, after taking into account the benefit improvement, the plan is projected to avoid insolvency indefinitely. The final regulations require that this certification be made using the standards that apply for purposes of determining whether a suspension is sufficient to avoid insolvency that are described in this preamble.

The final regulations provide that these limitations do not apply to a resumption of suspended benefits or plan amendment that increases liabilities with respect to participants and beneficiaries not in pay status by the first day of the plan year in which the benefit improvement took effect that: (1) The Treasury Department, in consultation with PBGC and the Labor Department, determines to be reasonable and which provides for only *de minimis* increases in plan liabilities, or (2) is required as a condition of qualification under section 401 or to comply with other applicable law, as determined by the Treasury Department.

#### B. Limitations on Benefit Increases for Those in Pay Status

Under final regulations, as under the 2015 regulations, the plan sponsor may increase liabilities of the plan by eliminating some or all of the suspension that applies solely to participants and beneficiaries in pay status at the time of the resumption, provided that the plan sponsor equitably distributes the value of those resumed benefits among participants and beneficiaries in pay status, taking into account factors relevant to whether a suspension of benefits is equitably distributed. Such a resumption of benefits is not subject to the limitations on a benefit improvement under section 432(f) (relating to restrictions on benefit increases under plans in critical status).

#### C. Other Limitations on Benefit Increases

The final regulations provide that the limitations on benefit improvements generally apply in addition to other limitations on benefit increases that apply to a plan. These limitations on benefit improvements are in addition to the limitations in section 432(f) and any other applicable limitations on increases

in benefits imposed on a plan. These limitations on benefit improvements do not apply in the case of benefits paid following the scheduled expiration of a temporary suspension of benefits.

One commenter asked that benefit improvements under other plans be treated in the same manner as benefit improvements under the plan at issue for purposes of satisfying the requirement that retirees be given at least as much as active participants with respect to benefit improvements. Such a requirement would not be consistent with the terms of section 432(e)(9)(E), and, therefore, the final regulations do not adopt this suggestion. However, any actions that increase liabilities with respect to a group or groups of individuals subject to the suspension, even if under another plan, would result in a use of resources that must be taken into account in the annual plan sponsor determination of whether all reasonable measures have been and continue to be taken to avoid insolvency.

#### VII. Notice of Proposed Suspension

Section 432(e)(9)(F)(iii) states that notice must be provided in a form and manner prescribed in guidance and that notice may be provided in written, electronic, or other appropriate form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided.

The final regulations prescribe rules implementing the statutory notice requirements in section 432(e)(9)(F) that are generally the same as the rules set forth in the 2015 regulations. The final regulations require the plan sponsor to provide notice of a proposed suspension to: (i) All plan participants, beneficiaries of deceased participants, and alternate payees (regardless of whether their benefits are proposed to be suspended), except those who cannot be contacted by reasonable efforts; (ii) each employer that has an obligation to contribute (within the meaning of section 4212(a) of ERISA) under the plan; and (iii) each employee organization that, for purposes of collective bargaining, represents plan participants employed by such an employer.

The 2015 regulations contain two examples illustrating the efforts that constitute reasonable efforts to contact individuals for purposes of this notice requirement. In response to comments, these examples have been modified in the final regulations to describe in more detail the steps taken to locate participants whose notices were returned as undeliverable. These steps include contacting administrators of any other employee benefit plans (such as, to the extent such contact is permitted

under applicable law, the administrators of a health fund or an apprenticeship training fund) for contact information regarding a missing individual. As in the 2015 regulations, these examples demonstrate that it is not sufficient to merely send notices to the individuals' last known mailing addresses.

The final regulations state that, to satisfy the statutory requirement that the notice contain sufficient information to enable plan participants and beneficiaries to understand the effect of the suspension of benefits, the notice must contain the following items:

- An individualized estimate, on an annual or monthly basis, of the effect of the suspension on the participant or beneficiary. However, to the extent it is not possible to provide an individualized estimate on an annual or monthly basis of the quantitative effect of the suspension on the participant or beneficiary, such as in the case of a suspension that affects the payment of a future cost-of-living adjustment, that effect may be reflected in a narrative description;

- A statement that the plan sponsor has determined that the plan will become insolvent unless the proposed suspension (and, if applicable, the proposed partition) takes effect, and the year in which insolvency is projected to occur without a suspension of benefits (and, if applicable, a proposed partition);

- A statement that insolvency of the plan could result in benefits lower than benefits paid under the proposed suspension and a description of the projected benefit payments upon insolvency;

- A description of the proposed suspension and its effect, including a description of the different categories or groups affected by the suspension, how those categories or groups are defined, and the formula that is used to calculate the amount of the proposed suspension for individuals in each category or group;

- A description of the effect of the proposed suspension on the plan's projected insolvency;

- A description of whether the suspension will remain in effect indefinitely or the date the suspension will expire if it will expire by its own terms; and

- A statement describing the right to vote on the suspension application.

The final regulations provide that the notice of proposed suspension may not include false or misleading information (or omit information so as to cause the information provided to be misleading). The notice is permitted to include additional information, including

information relating to an application for partition under section 4233 of ERISA, provided that it satisfies the requirement to not provide false or misleading information.

The notice of proposed suspension must be written in a manner so as to be understood by the average plan participant.<sup>10</sup> The regulations provide that the Treasury Department will provide a model notice. The use of the model notice will satisfy the content requirement and the readability requirement with respect to the language provided in the model.

The final regulations provide that notice may be provided in writing. It may also be provided in electronic form to the extent that the form is reasonably accessible to persons to whom the notice is required to be provided. Permissible electronic methods include those permitted under regulations of the Department of Labor at 29 CFR 2520.104b-1(c) and those described at § 54.4980F-1, Q&A-13(c) of the Excise Tax Regulations.

Section 432(e)(9)(F) provides that the notice of proposed suspension must be given "concurrently" with the submission of an application to the Treasury Department, but does not specify a precise timeframe for satisfying this requirement. An interpretation that "concurrently" means either simultaneously or on the same day was rejected because it would require the difficult synchronization of the plan sponsor's electronic submission of its application and its giving of notice in written and/or in electronic form. As described in section VIII of this preamble, the final regulations require a plan sponsor to submit its application electronically, but, as described previously in this section of the preamble, the final regulations also allow a plan sponsor to give notice by mail. Therefore, the final regulations interpret "concurrently" to permit the sponsor to provide written notice a few days earlier than the electronic submission of the application (in order for the mailed notice and application to be received on or about the same date). The final regulations thus permit a plan sponsor to give notice no earlier than four business days before the submission of its application.

The final regulations also provide that a plan sponsor is permitted to give written notice no later than two business days after the Treasury Department notifies the plan sponsor that it has submitted a complete

application. This allows a plan sponsor a maximum of four business days following its submission of an application to provide the required notices. This four-business-day period of time enables the Treasury Department to make a preliminary completeness check of the application during the first two business days, and the plan sponsor two business days thereafter to give the required notices.<sup>11</sup> This approach will help participants by minimizing the risk of confusion and plan expense. For example, if a plan sponsor submits an incomplete application, compiles the additional information, and then finds the individualized estimates that the plan sponsor already gave to be inaccurate (or simply takes too long to compile the additional information), the plan sponsor would have to re-send the notices, increasing the likelihood that the notice would not be understood by the average plan participant as a result of receiving two different notices, each with a different individualized estimate. The Treasury Department encourages plan sponsors to delay giving notice until after the Treasury Department provides notification that the application is complete. If additional individuals who are entitled to notice are located after the deadline for providing notice then the plan sponsor must give those newly located individuals notice as soon as practicable after they are located.

In accordance with section 432(e)(9)(F)(iv), the final regulations provide that a notice of proposed suspension satisfies the requirement for notice of a significant reduction in benefits described in section 4980F that would otherwise be required as a result of that suspension of benefits. To the extent that other reductions accompany a suspension of benefits, such as a reduction in the future accrual rate described in section 4980F for active participants or a reduction in adjustable benefits under section 432(e)(8), notice that satisfies the requirements (including the applicable timing requirements) of section 4980F or section 432(e)(8), as applicable, must be provided.

#### *VIII. Approval or Denial of an Application for Suspension of Benefits*

The final regulations generally adopt the provisions of the 2015 regulations under which the plan sponsor of a plan in critical and declining status for a plan year that seeks to suspend benefits must submit an application for approval of the proposed suspension of benefits to

<sup>10</sup> See 29 CFR 2520.102-2 of the Department of Labor regulations for rules under a similar standard applicable to summary plan descriptions.

<sup>11</sup> The completeness check is described in section VIII of this preamble.

the Treasury Department. The Treasury Department, in consultation with PBGC and the Labor Department, will approve a complete application upon finding that: (1) The plan is eligible for the suspension; (2) the plan actuary and plan sponsor have satisfied the requirements of section 432(e)(9)(C), (E), and (F); and (3) the design of the suspension satisfies the criteria of section 432(e)(9)(D). The Treasury Department's approval of the design of the suspension of benefits does not constitute approval of any individual benefit calculation for any participant or beneficiary.

The final regulations provide that additional guidance that may be necessary or appropriate with respect to applications, including procedures for submitting applications and the information required to be included in a complete application, may be issued in the form of revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin. The guidelines and procedures for submitting an application that were set forth in Rev. Proc. 2015-34 have been updated in Rev. Proc. 2016-xx.

The final regulations provide that a complete application will be deemed approved unless, within 225 days after a complete application is received, the Treasury Department notifies the plan sponsor that its application does not satisfy one or more of the requirements for approval. The final regulations provide that, if necessary under the circumstances, the Treasury Department and the plan sponsor may mutually agree in writing to stay the 225-day period. It is expected that any such agreement would be entered into only in unusual circumstances.

The final regulations provide, as required by section 432(e)(9)(G)(iv), that, in evaluating whether the plan sponsor has satisfied the condition (in section 432(e)(9)(C)(ii)) that it determine that all reasonable measures to avoid insolvency within the meaning of section 418E have been taken, the Treasury Department, in consultation with PBGC and the Labor Department, will review the plan sponsor's consideration of each of the factors enumerated in section 432(e)(9)(C)(ii) and each other factor it took into account in making that determination. The final regulations do not require the plan sponsor to take any particular measure or measures to avoid insolvency but do require, in the aggregate, that the plan sponsor take all reasonable measures to avoid insolvency. As required by section 432(e)(9)(G)(v), in evaluating a plan sponsor's application, the Treasury

Department will accept the plan sponsor's determinations under section 432(e)(9)(C)(ii), unless the Treasury Department concludes, in consultation with PBGC and the Labor Department, that the determinations were clearly erroneous. This statutory structure reflects the view that particular measures to avoid insolvency may be inappropriate for some plans and requires the Treasury Department to review the plan sponsor's consideration of the appropriateness of each of the statutory factors, but recognizes that the plan sponsor is generally in a better position than the Treasury Department to determine the most effective measures that a particular plan should take to avoid insolvency.

The final regulations provide that an application to suspend benefits will not be approved unless the plan sponsor certifies that, if it receives final authorization to suspend benefits, chooses to implement the suspension, and adopts a plan amendment to implement the suspension, it will timely amend the plan to provide that: (1) The suspension of benefits will cease as of the first day of the first plan year following the first plan year in which the plan sponsor fails to make the annual determinations in section 432(e)(9)(C)(ii), and (2) any future benefit improvement must satisfy the section 432(e)(9)(E) rules for benefit improvements.

An application must be submitted electronically in a searchable format. The final regulations provide that, after receiving a submission, the plan sponsor will be notified within two business days whether the submission constitutes a complete application. If the submission is a complete application, the application will be treated as submitted on the date it was originally submitted to the Treasury Department. If a submission is incomplete, the notification will inform the plan sponsor of the information that is needed to complete the submission and give the plan sponsor a reasonable opportunity to submit a complete application. In such a case, the complete application will be treated as submitted on the date the additional information needed to complete the application is submitted to the Treasury Department.

The final regulations provide that in the case of a plan sponsor that is not submitting an application for suspension in combination with an application to PBGC for a plan partition, the application for suspension generally will not be accepted unless the proposed effective date of the suspension is at least nine months after the date on which the application is

submitted. However, in appropriate circumstances, an earlier effective date may be permitted. Appropriate circumstances could include an application for a proposed suspension that is a revision of a previously proposed suspension.

Some commenters asserted that an earlier effective date of a suspension should be permitted because the size of the benefit cuts pursuant to the suspension might be smaller with an earlier effective date. The purpose of the general nine month requirement is to ensure adequate time to review the proposed suspension without a need to delay the effective date of the proposed suspension. Deferring the original effective date could have other repercussions on the proposed suspension, including confusion for plan participants and beneficiaries. Furthermore, deferring the effective date would change the economics of the suspension. For example, it could result in the application of the age-based limitation to additional participants. This in turn could lead to greater reductions in the benefits of other individuals in order to satisfy the requirement that the suspension, in the aggregate, be reasonably estimated to achieve, but not materially exceed, the level necessary to avoid insolvency. Accordingly, no change has been made in the final regulations to this provision.

In the case of an application for suspension in combination with an application for partition, the impact of a delayed effective date for the suspension would be the potential that PBGC's ability to provide the plan with sufficient financial assistance to keep the plan solvent would be impaired (rather than a redesign of the suspension). Accordingly, the final regulations do not require the proposed effective date of such a suspension to be at least nine months after the date on which the application is submitted.

The final regulations provide that, in any case in which a suspension of benefits with respect to a plan is made in combination with a partition of the plan under section 4233 of ERISA, the suspension of benefits is not permitted to take effect prior to the effective date of the partition. This requirement will not be satisfied if the partition order under section 4233 of ERISA has not been provided to the Treasury Department by the last day of the 225-day review period described in section 432(e)(9)(G)(iii), after which deemed approval of the suspension would occur. The final regulations clarify that a conditional approval by PBGC of a partition application that is conditioned only on the Treasury Department's

issuing a final authorization to suspend is treated as a partition order.

The final regulations generally adopt other provisions from the 2015 regulations, with respect to the application process. The final regulations provide that, no later than 30 days after receiving a complete application, the application will be published on the Web site of the Department of the Treasury, and the Treasury Department will publish a notice in the **Federal Register** soliciting comments from contributing employers, employee organizations, and participants and beneficiaries of the plan for which an application was made, and other interested parties. In addition, the final regulations provide that the notice soliciting comments will generally request that comments be submitted no later than 45 days after publication of that notice in the **Federal Register**, but the notice may specify a different deadline for comments in appropriate circumstances.

(Circumstances under which a shorter comment period may be appropriate include the receipt of an application for a proposed suspension that is a revision of a previously proposed suspension.) Comments received in response to such a solicitation will be made publicly available.

The final regulations include a new rule that, in appropriate circumstances, the Treasury Department may permit a plan sponsor that has withdrawn an application to submit a revised application for suspension that will be subject to a different review process (referred to in the regulations as the resubmission review process). The Treasury Department will follow the same procedures and apply the same standards in the resubmission review process as in the review of any other application, except: (1) The revised application would be permitted to propose an effective date of the suspension that is less than nine months after the revised application is submitted; (2) the individual and aggregate limitations under section 432(e)(9)(D) may be applied using the same actuarial data (including the same fair market value of the plan assets) as was used in the initial application; and (3) the plan sponsor would be permitted to provide a simplified version of the notice of the revised application to any individual for whom the amount and timing of the proposed suspension under the revised application are the same as under the withdrawn application.

Whether to make the resubmission review process available for a particular application is within the Treasury

Department's discretion, in consultation with PBGC and the Labor Department.

In determining whether there are appropriate circumstances that warrant the resubmission review process, the Treasury Department will, for example, evaluate whether such resubmission review would enable it to make significant use of its prior analysis of the withdrawn application. Specifically, the Treasury Department expects to take into consideration one or more factors, including: (1) The extent to which the Treasury Department, in consultation with PBGC and the Labor Department, had evaluated the application prior to withdrawal; (2) the amount of time that has or will have elapsed since the submission of the withdrawn application; and (3) the extent to which the experience of the plan has been different than expected since the submission of the withdrawn application, including the extent of changes in the fair market value of plan assets, changes in the number of disabled participants (as defined under the plan), or withdrawals or bankruptcy proceedings filed by employers contributing to the plan.

As under the 2015 regulations, the final regulations provide that if the Treasury Department denies a plan sponsor's application, the notification of the denial will detail the specific reasons for the denial, including reference to the specific requirement not satisfied. If the Treasury Department approves a plan sponsor's application and expects that the plan is a systemically important plan, then the Treasury Department will notify the plan sponsor of that expectation and that the plan sponsor will be required to provide individual participant data and actuarial analysis upon request. This information would be used in the event the vote results in the rejection of the suspension and would assist the Treasury Department in determining whether to permit an implementation of the rejected suspension or a modification of that suspension.

The final regulations provide that the Secretary of the Treasury may appoint a Special Master for purposes of section 432(e)(9). If a Special Master is appointed, the Special Master will be an employee of the Department of the Treasury, will coordinate the implementation of the regulations and the review of applications for the suspension of benefits and other appropriate documents, and will provide recommendations to the Secretary of the Treasury with respect to decisions required under these regulations.

## *IX. Participant Vote on Proposed Benefit Reduction*

A participant vote requires the completion of three steps. First, a package of ballot materials is distributed to eligible voters. Second, the eligible voters cast their votes and the votes are collected and tabulated. Third, the Treasury Department (in consultation with PBGC and the Labor Department) determines whether a majority of the eligible voters has voted to reject the proposed suspension.

### *A. Eligible Voters and Voting Roster*

The 2015 regulations define the term "eligible voters" as all plan participants and all beneficiaries of deceased participants. Some commenters noted that the reference to participants in this provision could be interpreted as referring only to active participants. Accordingly, these final regulations clarify that eligible voters include terminated vested participants and retirees (but not alternate payees).

These final regulations add the term "voting roster" to describe the list of eligible voters to whom the ballot must be sent. The plan sponsor must prepare the voting roster that includes those eligible voters to whom the notices were sent. If there is a plan participant or beneficiary who did not receive a notice but who is subsequently located by the plan sponsor, the final regulations require that individual to be included on the voting roster. Similarly, if an individual becomes a plan participant after the date the notices were sent, then the individual must be included on the voting roster. If a plan sponsor learns that an eligible voter has died, then that deceased individual must not be included on the voting roster (but if that participant has a beneficiary entitled to benefits under the plan, the beneficiary must be included on the roster).

### *B. Service Provider May Be Designated*

As under the 2015 regulations, these final regulations provide that the Treasury Department is permitted to designate a service provider or service providers to facilitate the administration of the vote. The service provider may assist in the steps of distributing the ballot package to eligible voters and collecting and tabulating the votes. If a service provider is designated to collect and tabulate votes, then the service provider will provide the Treasury Department with the report of the results of the vote, which includes an accounting of the number of eligible voters who voted, the number of eligible voters who voted in support of and to

reject the suspension, and certain other information.

#### C. Ballots and Other Plan Sponsor Communications

These final regulations set forth rules regarding the ballot package that is sent to eligible voters and the plan sponsor's responsibilities relating to ballots and related communications to participants and beneficiaries. The final regulations provide that the ballot must be approved by the Treasury Department, in consultation with PBGC and the Labor Department, and that the ballot must be written in a manner that can be readily understood by the average plan participant and may not include any false or misleading information. Under the final regulations, the ballot package sent to eligible voters includes the approved ballot and a voter identification code for each eligible voter. The voter identification code, which is assigned by the Treasury Department or a designated service provider, is intended to ensure the validity of the vote while maintaining the eligible voters' privacy in the voting process.

These final regulations provide guidance on the plan sponsor's statutory requirement to provide a ballot. Because the ballot for each eligible voter is accompanied by a voter identification code, the plan sponsor cannot directly distribute the ballots. Instead, the plan sponsor is responsible for furnishing the voting roster so that the Treasury Department or its designated service provider can distribute the ballots on the plan sponsor's behalf. For each eligible voter on the voting roster, the plan sponsor must include the last known mailing address (except with respect to those eligible voters for whom the last known mailing address is known to be incorrect). The plan sponsor must also provide a list of eligible voters whom the plan sponsor has been unable to locate using reasonable efforts. In addition, the plan sponsor must furnish current electronic mailing addresses for certain eligible voters (that is, those who received the notice of the proposed suspension under section 432(e)(9)(F) in electronic form and those who regularly receive plan-related electronic communications from the plan sponsor). The plan sponsor must also furnish the individualized estimates provided to eligible voters as part of the earlier notices described in section 432(e)(9)(F) (or, if an individualized estimate is no longer accurate for an eligible voter, a corrected version of that estimate) so that an individualized estimate can be included with the ballot for each

eligible voter. These final regulations add a requirement for the plan sponsor to provide plan information (such as participant identification codes used by the plan) to enable the Treasury Department to verify the identity of each eligible voter, in order to ensure the integrity of the voting process. These materials must be provided no later than seven days after the date the Treasury Department has approved an application for a suspension of benefits.

Section 432(e)(9)(H)(iii) requires a plan sponsor to provide a ballot. These final regulations adopt the interpretation set forth in the 2015 regulations that, under this statutory requirement, the plan sponsor is responsible for the costs of providing the ballot package to eligible voters, including the costs associated with printing, assembling, and mailing those ballot packages.

The final regulations provide that ballot packages will be distributed to eligible voters by first-class U.S. mail. A supplemental copy of the ballot package that includes the same content as the mailed ballot package may also be sent by an electronic communication to an eligible voter who has consented to receive electronic notifications. For example, if an eligible voter notifies the Treasury Department or the designated service provider that the mailed ballot package has not been received, then a supplemental copy of the ballot package may be provided by electronic mail.

The final regulations provide guidance regarding the plan sponsor's duty under section 432(e)(9)(H)(iv) to communicate with eligible voters. Under the final regulations, the plan sponsor must notify certain eligible voters (using an electronic communication) that the ballot package will be mailed to them by first-class U.S. mail. The eligible voters who must be notified under this rule are those who received the notice of the proposed suspension under section 432(e)(9)(F) in electronic form and those who regularly receive plan-related electronic communications from the plan sponsor.<sup>12</sup> This notification must be sent promptly after the plan sponsor is informed of the ballot distribution date. This notification in electronic form ensures that those eligible voters who ordinarily expect to receive communications from the plan sponsor in electronic form are aware that a ballot package will arrive via first-class U.S. mail. This notification must be sent by the plan sponsor, rather than the

Treasury Department or a service provider, so that the communication comes from a familiar source, which will make it less likely that the communication is filtered from delivery as spam or junk mail.

As previously described in section VII of this preamble, a plan sponsor must make reasonable efforts to contact individuals whose initial suspension notices that were provided by mail were returned as undeliverable. The mailing addresses for the ballot packages that are furnished by the plan sponsor must reflect updates resulting from those reasonable efforts. If ballot packages sent to eligible voters are returned as undeliverable, the plan sponsor must make similar reasonable efforts to locate those eligible voters after being notified that their ballots were returned as undeliverable.

#### D. Contents of Ballot

The final regulations provide that the ballot must be written in a manner that can be readily understood by the average plan participant and may not include any false or misleading information. The ballot must contain the following information:

- A description of the proposed suspension and its effect, including the effect of the suspension on each category or group of individuals affected by the suspension and the extent to which they are affected;
- A description of the factors considered by the plan sponsor in designing the benefit suspension, including but not limited to the factors in section 432(e)(9)(D)(vi);
- A description of whether the suspension will remain in effect indefinitely or will expire by its own terms (and, if it will expire by its own terms, when that will occur);
- A statement from the plan sponsor in support of the proposed suspension;
- A statement in opposition to the proposed suspension compiled from comments received pursuant to the solicitation of comments in the **Federal Register** notice with respect to the application;
- A statement that the proposed suspension has been approved by the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor;
- A statement that the plan sponsor has determined that the plan will become insolvent unless the proposed suspension takes effect (including the year in which insolvency is projected to occur without a suspension of benefits), and an accompanying statement that this determination is subject to uncertainty;

<sup>12</sup> The plan sponsor is also permitted to send this notification to any other eligible voters for whom the plan sponsor has an electronic mailing address.

- A statement that insolvency of the plan could result in benefits lower than benefits paid under the proposed suspension and a description of the projected benefit payments in the event of plan insolvency;
- A statement that insolvency of PBGC would result in benefits lower than benefits otherwise paid in the case of plan insolvency;
- A statement that the plan's actuary has certified that the plan is projected to avoid insolvency, taking into account the proposed suspension of benefits (and, if applicable, a proposed partition of the plan), and an accompanying statement that the actuary's projection is subject to uncertainty;
- A statement that the suspension will go into effect unless a majority of eligible voters vote to reject the suspension and that, therefore, a failure to vote has the same effect on the outcome of the vote as a vote in favor of the suspension;
- A copy of the individualized estimate that was provided as part of the earlier notice described in section 432(e)(9)(F) (or, if that individualized estimate is no longer accurate, a corrected version of that estimate); and
- A description of the voting procedures, including the deadline for voting.

These final regulations provide that the statement in opposition to the proposed suspension that is compiled from comments received on the application will be prepared by the Labor Department. The final regulations provide that this statement in opposition must be written in a manner that is readily understandable to the average plan participant. If there are no comments in opposition to the proposed suspension, then the statement in opposition will indicate that there were no such comments.

Model language for use in the ballot may be published in the form of a revenue procedure, notice, or other guidance published in the Internal Revenue Bulletin.

#### E. Timing Rules for the Participant Vote

In accordance with section 432(e)(9)(H)(ii), the final regulations require that the Treasury Department (in consultation with PBGC and the Labor Department) administer the participant vote no later than 30 days following the date of approval of an application for a suspension of benefits. The final regulations interpret the term "administer a vote" to mean that eligible voters must have the opportunity to vote beginning no later than 30 days following approval of the application, but the regulations do not

require voting to be completed within that 30-day time frame. Accordingly, ballot packages must be distributed no later than 30 days after the application has been approved, and the voting period (the period during which a vote received from an eligible voter will be counted) begins on the ballot distribution date. Although ballot packages may be distributed at any time up to 30 days following approval of an application for suspension of benefits, it is generally expected that ballot packages will be distributed well before that deadline.

The final regulations specify that the voting period generally will remain open until the 30th day following the date the Treasury Department approves the application for a suspension of benefits. However, the voting period will not close earlier than 21 days after the ballot distribution date. In addition, the Treasury Department (in consultation with PBGC and the Labor Department) is permitted to specify a later end to the voting period in appropriate circumstances. For example, an extension might be appropriate if, near the end of the original voting period, there are significant technical difficulties with respect to the collection of votes and those technical difficulties are not resolved in time to provide eligible voters with sufficient time to cast their votes.

#### F. Methods for Casting Votes

The final regulations specify that an automated voting system must be made available to the eligible voters under which each eligible voter who furnishes a voter identification code must be able to cast a vote to be tabulated by the automated voting system. Such a system must be designed to record votes both electronically (through a Web site) and telephonically (through a toll-free number that allows votes to be cast using both a touch-tone voting system and an interactive voice response system). Because the system includes interactive voice response capability, eligible voters can cast votes on their home phones (including rotary phones) and all types of mobile phones (including phones that cannot access the internet). This type of system will permit any voter who lacks internet access or, for any reason, is unwilling or unable to vote via a Web site, to cast a vote using a toll-free number.

A number of commenters to the 2015 regulations requested that eligible voters be permitted to cast votes by mail. In response to these comments, the final regulations provide that, in appropriate circumstances, the Treasury Department

may, in consultation with PBGC and the Labor Department, allow voters to cast votes by mail in lieu of using the automated voting system.<sup>13</sup> If voters are permitted to cast votes by mail then the ballot package must include a postage prepaid, return addressed envelope for use in returning the completed ballot.

#### G. General Procedures Following the Vote

Under section 432(e)(9)(H)(ii), a proposed suspension is generally permitted to be implemented unless rejected by a majority vote of all eligible voters. Numerous commenters expressed dissatisfaction with this statutory provision, and several commenters suggested that the regulations require a majority of eligible voters to vote in favor of a suspension before it is permitted to take effect. The Treasury Department and the IRS have not adopted this suggestion because it is inconsistent with the statutory language.

As under the 2015 regulations, the final regulations provide that, for purposes of determining whether a majority of all eligible voters have voted to reject the suspension under section 432(e)(9)(H)(ii), any eligible voters to whom ballots have not been provided (because the individuals could not be located) are treated as voting to reject the suspension at the same rate (in other words, in the same percentage) as those to whom ballots have been provided.

In accordance with section 432(e)(9)(H)(ii), the final regulations require that an approved suspension will be permitted to take effect unless a majority of all eligible voters vote to reject the suspension. If a majority of all eligible voters vote to reject the suspension, the suspension will not be permitted to take effect (except that, as described in section IX.H of this preamble, the suspension or a modified suspension will be permitted to go into effect if the plan is a systemically important plan). A plan sponsor is permitted to submit a new suspension application to the Treasury Department for approval in any case in which a suspension is prohibited from taking effect as a result of a vote.

#### H. Special Rules for Systemically Important Plans

The final regulations set forth rules for systemically important plans that are generally the same as the rules set forth in the 2015 regulations. The final regulations provide that if a majority of all eligible voters vote to reject the

<sup>13</sup> If a mail-in ballot is permitted then it must be received before the end of the voting period in order to be considered.

suspension, the Treasury Department will consult with PBGC and the Labor Department to determine if the plan is a systemically important plan. The Treasury Department is required to make this determination no later than 14 days after the results of the vote are certified.

The final regulations provide that the Participant and Plan Sponsor Advocate selected under section 4004 of ERISA may, in the case of a systemically important plan, submit recommendations to the Treasury Department with respect to an approved suspension (or any modifications to an approved suspension). Under the 2015 regulations, the Participant and Plan Sponsor Advocate was given up to 30 days after the Treasury Department's determination that the plan is systemically important to make this recommendation. The final regulations change this deadline to give the Participant and Plan Sponsor Advocate up to 44 days after the results of the participant vote are certified to submit any recommendations. This 44-day period provides the Participant and Plan Sponsor Advocate with 30 days following the Treasury Department's determination to make its recommendations if the Treasury Department uses the entire 14 days to determine that plan is a systemically important plan (and provides the Participant and Plan Sponsor Advocate a longer time if the Treasury Department makes its determination at an earlier date).

As under the 2015 regulations, the final regulations provide that if a plan is a systemically important plan for which a majority of all eligible voters vote to reject the suspension then, as required under section 432(e)(9)(H)(v), the Treasury Department will either permit the implementation of the suspension that was rejected by the vote or permit the implementation of a modification of that suspension. Under any such modification, the plan must be projected to avoid insolvency in accordance with section 432(e)(9)(D)(iv). No later than 60 days after the results of a vote to reject a suspension are certified, the Treasury Department will notify the plan sponsor that the suspension (or a modified suspension) is permitted to be implemented.

The final regulations adopt the definition of a systemically important plan from the 2015 regulations, with a minor clarification. Under the final regulations, a systemically important plan is a plan with respect to which PBGC projects that the present value of its financial assistance payments will exceed \$1.0 billion if the suspension is

not implemented. The final regulations clarify that this \$1.0 billion threshold is indexed for inflation.

#### I. Final Treasury Department Authorization or Notification Following the Vote

As under the 2015 regulations, the final regulations provide that in any case in which a proposed suspension (or a modification of a proposed suspension) is permitted to go into effect, the Treasury Department, in consultation with PBGC and the Labor Department, will issue a final authorization to suspend with respect to the suspension. If a suspension is permitted to go into effect following a vote, the final authorization will be issued no later than seven days after the vote. If a suspension is permitted to go into effect following a determination that the plan is a systemically important plan, the final authorization will be issued at a time sufficient to allow the implementation of the suspension prior to the end of the 90-day period beginning on the date the results of the vote rejecting the suspension are certified. Under the final regulations, no later than 60 days after the certification, the Treasury Department will notify the plan sponsor that the suspension that was rejected by the vote or a modified suspension is permitted to be implemented.

#### Effective/Applicability Dates

These regulations are effective on April 28, 2016. The final regulations under § 1.432(e)(9)–1 apply with respect to suspensions for which the approval or denial is issued on or after April 26, 2016. In the case of a systemically important plan, the final regulations apply with respect to any modified suspension implemented on or after that date.

#### Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS Web site at <http://www.irs.gov>.

#### Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined

that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

The Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6) requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. In this case, the IRS and Treasury believe that the regulations likely would not have a “significant economic impact on a substantial number of small entities.” 5 U.S.C. 605. This certification is based on the fact that the number of small entities affected by this rule is unlikely to be substantial because it is unlikely that a substantial number of small multiemployer plans in critical and declining status will suspend benefits under section 432(e)(9).

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### Contact Information

For general questions regarding these regulations, please contact the Department of the Treasury MPRA guidance information line at (202) 622–1559 (not a toll-free number). For information regarding a specific application for a suspension of benefits, please contact the Department of the Treasury at (202) 622–1534 (not a toll-free number).

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ **Par. 2.** Section 1.432(e)(9)–1 is added to read as follows:

#### § 1.432(e)(9)–1 Benefit suspensions for multiemployer plans in critical and declining status.

(a) *General rules on suspension of benefits*—(1) *General rule.* Subject to section 432(e)(9)(B) through (I) and this section, the plan sponsor of a multiemployer plan that is in critical and declining status (within the meaning of section 432(b)(6)) for a plan

year may, by plan amendment adopted in the plan year, implement a suspension of benefits that the plan sponsor deems appropriate. Such an amendment is permitted notwithstanding the anti-cutback provisions of section 411(d)(6). As amended, the terms of the plan must satisfy the requirements of section 401(a).

(2) *Adoption of plan terms inconsistent with suspension requirements*—(i) *General rule.* A plan may implement (or continue to implement) a reduction of benefits pursuant to a suspension of benefits only if the terms of the plan are consistent with the requirements of section 432(e)(9) and this section.

(ii) *Changes in level of suspension*—(A) *Phased-in suspension.* A plan's terms are consistent with the requirements of section 432(e)(9) even if the plan provides that, instead of a suspension of benefits occurring in full on a specified effective date, the amount of a suspension will phase in or otherwise change in a definite, pre-determined manner as of a specified future effective date or dates.

(B) *Level of suspension contingent on future events.* Except as otherwise provided in this paragraph (a)(2)(ii), a plan's terms are inconsistent with the requirements of section 432(e)(9) if they provide that the amount of a suspension will change contingent upon the occurrence of any other specified future event, condition, or development. For example, a plan is not permitted to provide that an additional or larger suspension of benefits is triggered if the plan's funded status deteriorates. Similarly, a plan is not permitted to provide that a suspension of benefits is decreased if the plan's funded status improves (except upon a failure to satisfy the annual plan sponsor determinations requirement of paragraph (c)(4) of this section).

(C) *Level of suspension contingent on future status of individual.* A plan's terms are not inconsistent with the requirements of section 432(e)(9) merely because they provide that, for a participant who has not commenced benefits before the effective date of the suspension, the amount of the suspension will change upon the occurrence of a specified future event, condition or development (such as retirement, death, or disability) with respect to the participant.

(3) *Organization of the regulation.* This paragraph (a) contains definitions and general rules relating to a suspension of benefits by a multiemployer plan under section 432(e)(9). Paragraph (b) of this section

defines a suspension of benefits and describes the length of a suspension, the treatment of beneficiaries and alternate payees under this section, and the requirement to select a retiree representative. Paragraph (c) of this section prescribes certain rules for the actuarial certification and plan sponsor determinations that must be made in order for a plan to suspend benefits. Paragraph (d) of this section describes certain limitations on suspensions of benefits. Paragraph (e) of this section prescribes rules relating to benefit improvements. Paragraph (f) of this section describes the requirement to provide notice in connection with an application to suspend benefits. Paragraph (g) of this section describes certain requirements with respect to the approval or denial of an application for a suspension of benefits. Paragraph (h) of this section contains certain rules relating to the vote on an approved suspension, systemically important plans, and the issuance of a final authorization to suspend benefits. Paragraph (j) of this section provides the effective/applicability date of this section.

(4) *Definitions.* The following definitions apply for purposes of this section—

(i) *Pay status.* A person is in pay status under a multiemployer plan if, as described in section 432(j)(6), at any time during the current plan year, the person is a participant, beneficiary, or alternate payee under the plan and is paid an early, late, normal, or disability retirement benefit under the plan (or a death benefit under the plan related to a retirement benefit).

(ii) *Plan sponsor.* The term plan sponsor means the association, committee, joint board of trustees, or other similar group of representatives of the parties that establishes or maintains the multiemployer plan. However, in the case of a plan described in section 404(c), or a continuation of such a plan, the term plan sponsor means the association of employers that is the employer settlor of the plan.

(iii) *Effective date of suspension of benefits*—(A) *Individuals who are receiving benefits.* In the case of a suspension affecting an individual who is receiving benefits when the suspension is implemented, the effective date of a suspension of benefits is the first date as of which any portion of the individual's benefits are not paid as a result of the suspension.

(B) *Individuals who are not receiving benefits.* In the case of a suspension affecting individuals other than individuals described in paragraph (a)(4)(iii)(A) of this section, the effective

date of the suspension is the first date as of which the individual's entitlement to benefits is reduced as a result of the implementation of the suspension, regardless of whether the individual is eligible to commence benefits at that date.

(C) *Phased-in suspension.* If a suspension of benefits provides for more than one reduction in benefits over time, such that benefits are scheduled to be reduced by an additional amount after benefits are first reduced pursuant to the suspension, then each date as of which benefits are reduced is treated as a separate effective date of the suspension. However, if the effective date of the final scheduled reduction in benefits in a series of reductions pursuant to a suspension is less than three years later than the effective date of the first reduction, then the effective date of the first reduction will be treated as the effective date of all subsequent reductions pursuant to that suspension.

(D) *Effective date may not be retroactive.* The effective date of a suspension may not precede the date on which a final authorization to suspend benefits is issued pursuant to paragraph (h)(6) of this section.

(b) *Definition of suspension of benefits and related rules*—(1) *In general*—(i) *Definition.* For purposes of this section, the term suspension of benefits means the temporary or permanent reduction, pursuant to the terms of the plan, of any current or future payment obligation of the plan with respect to any plan participant. A suspension of benefits may apply with respect to a plan participant regardless of whether the participant, beneficiary, or alternate payee commenced receiving benefits before the effective date of the suspension of benefits.

(ii) *Plan not liable for suspended benefits.* If a plan pays a reduced level of benefits pursuant to a suspension of benefits that complies with the requirements of section 432(e)(9) and this section, then the plan is not liable for any benefits not paid as a result of the suspension.

(2) *Length of suspension*—(i) *In general.* A suspension of benefits may be of indefinite duration or may expire as of a date that is specified in the plan amendment implementing the suspension.

(ii) *Effect of a benefit improvement.* A plan sponsor may amend the plan to eliminate some or all of a suspension of benefits, provided that the amendment satisfies the requirements that apply to a benefit improvement under section 432(e)(9)(E), in accordance with the rules of paragraph (e) of this section.

(3) *Treatment of beneficiaries and alternate payees.* Except as otherwise specified in this section, all references to suspensions of benefits, increases in benefits, or resumptions of suspended benefits with respect to participants also apply with respect to benefits of beneficiaries or alternate payees (as defined in section 414(p)(8)) of participants.

(4) *Retiree representative*—(i) *In general*—(A) *Requirement to select retiree representative.* The plan sponsor of a plan that intends to submit an application for a suspension of benefits and that has reported a total of 10,000 or more participants as of the end of the plan year for the most recently filed Form 5500, Annual Return/Report of Employee Benefit Plan, must select a retiree representative. The plan sponsor must select the retiree representative at least 60 days before the date the plan sponsor submits an application to suspend benefits. The retiree representative must be a plan participant who is in pay status. The retiree representative may or may not be a plan trustee.

(B) *Role of retiree representative.* The role of the retiree representative is to advocate for the interests of the retired and deferred vested participants and beneficiaries of the plan, beginning when the retiree representative is selected and continuing throughout the suspension approval process. In the discretion of the plan sponsor, the retiree representative may continue in this role throughout the period of the benefit suspension.

(ii) *Reasonable expenses from plan.* The plan must pay reasonable expenses incurred by the retiree representative, including reasonable expenses for legal and actuarial support and communication with retired and deferred vested participants and beneficiaries, commensurate with the plan's size and funded status.

(iii) *Disclosure of information.* Upon request, the plan sponsor must promptly provide the retiree representative with relevant information, such as plan documents and data, that is reasonably necessary to enable the retiree representative to perform the role described in paragraph (b)(4)(i)(B) of this section.

(iv) *Special rules relating to fiduciary status.* See section 432(e)(9)(B)(v)(III) for rules relating to the fiduciary status of a retiree representative.

(v) *Retiree representative for other plans.* The plan sponsor of a plan that has reported fewer than 10,000 participants as of the end of the plan year for the most recently filed Form 5500, Annual Return/Report of

Employee Benefit Plan is permitted to select a retiree representative. The rules in this paragraph (b)(4) (other than the rules in the first two sentences of paragraph (b)(4)(i)(A) of this section concerning the size of the plan and the timing of the appointment of the retiree representative) apply to such a representative.

(c) *Conditions for suspension*—(1) *In general*—(i) *Actuarial certification and initial plan sponsor determinations.* The plan sponsor of a plan in critical and declining status for a plan year may suspend benefits only if the actuarial certification requirement in paragraph (c)(2) of this section and the initial plan sponsor determinations requirement in paragraph (c)(3) of this section are met.

(ii) *Annual requirement to make plan sponsor determinations.* As provided in paragraph (c)(5) of this section, the suspension will continue only if the plan sponsor continues to make the annual plan sponsor determinations described in paragraph (c)(4) of this section.

(2) *Actuarial certification.* A plan satisfies the actuarial certification requirement of this paragraph (c)(2) if, taking into account the proposed suspension of benefits (and, if applicable, a proposed partition of the plan under section 4233 of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829 (1974)), as amended (ERISA)), the plan's actuary certifies that the plan is projected to avoid insolvency within the meaning of section 418E, assuming the suspension of benefits continues until it expires by its own terms or if no such expiration date is set, indefinitely.

(3) *Initial plan sponsor determinations*—(i) *General rule.* A plan satisfies the initial plan sponsor determinations requirement of this paragraph (c)(3) only if the plan sponsor determines that—

(A) All reasonable measures to avoid insolvency, within the meaning of section 418E, have been taken; and

(B) The plan would not be projected to avoid insolvency (determined using the standards described in paragraphs (d)(5)(ii), (iv), and (v) of this section) if no suspension of benefits were applied under the plan.

(ii) *Factors.* In making its determination that all reasonable measures to avoid insolvency, within the meaning of section 418E, have been taken, the plan sponsor may take into account the following non-exclusive list of factors—

(A) Current and past contribution levels;

(B) Levels of benefit accruals (including any prior reductions in the rate of benefit accruals);

(C) Prior reductions (if any) of adjustable benefits;

(D) Prior suspensions (if any) of benefits under this section;

(E) The impact on plan solvency of the subsidies and ancillary benefits available to active participants;

(F) Compensation levels of active participants relative to employees in the participants' industry generally;

(G) Competitive and other economic factors facing contributing employers;

(H) The impact of benefit and contribution levels on retaining active participants and bargaining groups under the plan;

(I) The impact of past and anticipated contribution increases under the plan on employer attrition and retention levels; and

(J) Measures undertaken by the plan sponsor to retain or attract contributing employers.

(iii) *Reliance on certification of critical and declining status.* For purposes of the insolvency projection under paragraph (c)(3)(i)(B) of this section, a plan sponsor may rely on the actuarial certification made pursuant to section 432(b)(3)(A)(i) that the plan is in critical and declining status for the plan year in making the determination that the plan is projected to become insolvent unless benefits are suspended.

(4) *Annual plan sponsor determinations*—(i) *General rule.* A plan satisfies the annual plan sponsor determinations requirement of this paragraph (c)(4) for a plan year only if the plan sponsor determines, no later than the last day of the plan year, that—

(A) All reasonable measures to avoid insolvency have been and continue to be taken; and

(B) The plan would not be projected to avoid insolvency (determined using the standards described in paragraphs (d)(5)(ii), (iv), and (v) of this section, substituting the current plan year for the plan year that includes the effective date of the suspension) if no suspension of benefits were applied under the plan.

(ii) *Factors.* In making its determination that all reasonable measures to avoid insolvency have been and continue to be taken, the plan sponsor may take into account the non-exclusive list of factors in paragraph (c)(3)(ii) of this section.

(iii) *Requirement to maintain written record.* The plan sponsor must maintain a written record of the annual plan sponsor determinations made under this paragraph (c)(4). The written record must be included in an update to the rehabilitation plan, whether or not there

is otherwise an update for that year (or, if the plan is no longer in critical status, must be included in the documents under which the plan is maintained). The written record of the determinations must describe the plan sponsor's consideration of factors, as described in paragraph (c)(4)(ii) of this section.

(5) *Failure to make annual plan sponsor determinations.* If a plan sponsor fails to satisfy the annual plan sponsor determinations requirement of paragraph (c)(4) of this section for a plan year (including maintaining the written record described in paragraph (c)(4)(iii) of this section), then the suspension of benefits will cease to be in effect beginning as of the first day of the next plan year.

(d) *Limitations on suspension—(1) In general.* Any suspension of benefits with respect to a participant made by a plan sponsor pursuant to this section is subject to the individual limitations of sections 432(e)(9)(D)(i) through (iii) and paragraphs (d)(2) through (d)(4) of this section. After applying those provisions, the overall size and distribution of the suspension is subject to the aggregate limitations of sections 432(e)(9)(D)(iv) and (vi) and paragraphs (d)(5) and (d)(6) of this section. See section 432(e)(9)(D)(vii) and paragraph (d)(8) of this section for additional rules applicable to certain plans.

(2) *Guarantee-based limitation—(i) General rule.* The reduction with respect to a participant under a suspension of benefits must be limited so that, on and after the effective date of the suspension, the monthly benefit is not less than the guarantee-based limitation. The guarantee-based limitation is 110 percent of the monthly benefit payable to a participant, beneficiary, or alternate payee that would be guaranteed by the Pension Benefit Guaranty Corporation (PBGC) under section 4022A of ERISA if the plan were to become insolvent as of the effective date of the suspension.

(ii) *PBGC guarantee.* Under section 4022A of ERISA, the monthly benefit of a participant or beneficiary that would be guaranteed by PBGC with respect to a plan if the plan were to become insolvent as of the effective date of the suspension is generally based on section 4022A(c)(1) of ERISA. Under that section, the monthly benefit that would be guaranteed if the plan were to become insolvent as of the date as of which the guarantee is determined is the product of—

- (A) 100 percent of the accrual rate up to \$11, plus 75 percent of the lesser of—
  - (1) \$33; or
  - (2) The accrual rate, if any, in excess of \$11; and

(B) The number of the participant's years and months of credited service as of that date.

(iii) *Calculation of accrual rate.* The accrual rate, as defined in section 4022A(c)(2) of ERISA, is calculated by dividing—

(A) The participant's or beneficiary's monthly benefit, described in section 4022A(c)(2)(A) of ERISA; by

(B) The participant's years of credited service, described in section 4022A(c)(3) of ERISA, as of the effective date of the suspension.

(iv) *Special rule for non-vested participants.* For purposes of this paragraph (d)(2), a participant's nonforfeitable benefits under section 4022A(a) of ERISA include benefits that are forfeitable as of the effective date of the suspension, provided that the participant would have a nonforfeitable right to those benefits if the participant continued to earn vesting service following that date.

(v) *Examples.* The following examples illustrate the limitation on a suspension of benefits under this paragraph (d)(2). Unless otherwise stated, the amount of guarantee payable by PBGC in these examples is based on section 4022A(c) of ERISA, and the rules under section 4022A(d) of ERISA (guarantee for benefits reduced under section 411(a)(3)(E)), section 4022A(e) of ERISA (benefits ineligible for guarantee), and section 4022A(h) of ERISA (guarantee for benefits accrued as of July 30, 1980) do not apply. In these examples, unless otherwise stated, the monthly benefits are nonforfeitable, are based on benefits that have been in effect for at least 60 months as of the effective date of the suspension, and are no greater than the monthly benefit that would be payable at normal retirement age in the form of a single life annuity.

*Example 1. (i) Facts.* A participant is receiving a benefit of \$1,500 per month immediately prior to the effective date of the suspension. The participant has 30 years of credited service under the plan.

(ii) *Calculation of accrual rate.* The participant's accrual rate is \$50, calculated by dividing the participant's monthly benefit payment (\$1,500) by the participant's years of credited service (30).

(iii) *Calculation of monthly PBGC-guaranteed benefit.* The first \$11 of the accrual rate is fully guaranteed, and the next \$33 of the accrual rate is 75% guaranteed ( $\$33 \times .75 = \$24.75$ ). The participant's monthly guaranteed benefit per year of credited service is \$35.75 ( $\$11 + \$24.75 = \$35.75$ ). The PBGC guarantee formula is then applied to produce the amount of guarantee payable by PBGC, which is \$1,072.50 ( $\$35.75 \times 30 \text{ years} = \$1,072.50$ ).

(iv) *Calculation of guarantee-based limitation.* A suspension of benefits may not

reduce the participant's benefits, determined on and after the effective date of the suspension, below the guarantee-based limitation, which is equal to 110% of the amount of guarantee payable by PBGC. That monthly amount is \$1,179.75 ( $\$1,072.50 \times 1.1 = \$1,179.75$ ).

*Example 2. (i) Facts.* The facts are the same as in *Example 1*, except that the participant is deceased and, immediately prior to the effective date of the suspension, the participant's beneficiary is receiving a monthly benefit of \$750 under a 50% joint and survivor annuity.

(ii) *Calculation of accrual rate.* The beneficiary's accrual rate is \$25, calculated by dividing the beneficiary's monthly benefit payment (\$750) by the participant's years of credited service (30).

(iii) *Calculation of monthly PBGC-guaranteed benefit.* The first \$11 of the accrual rate is fully guaranteed, and the next \$14 ( $\$25 - \$11 = \$14$ ) of the accrual rate is 75% guaranteed ( $\$14 \times .75 = \$10.50$ ). The beneficiary's monthly guaranteed benefit is \$21.50 per year of credited service ( $\$11 + \$10.50 = \$21.50$ ). The PBGC guarantee formula is then applied to produce the amount of guarantee payable by PBGC, which is \$645 ( $\$21.50 \times 30 \text{ years} = \$645$ ).

(iv) *Calculation of guarantee-based limitation.* A suspension of benefits may not reduce the beneficiary's benefits, determined on and after the effective date of the suspension, below the guarantee-based limitation, which is equal to 110% of the monthly amount of guarantee payable by PBGC. That monthly guarantee-based limitation amount is \$709.50 ( $\$645 \times 1.1 = \$709.50$ ).

*Example 3. (i) Facts.* A participant would be eligible for a monthly benefit of \$1,000 payable as a single life annuity at normal retirement age, based on the participant's 25 years of credited service. The plan also permits a participant to receive a benefit on an unreduced basis as a single life annuity at a particular early retirement age and permits participants to receive an early retirement benefit beginning at that age in the form of a social security level income option. The participant has elected the social security level income option under which the participant receives a monthly benefit of \$1,600 prior to normal retirement age (which is the plan's assumed social security retirement age) and \$900 after normal retirement age.

(ii) *Calculation of accrual rate.* For purposes of calculating the accrual rate, the monthly benefit that is used to calculate the PBGC guarantee does not exceed the monthly benefit of \$1,000 that would be payable at normal retirement age. In calculating the accrual rate, the amount of guarantee payable by PBGC would be based on a monthly benefit of \$1,000 prior to normal retirement age and \$900 after normal retirement age. Before normal retirement age, the participant's accrual rate is \$40, determined by dividing the participant's monthly benefit payment (\$1,000) by years of credited service (25). After normal retirement age, the participant's accrual rate is \$36, calculated by dividing the participant's monthly benefit payment (\$900) by the participant's years of credited service (25).

(iii) *Calculation of monthly PBGC-guaranteed benefit.* Before normal retirement age, the first \$11 of the accrual rate is fully guaranteed, and the next \$29 of the accrual rate is 75% guaranteed ( $\$29 \times .75 = \$21.75$ ). The participant's monthly guaranteed benefit per year of credited service is \$32.75 ( $\$11 + \$21.75 = \$32.75$ ). The PBGC guarantee formula is then applied to produce the amount of guarantee payable by PBGC, which is \$818.75 ( $\$32.75 \times 25 \text{ years} = \$818.75$ ). After normal retirement age, the first \$11 of the accrual rate is fully guaranteed, and the next \$25 of the accrual rate is 75% guaranteed ( $\$25 \times .75 = \$18.75$ ). The participant's monthly guaranteed benefit per year of credited service is \$29.75 ( $\$11 + \$18.75 = \$29.75$ ). The PBGC guarantee formula is then applied to produce the amount of guarantee payable by PBGC, which is \$743.75 after normal retirement age ( $\$29.75 \times 25 \text{ years} = \$743.75$ ).

(iv) *Calculation of guarantee-based limitation.* A suspension of benefits may not reduce the participant's benefits, determined on and after the effective date of the suspension, below the guarantee-based limitation, which is equal to 110% of the monthly amount of guarantee payable by PBGC. That monthly guarantee-based limitation amount is \$900.63 ( $\$818.75 \times 1.1 = \$900.63$ ) before normal retirement age and \$818.13 ( $\$743.75 \times 1.1 = \$818.13$ ) after normal retirement age.

*Example 4. (i) Facts.* A participant would be eligible for a monthly benefit of \$1,000 payable as a single life annuity at normal retirement age, based on the participant's 20 years of credited service. The plan provides an actuarial increase for delaying benefits until after normal retirement age. The participant delays commencement of benefits until after normal retirement age and the monthly benefit the participant is receiving immediately before the effective date of the suspension is \$1,200 instead of \$1,000.

(ii) *Calculation of accrual rate.* For purposes of calculating the accrual rate, the monthly benefit that is used to calculate the PBGC guarantee does not exceed the monthly benefit of \$1,000 that would be payable at normal retirement age. Thus, in determining the accrual rate, the PBGC guarantee would be based on a monthly benefit of \$1,000, whether benefits are paid at or after normal retirement age. The participant's accrual rate is \$50, calculated by dividing the participant's monthly benefit payment (\$1,000) by the participant's years of credited service (20).

(iii) *Calculation of monthly PBGC-guaranteed benefit.* The first \$11 of the accrual rate is fully guaranteed, and the next \$33 of the accrual rate is 75% guaranteed ( $\$33 \times .75 = \$24.75$ ). The participant's monthly guaranteed benefit per year of credited service is \$35.75 ( $\$11 + \$24.75 = \$35.75$ ). The PBGC guarantee formula is then applied to produce the amount of guarantee payable by PBGC, which is \$715 ( $\$35.75 \times 20 \text{ years} = \$715$ ).

(iv) *Calculation of guarantee-based limitation.* A suspension of benefits may not reduce the participant's benefits, determined on and after the effective date of the suspension, below the guarantee-based

limitation, which is equal to 110% of the monthly amount of guarantee payable by PBGC. That monthly guarantee-based limitation amount is \$786.50 ( $\$715 \times 1.1 = \$786.50$ ).

*Example 5. (i) Facts.* A plan provides that a participant who has completed at least five years of service will have a nonforfeitable right to 100% of an accrued benefit (and will not have a nonforfeitable right to any portion of the accrued benefit prior to completing five years of service). The plan implements a suspension of benefits on January 1, 2017. As of that date, a participant has three years of vesting service, and none of the participant's benefits are nonforfeitable under the terms of the plan.

(ii) *Calculation of nonforfeitable benefits.* For purposes of applying the guarantee-based limitation, the participant is considered to have a nonforfeitable right to 100% of the accrued benefit under the plan as of January 1, 2017.

(3) *Age-based limitation—(i) No suspension for participants or beneficiaries who are age 80 and older.* Pursuant to the age-based limitation of this paragraph (d)(3), no suspension of benefits is permitted to apply to a participant or beneficiary who—

(A) Has commenced benefits as of the effective date of the suspension; and

(B) Has attained 80 years of age no later than the end of the month that includes the effective date of the suspension.

(ii) *Limited suspension for participants and beneficiaries between ages 75 and 80.* Pursuant to the age-based limitation of this paragraph (d)(3), no more than the applicable percentage of the maximum suspendable benefit may be suspended for a participant or beneficiary who—

(A) Has commenced benefits as of the effective date of the suspension; and

(B) Has attained 75 years of age no later than the end of the month that includes the effective date of the suspension.

(iii) *Maximum suspendable benefit—(A) In general.* For purposes of this paragraph (d)(3), the maximum suspendable benefit with respect to a participant, beneficiary, or alternate payee is the portion of the individual's benefits that would otherwise be suspended pursuant to this section (that is, the amount that would be suspended without regard to the limitation of this paragraph (d)(3)).

(B) *Coordination of limitations.* An individual's maximum suspendable benefit is calculated after the application of the guarantee-based limitation under paragraph (d)(2) of this section and the disability-based limitation under paragraph (d)(4) of this section.

(iv) *Applicable percentage.* For purposes of this paragraph (d)(3), the

applicable percentage is the percentage obtained by dividing—

(A) The number of months during the period beginning with the month after the month in which the suspension of benefits is effective and ending with the month during which the participant or beneficiary attains the age of 80, by

(B) 60.

(v) *Applicability of age-based limitation to benefits paid to beneficiaries.* If the age-based limitation of this paragraph (d)(3) applies to a participant on the effective date of the suspension, then the age-based limitation also applies to the beneficiary of the participant, based on the age of the participant as of the end of the month that includes the effective date of the suspension.

(vi) *Rule for benefits that have not commenced at the time of the suspension.* If benefits have not commenced to either a participant or beneficiary as of the effective date of the suspension, then in applying this paragraph (d)(3)—

(A) If the participant is alive on the effective date of the suspension, the participant is treated as having commenced benefits on that date; and

(B) If the participant dies before the effective date of the suspension, the beneficiary is treated as having commenced benefits on that date.

(vii) *Rules for alternate payees.* The age-based limitation of this paragraph (d)(3) applies to a suspension of benefits in which an alternate payee has an interest, whether or not the alternate payee has commenced benefits as of the effective date of the suspension. For purposes of this paragraph (d)(3), the applicable percentage for an alternate payee is calculated by—

(A) Using the participant's age as of the end of the month that includes the effective date of the suspension, if the alternate payee's right to the suspended benefits derives from a qualified domestic relations order within the meaning of section 414(p)(1)(A) (QDRO) under which the alternate payee shares in each benefit payment but the participant retains the right to choose the time and form of payment with respect to the benefit to which the suspension applies (shared payment QDRO); or

(B) Substituting the alternate payee's age as of the end of the month that includes the effective date of the suspension for the participant's age, if the alternate payee's right to the suspended benefits derives from a QDRO under which the alternate payee has a separate right to receive a portion of the participant's retirement benefit to be paid at a time and in a form different

from that chosen by the participant (separate interest QDRO).

(viii) *Examples.* The following examples illustrate the rules of this paragraph (d)(3):

*Example 1. (i) Facts.* The plan sponsor of a plan in critical and declining status is implementing a suspension of benefits, effective December 1, 2017, that generally would reduce all benefit payments under the plan by 30%. On that date, a retiree is receiving a monthly benefit of \$1,500 (which is not a benefit based on disability) and has 28 years of credited service under the plan. If none of the limitations in section 432(e)(9)(D)(i), (ii), and (iii) were to apply, a 30% suspension would reduce the retiree's monthly benefit by \$450, to \$1,050. Under the guarantee-based limitation in section 432(e)(9)(D)(i), the retiree's monthly benefit could not be reduced by more than \$398.90, to \$1,101.10 ( $1.1 \times (28 \times (\$11 + (.75 \times \$33)))$ ). The retiree is 77 years old on the effective date of the suspension, turns 78 on December 10, 2017, and turns 80 on December 10, 2019.

(ii) *Maximum suspendable benefit.* Because the retiree is not receiving a benefit based on disability under section 432(e)(9)(D)(iii), the retiree's maximum suspendable benefit is \$398.90 (which is equal to the lesser of the amount of reduction that would apply pursuant to the 30% suspension (\$450) or the amount of reduction that would be permitted under the guarantee-based limitation (\$398.90)).

(iii) *Applicable percentage.* Because the retiree is between ages 75 and 80 on the effective date of the suspension, the reduction is not permitted to exceed the applicable percentage of the retiree's maximum suspendable benefit. The number of months during the period beginning with January 2018 (the month after the month that includes the effective date of the suspension) and ending with December 2019 (the month in which the retiree turns 80) is 24. The applicable percentage is equal to 40% (24 months divided by 60).

(iv) *Age-based limitation.* The retiree's maximum suspendable benefit is \$398.90 and the applicable percentage is 40%. Thus, under the age-based limitation, the retiree's benefit may not be reduced by more than \$159.56 ( $\$398.90 \times .40 = \$159.56$ ). Because the retiree was receiving a monthly benefit of \$1,500, the suspension of benefits may not reduce the retiree's monthly benefit below \$1,340.44 ( $\$1,500 - \$159.56 = \$1,340.44$ ).

*Example 2. (i) Facts.* The facts are the same as *Example 1*, except that the retiree is 79 years old on December 1, 2017, and turns 80 on December 20, 2017.

(ii) *Age-based limitation.* The suspension is not permitted to apply to the retiree because the retiree will turn 80 by the end of the month (December 2017) in which the suspension is effective.

*Example 3. (i) Facts.* The facts are the same as *Example 1*, but on the effective date of the suspension, the retiree is receiving a benefit in the form of a 50% joint and survivor annuity for himself and a contingent beneficiary who is age 71. The retiree dies in October 2018.

(ii) *Application of age-based limitation to contingent beneficiary.* Because the retiree

had attained age 78 in the month that included the effective date of the suspension, the age-based limitation on the suspension of benefits for a 78-year-old individual applies to the retiree. The age-based limitation also applies to the contingent beneficiary, even though the contingent beneficiary had not commenced benefits under the plan as of the effective date of the suspension and had not attained age 75 by the end of the month containing the effective date of the suspension.

(iii) *Maximum suspendable benefit.* The contingent beneficiary's amount of guarantee payable by PBGC is based on the benefit the beneficiary would have received from the plan before the suspension (\$750). The beneficiary's accrual rate is \$26.7857 (calculated by dividing the monthly benefit payment (\$750) by years of credited service (28)) and the beneficiary's amount of guarantee payable by PBGC is \$639.50 ( $28 \times (\$11 + (.75 \times \$15.7857))$ ). The beneficiary's maximum suspendable benefit is \$46.55 (which is equal to the lesser of the amount of reduction that would apply pursuant to the 30% suspension (\$225) or the amount of reduction that would be permitted under the guarantee-based limitation (\$46.55, which is equal to  $\$750 - 1.1 \times \$639.50$ )).

(iv) *Applicable percentage.* The applicable percentage for the beneficiary is based on the retiree's age of 78 as of the end of the month that includes the effective date of the suspension. Accordingly, the applicable percentage for the beneficiary is 40%.

(v) *Age-based limitation.* The beneficiary's maximum suspendable benefit is \$46.55 and the applicable percentage is 40%. Thus, under the age-based limitation, the beneficiary's benefit may not be reduced by more than \$18.62 ( $\$46.55 \times .40 = \$18.62$ ). Therefore, as a result of the retiree's age-based limitation, the suspension of benefits may not reduce the beneficiary's monthly benefit below \$731.38 ( $\$750 - \$18.62 = \$731.38$ ).

*Example 4. (i) Facts.* The facts are the same as *Example 3*, except that on the effective date of the suspension the retiree is age 71 and the retiree's contingent beneficiary is age 77.

(ii) *Application of age-based limitation to contingent beneficiary.* Because the retiree had not reached age 75 as of the end of the month that includes the effective date of the suspension, the age-based limitation on the suspension of benefits does not apply to the retiree. The age-based limitation also does not apply to the retiree's contingent beneficiary, even though the contingent beneficiary had attained age 77 as of the end of the month that includes the effective date of the suspension, because the contingent beneficiary had not yet commenced benefits on that date. The beneficiary's post-suspension benefit may not be less than the minimum benefit payable pursuant to the guarantee-based limitation, which is \$703.45 ( $\$639.50 \times 1.1 = \$703.45$ ).

*Example 5. (i) Facts.* The facts are the same as in *Example 4*, except that the retiree died in October 2017, prior to the December 1, 2017 effective date of the suspension of benefits. The retiree's beneficiary commenced benefits on November 1, 2017.

(ii) *Application of age-based limitation to contingent beneficiary.* Because the retiree's beneficiary had commenced benefits before the effective date of the suspension and had reached age 75 as of the end of the month that includes the effective date of the suspension, the age-based limitation applies to the beneficiary based on the beneficiary's age as of the end of the month that includes the effective date of the suspension.

(4) *Disability-based limitation—(i) General rule.* Pursuant to the disability-based limitation of this paragraph (d)(4), benefits based on disability (as defined under the plan) may not be suspended.

(ii) *Benefits based on disability—(A) In general.* For purposes of this section, benefits based on disability means the entire amount paid to a participant pursuant to the participant becoming disabled, without regard to whether a portion of that amount would have been paid if the participant had not become disabled.

(B) *Rule for auxiliary or other temporary disability benefits.* If a participant begins receiving an auxiliary or other temporary disability benefit and the sole reason the participant ceases receiving that benefit is commencement of retirement benefits, then the benefit based on disability after commencement of retirement benefits is the lesser of—

(1) The periodic payment the participant was receiving immediately before the participant's retirement benefits commenced; or

(2) The periodic payment to the participant of retirement benefits under the plan.

(C) *Examples.* The following examples illustrate the disability-based limitation on a suspension of benefits under this paragraph (d)(4):

*Example 1. (i) Facts.* A participant with a vested accrued benefit of \$1,000 per month, payable at age 65, becomes disabled at age 55. The plan applies a reduction to the monthly benefit for early commencement if the participant commences benefits before age 65. For a participant who commences receiving benefits at age 55, the actuarially adjusted early retirement benefit is 60% of the accrued benefit. However, the plan also provides that if a participant becomes entitled to an early retirement benefit on account of disability, as defined in the plan, the benefit is not reduced. On account of a disability, the participant commences an unreduced early retirement benefit of \$1,000 per month at age 55 (instead of the \$600 monthly benefit the participant would receive if the participant were not disabled). The participant continues to receive \$1,000 per month after reaching age 65.

(ii) *Conclusion.* The participant's disability benefit payment of \$1,000 per month commencing at age 55 is a benefit based on disability, even though the participant would have received a portion of these benefits at

retirement regardless of the disability. Thus, both before and after attaining age 65, the participant's entire monthly payment amount (\$1,000) is a benefit based on disability. A suspension of benefits is not permitted to apply to any portion of the participant's benefit at any time.

*Example 2. (i) Facts.* The facts are the same as *Example 1*, except that the terms of the plan provide that when a disabled participant reaches age 65, the disability pension is discontinued by reason of reaching age 65, and the retirement benefits commence. In this case, the amount of the participant's retirement benefits is the same as the amount that the participant was receiving immediately before commencing retirement benefits, or \$1,000.

(ii) *Conclusion.* Before age 65, the participant's disability benefit payment of \$1,000 per month commencing at age 55 is a benefit based on disability. After age 65, the periodic retirement benefit of \$1,000 per month is a benefit based on disability because it does not exceed the benefit based on disability that the participant was receiving immediately before commencing retirement benefits. Thus, both before and after attaining age 65, the participant's entire monthly payment amount (\$1,000) is a benefit based on disability. A suspension of benefits is not permitted to apply to any portion of the participant's benefit at any time.

*Example 3. (i) Facts.* The facts are the same as *Example 2*, except that upon reaching age 65, the participant elects to commence payment of retirement benefits not in the form of a single life annuity payable in the amount of \$1,000 per month but instead in the form of an actuarially equivalent joint and survivor annuity payable in the amount of \$850 per month.

(ii) *Conclusion.* Before age 65, the participant's benefit based on disability is \$1,000 per month. After age 65, the participant's entire retirement benefit of \$850 per month is a benefit based on disability because it does not exceed the benefit based on disability that the participant was receiving immediately before commencing retirement benefits. Thus, a suspension of benefits is not permitted to apply to any portion of those benefits at any time.

*Example 4. (i) Facts.* A participant's disability pension is a specified amount unrelated to the participant's accrued benefit. The participant's disability benefit commencing at age 55 is \$750 per month. Upon reaching age 65, the participant's disability pension is discontinued by reason of reaching age 65 and the participant elects to receive an accrued benefit payable in the amount of \$1,000 per month.

(ii) *Conclusion.* Before age 65, the participant's benefit based on disability is \$750 per month. After age 65, the participant's benefit based on disability continues to be \$750 per month (even though the participant's payment is \$1,000 per month), because the benefit based on disability is the lesser of the periodic disability pension the participant was receiving immediately before retirement benefits commenced (\$750) and the periodic payment of retirement benefits to the

participant under the plan determined without regard to the suspension (\$1,000). Thus, a suspension of benefits is not permitted to reduce the participant's benefit based on disability (\$750 per month) at any time.

*Example 5. (i) Facts.* The facts are the same as *Example 2*, except that when the participant attains age 65, the participant's monthly benefit payment increases from \$1,000 to \$1,300 as a result of the plan providing additional accruals during the period of disability, as if the participant were not disabled.

(ii) *Conclusion.* As in *Example 2*, before age 65, the participant's benefit payment of \$1,000 per month commencing at age 55 is a benefit based on disability. After age 65, the participant's benefit payment of \$1,300 per month is a benefit based on disability because the \$1,300 is payable based on additional accruals earned pursuant to the participant becoming disabled. Thus, both before and after attaining age 65, the participant's entire monthly payment amount is a benefit based on disability. A suspension of benefits is not permitted to apply to any portion of the participant's benefit at any time.

*Example 6. (i) Facts.* The facts are the same as *Example 3* of paragraph (d)(2)(v) of this section, except that the social security level income option is only available to a participant who incurs a disability as defined in the plan.

(ii) *Conclusion.* Before normal retirement age, the participant's benefit payment of \$1,600 per month is a benefit based on disability. After normal retirement age, the participant's benefit based on disability is \$900, which is the lesser of the \$1,600 periodic payment that the participant was receiving immediately before the participant's normal retirement benefit commenced and the participant's \$900 periodic payment of retirement benefits determined without regard to the suspension. Thus, a suspension of benefits is not permitted to apply to any portion of those benefits (\$1,600 per month before and \$900 per month after normal retirement age) at any time.

*Example 7. (i) Facts.* A plan applies a reduction to the monthly benefit for early commencement if a participant commences benefits before age 65. The plan also provides that if a participant becomes disabled, as defined in the plan, the benefit that is paid before normal retirement age is not reduced for early retirement. Under the plan, when a disabled participant reaches age 65, the disability pension is discontinued by reason of reaching age 65 and the retirement benefits commence. A participant with a vested accrued benefit of \$1,000 per month, payable at age 65, becomes disabled at age 55. On account of the disability, the participant commences benefits at age 55 in the amount of \$1,000 per month (instead of the \$600 monthly benefit the participant could have received at that age if the participant were not disabled). The participant recovers from the disability at age 60, and the participant's disability benefits cease. At age 60, the participant immediately elects to begin an early retirement benefit of \$800.

(ii) *Conclusion.* The participant's disability benefit payment of \$1,000 per month commencing at age 55 is a benefit based on disability, even though the participant would have received a portion of these benefits at retirement regardless of the disability. Because the participant ceased receiving disability benefits on account of the participant no longer being disabled (and not solely on account of commencing retirement benefits), the participant's early retirement benefit of \$800 per month that began after the disability benefit ended is not a benefit based on disability.

(5) *Limitation on aggregate size of suspension—(i) General rule.* Any suspension of benefits (considered, if applicable, in combination with a partition of the plan under section 4233 of ERISA (partition)) must be at a level that is reasonably estimated to—

(A) Enable the plan to avoid insolvency; and

(B) Not materially exceed the level that is necessary to enable the plan to avoid insolvency.

(ii) *Suspension sufficient to avoid insolvency—(A) General rule.* A suspension of benefits (considered, if applicable, in combination with a partition of the plan) will satisfy the requirement that it is at a level that is reasonably estimated to enable the plan to avoid insolvency if—

(1) For each plan year throughout an extended period (as described in paragraph (d)(5)(ii)(C) of this section) beginning on the first day of the plan year that includes the effective date of the suspension, the plan's solvency ratio is projected on a deterministic basis to be at least 1.0;

(2) Based on stochastic projections reflecting variance in investment return, the probability that the plan will avoid insolvency throughout the extended period is more than 50 percent; and

(3) Unless the plan's projected funded percentage (within the meaning of section 432(j)(2)) at the end of the extended period using the deterministic projection described in paragraph (d)(5)(ii)(A)(1) of this section exceeds 100 percent, that projection shows that, during each of the last five plan years of that period, neither the plan's solvency ratio nor its available resources (as defined in section 418E(b)(3)) is projected to decrease.

(B) *Solvency ratio.* For purposes of this section, a plan's solvency ratio for a plan year means the ratio of—

(1) The plan's available resources (as defined in section 418E(b)(3)) for the plan year; to

(2) The scheduled benefit payments under the plan for the plan year.

(C) *Extended period.* For purposes of this section, an extended period means a period of at least 30 plan years.

However, in the case of a temporary suspension of benefits that is scheduled to cease as of a date that is more than 25 years after the effective date, the extended period must be lengthened so that it ends no earlier than five plan years after the cessation of the suspension.

(iii) *Suspension not materially in excess of level necessary to avoid insolvency*—(A) *General rule.* A suspension of benefits will satisfy the requirement under paragraph (d)(5)(i)(B) of this section that the suspension be at a level that is reasonably estimated to not materially exceed the level necessary for the plan to avoid insolvency only if an alternative, similar but smaller suspension of benefits would not be sufficient to enable the plan to satisfy the requirement to avoid insolvency under paragraph (d)(5)(i)(A) of this section (determined using an extended period that is no shorter than the extended period used to satisfy the requirements of paragraph (d)(5)(i)(A) of this section). The alternative suspension of benefits that is used for this purpose is a suspension of benefits under which, for each participant or beneficiary, the amount of the reduction in the periodic payment (determined after application of the individual limitations) is equal to the amount of the reduction proposed for that participant or beneficiary in the application submitted pursuant to paragraph (g) of this section, decreased (but not below zero) by the greater of—

(1) Five percent of the amount of the reduction in the periodic payment proposed for that participant or beneficiary; or

(2) Two percent of the amount of the participant's or beneficiary's periodic payment determined without regard to the reduction proposed in the application.

(B) *Special rule for partitions.* If PBGC issues an order partitioning the plan, then a suspension of benefits with respect to the plan will be deemed to satisfy the requirement under paragraph (d)(5)(i)(B) of this section that the suspension be at a level that is reasonably estimated to not materially exceed the level necessary for the plan to avoid insolvency.

(iv) *Actuarial basis for projections*—(A) *In general.* This paragraph (d)(5)(iv) sets forth rules for the actuarial projections that are required under this paragraph (d)(5). The projections must reflect the assumption that the suspension of benefits continues indefinitely (or, if the suspension expires on a specified date by its own terms, until that date).

(B) *Reasonable actuarial assumptions and methods.* Each of the actuarial

assumptions and methods used for the actuarial projections that are required under this paragraph (d)(5), and the combination of those actuarial assumptions and methods, must be reasonable, taking into account the experience of the plan and reasonable expectations. To be reasonable, the actuarial assumptions and methods must also be appropriate for the purpose of the measurement (this means that factors specific to the measurements must be taken into account). The actuary's selection of assumptions about future covered employment and contribution levels (including contribution base units and average contribution rate) may be based on information provided by the plan sponsor, which must act in good faith in providing the information. In addition, to the extent that an actuarial assumption used for the deterministic projection in paragraph (d)(5)(ii)(A)(1) of this section differs from that used to certify whether the plan is in critical and declining status pursuant to section 432(b)(3)(B)(iv), an explanation of the information and analysis that led to the selection of that different assumption must be provided. Similarly, to the extent that an actuarial assumption used for the stochastic projection in paragraph (d)(5)(ii)(A)(2) of this section differs from that used for the deterministic projection, an explanation of the information and analysis that led to the selection of that different assumption must be provided.

(C) *Initial value of plan assets and cash flow projections.* Except as provided in paragraph (d)(5)(iv)(D) of this section, the cash flow projections must be based on—

(1) The fair market value of plan assets as of the end of the calendar quarter immediately preceding the date the application is submitted;

(2) Projected benefit payments that are consistent with the projected benefit payments under the most recent actuarial valuation; and

(3) Appropriate adjustments to projected benefit payments to include benefits for new hires who are reflected in the projected contribution amounts.

(D) *Requirement to reflect significant events.* The projected cash flows relating to contributions, withdrawal liability payments, and benefit payments must also be adjusted to reflect significant events that occurred after the most recent actuarial valuation. Significant events include—

(1) A plan merger or transfer;

(2) The withdrawal or the addition of employers that changed projected cash flows relating to contributions, withdrawal liability payments, or

benefit payments by more than five percent;

(3) A plan amendment, a change in a collective bargaining agreement, or a change in a rehabilitation plan that changed projected cash flows relating to contributions, withdrawal liability payments, or benefit payments by more than five percent; or

(4) Any other event or trend that resulted in a material change in those projected cash flows.

(v) *Simplified determination for smaller plans.* In the case of a plan that is not large enough to be required to select a retiree representative under paragraph (b)(4) of this section, the determination of whether the benefit suspension (or a benefit suspension in combination with a partition of the plan) will satisfy the requirement that it is at a level that is reasonably estimated to enable the plan to avoid insolvency is permitted to be made without regard to paragraph (d)(5)(ii)(A)(2) of this section.

(vi) *Additional disclosure*—(A) *Disclosure of past experience for critical assumptions.* The application for suspension must include a disclosure of the total contributions, total contribution base units and average contribution rate, withdrawal liability payments, and the rate of return on plan assets for each of the 10 plan years preceding the plan year in which the application is submitted.

(B) *Sensitivity of results to investment return assumptions.* The application must include deterministic projections of the plan's solvency ratio over the extended period using two alternative assumptions for the plan's rate of return. These alternatives are that the plan's future rate of return will be lower than the assumed rate of return used under paragraph (d)(5)(iv)(B) of this section by—

(1) One percentage point; and

(2) Two percentage points.

(C) *Sensitivity of results to industry level assumptions.* The application must include deterministic projections of the plan's solvency ratio over the extended period using two alternative assumptions for future contribution base units. These alternatives are that future contribution base units—

(1) Continue under the same trend as the plan experienced over the past 10 years; and

(2) Continue under the trend identified in paragraph (d)(5)(vi)(C)(1) of this section reduced by one percentage point.

(D) *Projection of funded percentage.*

The application must include an illustration, prepared on a deterministic basis, of the projected value of plan

assets, the accrued liability of the plan (calculated using the unit credit funding method), and the funded percentage for each year in the extended period.

(E) *Permitted simplification of certain projections.* It is permissible for the projections described in paragraph (d)(5)(vi)(C) of this section to be made without reflecting any adjustments to the projected benefit payments that result from the alternative assumptions regarding future contribution base units.

(6) *Equitable distribution*—(i) *In general.* Any suspension of benefits must be equitably distributed across the participant and beneficiary population, taking into account factors, with respect to participants and beneficiaries and their benefits, that may include one or more of the factors described in paragraph (d)(6)(ii) of this section. If a suspension of benefits provides for different treatment for different participants and beneficiaries (other than as a result of application of the individual limitations), then the suspension of benefits is equitably distributed across the participant and beneficiary population only if—

(A) Under the suspension, the participants and beneficiaries are divided into separate categories or groups that are defined by the consistent treatment of individuals within each separate category or group;

(B) Any difference in treatment under the suspension of benefits among the different categories or groups is based on relevant factors reasonably selected by the plan sponsor, such as the factors described in paragraph (d)(6)(ii) of this section; and

(C) Any such difference in treatment is based on a reasonable application of those relevant factors.

(ii) *Factors that may be considered*—

(A) *In general.* In accordance with paragraph (d)(6)(i)(B) and (C) of this section, if, under the suspension, there is any difference between the treatment of one category or group of participants and beneficiaries and another category or group of participants and beneficiaries, that difference must be based on a reasonable application of relevant statutory factors described in paragraph (d)(6)(ii)(B) of this section and any other factors reasonably selected by the plan sponsor. For example, it would be reasonable for a plan sponsor to conclude that the statutory factor described in paragraph (d)(6)(ii)(B)(3) of this section (amount of benefit) is a factor that should be taken into account as justifying a lesser benefit reduction for participants or beneficiaries whose benefits are closer to the level of the PBGC guarantee than for others. In addition, it would be

reasonable for a plan sponsor to conclude that the presumed financial vulnerability of certain participants or beneficiaries who are reasonably deemed to be in greater need of protection than other participants or beneficiaries is a factor that should be taken into account as justifying a lesser benefit reduction (as a percentage or otherwise) for those participants or beneficiaries than for others.

(B) *Statutory factors.* Factors that may be selected as a basis for differences in treatment under a suspension of benefits include, when reasonable under the circumstances, the following statutory factors:

(1) The age and life expectancy of the participant or beneficiary;

(2) The length of time that benefits have been in pay status;

(3) The amount of benefits;

(4) The type of benefit, such as survivor benefit, normal retirement benefit, or early retirement benefit;

(5) The extent to which a participant or beneficiary is receiving a subsidized benefit;

(6) The extent to which a participant or beneficiary has received post-retirement benefit increases;

(7) The history of benefit increases and reductions for participants and beneficiaries;

(8) The number of years to retirement for active employees;

(9) Any differences between active and retiree benefits;

(10) The extent to which active participants are reasonably likely to withdraw support for the plan, accelerating employer withdrawals from the plan and increasing the risk of additional benefit reductions for participants in and out of pay status; and

(11) The extent to which a participant's or beneficiary's benefits are attributable to service with an employer that failed to pay its full withdrawal liability.

(iii) *Reasonable application of factors.* An application of a factor referred to in paragraph (d)(6)(ii) of this section is unreasonable if it is inconsistent with the protections provided by the individual limitations described in paragraphs (d)(2) through (d)(4) of this section. For example, it would constitute an unreasonable application of the factor described in paragraph (d)(6)(ii)(B)(3) of this section (amount of benefit) if that factor were used to justify a larger suspension for participants whose benefits are closer to the guarantee-based limitation. Similarly, it would constitute an unreasonable application of the factors described in paragraph (d)(6)(ii)(B)(1) of this section

(age and life expectancy of the participant or beneficiary) if those factors were used to justify a greater suspension for older participants.

(iv) *Special rule for identification of categories or groups*—(A) *New post-suspension benefit formula.* This paragraph (d)(6)(iv) applies in the case of a proposed suspension of benefits under which an individual's benefits after suspension are calculated under a new benefit formula (rather than by reference to the individual's benefits before suspension). In this case, the evaluation of whether the proposed suspension is equitably distributed across the participant and beneficiary population is based on a comparison of an individual's pre-suspension benefit to the individual's post-suspension benefit (determined without regard to the application of the individual limitations). Accordingly, all individuals whose pre-suspension benefits are determined under a uniform pre-suspension benefit formula and whose post-suspension benefits are determined under a different uniform post-suspension benefit formula are treated as a single group.

(B) *Blended pre-suspension benefit formula.* If a plan applies different pre-suspension benefit formulas with respect to different plan years, then all individuals to whom more than one such formula applied may be treated as having a uniform pre-suspension benefit formula for purposes of paragraph (d)(6)(iv)(A) of this section (even though those individuals have different proportions of their pre-suspension benefits calculated under the different benefit formulas).

(C) *Changes in early retirement factors.* For purposes of paragraph (d)(6)(iv)(A) of this section, two individuals are not treated as having different pre-suspension or post-suspension benefit formulas merely because, as a result of the application of a uniform set of early retirement factors, their benefits differ because of retirement at different ages.

(v) *Examples.* The following examples illustrate the rules on equitable distribution of a suspension of benefits of this paragraph (d)(6). As a simplifying assumption for purposes of these examples, it is assumed that the facts of each example describe all of the factors that are included in the application discussed in the example (provided, however, that, in the case of a plan described in section 432(e)(9)(D)(vii), the examples are not intended to illustrate the application of section 432(e)(9)(D)(vii) or its effect on the analysis or conclusions in the examples).

*Example 1. (i) Facts.* The plan sponsor applies for approval of a suspension of benefits on March 15, 2017. Under the plan terms applicable prior to the suspension, one group of participants benefitted only under Benefit Formula A and the remaining participants benefitted only under Benefit Formula B. Each of these benefit formulas is uniform. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, benefits for all participants are reduced so that a uniform post-suspension benefit formula (Benefit Formula C) applies to all participants.

(ii) *Conclusion.* Because the reduction in benefits under the suspension formula is different for participants who benefitted only under Benefit Formula A than for participants who benefitted only under Benefit Formula B, the suspension of benefits provides for different treatment for different participants and beneficiaries (other than as a result of application of the individual limitations). In addition, the suspension of benefits provides for consistent treatment of participants within the following two categories: (1) Participants who benefitted only under Benefit Formula A; and (2) participants who benefitted only under Benefit Formula B. Therefore, pursuant to paragraph (d)(6)(iv)(A) of this section, these two categories of participants are each treated as a single group for purposes of evaluating whether the proposed suspension is equitably distributed across the participant and beneficiary population. In order to demonstrate that the distribution of the suspension satisfies the equitable distribution requirement, the plan sponsor must reasonably select and apply factors that are the basis for the different treatment of these two groups of participants.

*Example 2. (i) Facts.* The facts are the same as in *Example 1*, except that the plan terms applicable prior to the suspension did not provide for different benefit formulas for different groups of participants at any given time. Instead, the plan terms provided that different uniform benefit formulas applied for service prior to January 1, 2000, and for service on or after January 1, 2000.

(ii) *Conclusion.* The reduction in benefits under the suspension formula is different for participants who had service only prior to January 1, 2000, participants who had service only after January 1, 2000, and participants who had service during both of those periods. The suspension of benefits provides for different treatment for different participants and beneficiaries (other than as a result of application of the individual limitations). In addition, the suspension of benefits provides for consistent treatment of participants within the following three categories of participants: (1) Participants whose entire service was prior to January 1, 2000, (2) participants whose entire service was on or after January 1, 2000, and (3) participants who have some service before January 1, 2000 and some service on or after January 1, 2000. Therefore, pursuant to paragraph (d)(6)(iv)(A) of this section, the two categories of participants whose entire service was either before or on or after January 1, 2000 are each treated as a single group for purposes of evaluating whether the

proposed suspension is equitably distributed across the participant and beneficiary population. In addition, pursuant to paragraph (d)(6)(iv)(B) of this section, the category of participants with some service before January 1, 2000 and some service on or after January 1, 2000 is treated as a single group for purposes of this evaluation. In order to demonstrate that the distribution of the suspension satisfies the equitable distribution requirement, the plan sponsor must reasonably select and apply factors that are the basis for the different treatment of these three categories of participants.

*Example 3. (i) Facts.* The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, benefits for all participants and beneficiaries are reduced by the same percentage, and the suspension application indicates the rationale for this reduction.

(ii) *Conclusion.* The suspension of benefits is equitably distributed across the participant and beneficiary populations.

*Example 4. (i) Facts.* The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the age-based and disability-based limitations of section 432(e)(9)(D)(ii) and (iii), the portion of each participant's and beneficiary's benefit that exceeds the guarantee-based limitation of section 432(e)(9)(D)(i) is reduced by the same percentage, and the suspension application indicates the rationale for this reduction.

(ii) *Conclusion.* The suspension of benefits is equitably distributed across the participant and beneficiary populations. The result would be the same if, instead, the suspension of benefits applies only to benefits that exceed a multiple (in excess of 100%) of the guarantee-based limitation.

*Example 5. (i) Facts.* A plan was previously amended to provide an ad hoc 15% increase to the benefits of all participants and beneficiaries (including participants who, at the time, were no longer earning service under the plan, which therefore included retirees and deferred vested participants). The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, benefits for all participants and beneficiaries who were no longer earning service under the plan at the time of the ad hoc amendment are reduced by eliminating the amendment for those individuals. The suspension application indicates why the benefit reduction is based on the statutory factors in paragraph (d)(6)(ii)(B)(6) of this section (the extent to which a participant or beneficiary has received post-retirement benefit increases), including application of the reduction to those who, at the time of the previous benefit increase, were either retired participants or deferred vested participants, and in paragraph (d)(6)(ii)(B)(7) of this section (the history of benefit increases and reductions), and why it is reasonable to apply the factors in this manner.

(ii) *Conclusion.* The suspension of benefits is equitably distributed across the participant and beneficiary populations. This is because

the difference in treatment between the two groups of participants is based on whether a participant has received post-retirement benefit increases (in this case, whether a participant was earning service under the plan at the time of the benefit increase amendment), which under these facts is a relevant factor that may be reasonably selected by the plan sponsor, and the difference in treatment between the two groups of participants (eliminating the amendment only for benefits with respect to participants who were no longer earning service at the time of the amendment) is based on a reasonable application of that factor.

*Example 6. (i) Facts.* A plan contains a provision that provides a "thirteenth check" in plan years for which the investment return is greater than 7% (which was the assumed rate of return under the plan's actuarial valuation). The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, benefits for all participants and beneficiaries are reduced by eliminating the "thirteenth check" for all of those individuals. The suspension application indicates why the benefit reduction is based on the statutory factors in paragraph (d)(6)(ii)(B)(6) of this section (the extent to which a participant or beneficiary has received post-retirement benefit increases) and in paragraph (d)(6)(ii)(B)(7) of this section (the history of benefit increases and reductions), and why it is reasonable to apply the factors in this manner.

(ii) *Conclusion.* The suspension of benefits is equitably distributed across the participant and beneficiary populations.

*Example 7. (i) Facts.* A plan was previously amended to reduce future accruals from \$60 per year of service to \$50 per year of service. The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, the accrued benefits for all participants and beneficiaries are reduced to \$50 per year of service (and the plan's generally applicable adjustments for early retirement and form of benefit apply). The suspension application indicates why the benefit reduction is based on the statutory factor in paragraph (d)(6)(ii)(B)(7) of this section (the history of benefit increases and reductions), and why it is reasonable to apply the factors in this manner.

(ii) *Conclusion.* The suspension of benefits is equitably distributed across the participant and beneficiary populations. This is because the difference in treatment among the different groups of participants is based on the history of benefit reductions and a discrepancy between active and retiree benefits, which under these facts are relevant factors that may be reasonably selected by the plan sponsor, and the difference in treatment between the three groups of participants (reducing the \$60 benefit multiplier to \$50 per year of service for two groups of participants—those who had accrued all of their benefits under the \$60 multiplier and those who had accrued some of their benefits under the \$60 multiplier—and not reducing

benefits for the group of participants who had accrued all of their benefits under the \$50 multiplier) is based on a reasonable application of those factors.

**Example 8. (i) Facts.** The facts are the same as in *Example 7*, except that no plan amendments have previously reduced future accruals or other benefits for active participants. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, benefits for deferred vested participants, retirees, and beneficiaries who have commenced benefits are reduced, but no reduction applies to active participants. The suspension of benefits is not accompanied by any reductions in future accruals or other benefits for active participants.

**(ii) Conclusion.** The suspension of benefits is not equitably distributed across the participant and beneficiary populations. This is because, under these facts, no relevant factor (such as a previous reduction in benefits applicable only to active participants) has been reasonably selected by the plan sponsor to justify the proposed difference in treatment among the categories.

**Example 9. (i) Facts.** The facts are the same as in *Example 8*, except that the suspension of benefits provides for a reduction that applies to both active and inactive participants. However, the reduction that applies to active participants is smaller than the reduction that applies to inactive participants because the plan sponsor concludes, as explained and supported in the application for suspension, that active participants are reasonably likely to withdraw support for the plan if any larger reduction is applied.

**(ii) Conclusion.** The suspension of benefits is equitably distributed across the participant and beneficiary populations. This is because the difference in treatment between the different groups of participants is based on the extent to which active participants are reasonably likely to withdraw support for the plan, which under these facts is a relevant factor that may reasonably be selected by the plan sponsor, and the difference in treatment between the two groups of participants (applying a greater suspension to inactive than to active participants) is based on a reasonable application of that factor.

**Example 10. (i) Facts.** The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, the benefits for participants and beneficiaries attributable to service with an employer that failed to pay its full withdrawal liability are reduced by 50%. As indicated in the suspension application, the present value of the benefit reduction with respect to the former employees of one such employer is significantly greater than the unpaid withdrawal liability for that employer. Benefits for participants and beneficiaries attributable to service with all other employers are reduced by 10%.

**(ii) Conclusion.** The suspension of benefits is not equitably distributed across the participant and beneficiary populations. This is because, although the difference in treatment between the different groups of

participants is based on a relevant factor that may reasonably be selected by the plan sponsor, the difference in treatment between the groups of participants is not based on a reasonable application of that factor.

**Example 11. (i) Facts.** The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, the benefits for all participants and beneficiaries are reduced by the same percentage, except that the benefits for employees and former employees of a particular employer that is actively represented on the plan's Board of Trustees are reduced by a specified lesser percentage.

**(ii) Conclusion.** The suspension of benefits is not equitably distributed across the participant and beneficiary populations. This is because, under these facts, no relevant factor has been reasonably selected by the plan sponsor to justify the difference in treatment between the two groups of participants.

**Example 12. (i) Facts.** The facts are the same as in *Example 11*, except that the particular employer whose employees and former employees are subject to the lesser benefit reduction is the union that also participates in the plan.

**(ii) Conclusion.** The suspension of benefits is not equitably distributed across the participant and beneficiary populations. This is because, under these facts, no relevant factor has been reasonably selected by the plan sponsor to justify the difference in treatment between the two groups of participants.

**Example 13. (i) Facts.** The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, the monthly benefit of all participants and beneficiaries is reduced to 110% of the monthly benefit that is guaranteed by PBGC under section 4022A of ERISA. As indicated in the suspension application, this is because the plan sponsor is applying to PBGC for a partition of the plan, which requires the plan sponsor to have implemented the maximum benefit suspensions under section 432(e)(9).

**(ii) Conclusion.** The suspension of benefits is equitably distributed across the participant and beneficiary populations.

**Example 14. (i) Facts.** The plan sponsor applies for approval of a suspension of benefits. Under the suspension of benefits, subject to the individual limitations on benefit suspensions, benefits for all participants and beneficiaries are reduced by the same percentage, except that the protection for benefits based on disability goes beyond the required disability-based limitations and also includes payments to a beneficiary of a participant who had been receiving benefits based on disability at the time of death. The suspension application indicates the rationale for this protection from reduction.

**(ii) Conclusion.** The suspension of benefits is equitably distributed across the participant and beneficiary populations because this suspension design is a reasonable application of the statutory factor in paragraph (d)(6)(ii)(B)(4) of this section (type of benefit).

**Example 15. (i) Facts.** The facts are the same as in *Example 3*, except that the plan does not provide for benefits based on disability. Under the suspension of benefits, less of a reduction is applied to a participant who has become disabled within the meaning of title II of the Social Security Act than to otherwise similarly situated participants and the suspension application indicates the rationale for this reduction.

**(ii) Conclusion.** The suspension of benefits is equitably distributed across the participant and beneficiary populations because a participant's disability within the meaning of title II of the Social Security Act is a factor that can reasonably be taken into account in designing a suspension of benefits and applying less of a reduction to an individual in this group is a reasonable application of that factor.

**(7) Effective date of suspension made in combination with partition.** In any case in which a suspension of benefits with respect to a plan is made in combination with a partition of the plan, the suspension of benefits may not take effect prior to the effective date of the partition. This requirement will not be satisfied if the partition order under section 4233 of ERISA has not been provided to the Secretary of the Treasury by the last day of the 225-day period described in paragraph (g)(3)(i) of this section. For purposes of the preceding sentence, a conditional approval by PBGC (within the meaning of 29 CFR 4233.12(c)) of a partition application that is conditioned only on the Secretary's issuing a final authorization to suspend is treated as a partition order.

**(8) Additional rules for plans described in section 432(e)(9)(D)(vii).** [Reserved].

**(e) Benefit improvements—(1) Limitations on benefit improvements.** This paragraph (e) sets forth rules for the application of section 432(e)(9)(E). A plan satisfies the criteria in section 432(e)(9)(E) only if, during the period that any suspension of benefits remains in effect, the plan sponsor does not implement any benefit improvement with respect to the plan except as provided in this paragraph (e). Paragraph (e)(2) of this section describes limitations on a benefit improvement for participants and beneficiaries who are not yet in pay status. Paragraph (e)(3) of this section describes limitations on a benefit improvement for participants and beneficiaries who are in pay status. Paragraph (e)(4) of this section provides that the limitations of this paragraph (e) generally apply in addition to other limitations on benefit increases that apply to a plan. Paragraph (e)(5) of this section defines benefit improvement.

**(2) Limitations on benefit improvements for those not in pay**

*status*—(i) *Equitable distribution for those in pay status and solvency projection.* During the period that any suspension of benefits under a plan remains in effect, the plan sponsor may not increase the liabilities of the plan by reason of any benefit improvement for any participant or beneficiary who was not in pay status by the first day of the plan year for which the benefit improvement takes effect, unless—

(A) The present value of the total liabilities for a benefit improvement for participants and beneficiaries whose benefit commencement dates were before the first day of the plan year for which the benefit improvement takes effect is not less than the present value of the total liabilities for a benefit improvement for participants and beneficiaries who were not in pay status by that date;

(B) The plan sponsor equitably distributes the benefit improvement among the participants and beneficiaries whose benefit commencement dates were before the first day of the plan year in which the benefit improvement is proposed to take effect; and

(C) The plan actuary certifies that after taking into account the benefit improvement, the plan is projected to avoid insolvency indefinitely.

(ii) *Rules of application*—(A) *Present value determination*—(1) *Actuarial assumptions and methods.* For purposes of paragraph (e)(2)(i)(A) of this section, the present value of the total liabilities for a benefit improvement is the present value as of the first day of the plan year in which the benefit improvement is proposed to take effect. The actuarial assumptions and methods used for the calculation for present values and the actuarial projections that are required under this paragraph (e)(2) must each be reasonable, and the combination of the actuarial assumptions and methods must be reasonable, taking into account the experience of the plan and reasonable expectations.

(2) *Increase in future accrual rate.* In the case of a benefit improvement that is an increase in the rate of future accrual, the present value determined under paragraph (e)(2)(i)(A) of this section must take into account the increase in accruals for participants and beneficiaries not yet in pay status for all future years.

(B) *Factors relevant to equitable distribution.* The evaluation of whether a benefit improvement is equitably distributed for purposes of paragraph (e)(2)(i)(B) of this section must take into account the relevant factors described in paragraph (d)(6)(ii)(B) of this section and the extent to which the benefits of

the participants and beneficiaries were suspended.

(C) *Actuarial certification.* The certification in paragraph (e)(2)(i)(C) of this section must be made using the standards described in paragraphs (d)(5)(ii), (iv), and (v) of this section, substituting the plan year that includes the effective date of the benefit improvement for the plan year that includes the effective date of the suspension.

(iii) *Special rule for certain benefit increases.* The limitations of this paragraph (e) do not apply to a resumption of suspended benefits or plan amendment that increases liabilities with respect to participants and beneficiaries not in pay status by the first day of the plan year in which the benefit improvement took effect that—

(A) The Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, determines to be reasonable and which provides for only *de minimis* increases in the liabilities of the plan; or

(B) Is required as a condition of qualification under section 401 or to comply with other applicable law, as determined by the Secretary of the Treasury.

(3) *Limitation on resumption of suspended benefits only for those in pay status.* The plan sponsor may increase liabilities of the plan by eliminating some or all of the suspension that applies solely to participants and beneficiaries in pay status at the time of the resumption, provided that the plan sponsor equitably distributes the value of those resumed benefits among participants and beneficiaries in pay status, taking into account the relevant factors described in paragraph (d)(6)(ii)(B) of this section. A resumption of benefits that is described in this paragraph (e)(3) is not subject to the limitations on a benefit improvement under section 432(f) (relating to restrictions on benefit increases for plans in critical status).

(4) *Additional limitations.* Except as provided in paragraph (e)(3) of this section, the limitations on a benefit improvement under this paragraph (e) are in addition to the limitations in section 432(f) and any other applicable limitations on increases in benefits imposed on a plan.

(5) *Definition of benefit improvement*—(i) *In general.* For purposes of this paragraph (e), the term benefit improvement means, with respect to a plan, a resumption of suspended benefits, an increase in benefits, an increase in the rate at which benefits accrue, or an increase in the

rate at which benefits become nonforfeitable, under the plan.

(ii) *Effect of expiration of suspension.* In the case of a suspension of benefits that expires as of a date that is specified in the plan amendment implementing the suspension, the resumption of benefits solely from the expiration of that period is not treated as a benefit improvement.

(f) *Notice requirements*—(1) *In general.* No suspension of benefits may be made pursuant to this section unless notice of the proposed suspension has been given by the plan sponsor to—

(i) All participants, beneficiaries of deceased participants, and alternate payees under the plan (regardless of whether their benefits are proposed to be suspended), except those who cannot be contacted by reasonable efforts;

(ii) Each employer who has an obligation to contribute (within the meaning of section 4212(a) of ERISA) under the plan; and

(iii) Each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in paragraph (f)(1)(ii) of this section.

(2) *Content of notice*—(i) *In general.* The notice described under paragraph (f)(1) of this section must contain—

(A) Sufficient information to enable a participant or beneficiary to understand the effect of any suspension of benefits, including an individualized estimate (on an annual or monthly basis) of the effect on that participant or beneficiary;

(B) A description of the factors considered by the plan sponsor in designing the benefit suspension;

(C) A statement that the application for approval of any suspension of benefits will be available on the Web site of the Department of the Treasury and that comments on the application will be accepted;

(D) Information as to the rights and remedies of plan participants and beneficiaries;

(E) If applicable, a statement describing the appointment of a retiree representative, the date of appointment of the representative, the role and responsibilities of the retiree representative, identifying information about the retiree representative (including whether the representative is a plan trustee), and how to contact the retiree representative; and

(F) Information on how to contact the Department of the Treasury for further information and assistance where appropriate.

(ii) *Description of suspension of benefits.* The notice described under paragraph (f)(1) of this section will not satisfy the requirements of paragraph

(f)(2)(i) of this section unless it includes the following—

(A) To the extent that it is not possible to provide an individualized estimate on an annual or monthly basis of the quantitative effect of the suspension on a participant or beneficiary, such as in the case of a suspension that affects the payment of any future cost-of-living adjustment, that effect may be reflected in a narrative description;

(B) A statement that the plan sponsor has determined that the plan will become insolvent unless the proposed suspension takes effect, and the year in which insolvency is projected to occur without a suspension of benefits;

(C) A statement that insolvency of the plan could result in benefits lower than benefits paid under the proposed suspension and a description of the projected benefit payments upon insolvency;

(D) A description of the proposed suspension and its effect, including a description of the different categories or groups affected by the suspension, how those categories or groups are defined, and the formula that is used to calculate the amount of the proposed suspension for individuals in each category or group;

(E) A description of the effect of the proposed suspension on the plan's projected insolvency;

(F) A description of whether the suspension will remain in effect indefinitely, or the date the suspension expires if it expires by its own terms; and

(G) A statement describing the right to vote on the suspension application.

(iii) *Readability requirement.* A notice given under paragraph (f)(1) of this section must be written in a manner so as to be understood by the average plan participant.

(iv) *Model notice.* The Secretary of the Treasury will provide a model notice. The use of the model notice will satisfy the content and readability requirements of this paragraph (f)(2) with respect to the language provided in the model.

(3) *Form and manner—(i) Timing—*  
(A) *In general.* A notice under paragraph (f)(1) of this section must be given no earlier than four business days before the date on which an application is submitted and no later than two business days after the Secretary of the Treasury notifies the plan sponsor that it has submitted a complete application, as described in paragraph (g)(1)(ii) of this section.

(B) *Timing for lost participants.* If additional individuals who are entitled to notice are located after the time period in paragraph (f)(3)(i)(A) of this

section has elapsed, then the plan sponsor must give notice to these individuals as soon as practicable thereafter.

(ii) *Method of delivery of notice—(A) Written or electronic delivery.* A notice given under paragraph (f)(1) of this section may be provided in writing. It may also be provided in electronic form to the extent that the form is reasonably accessible to persons to whom the notice is required to be provided. Permissible electronic methods include those permitted under regulations of the Department of Labor at 29 CFR 2520.104b–1(c) and those described at § 54.4980F–1, Q&A–13(c) of the Excise Tax Regulations.

(B) *No alternative method of delivery.* A notice under this paragraph (f) must be provided in written or electronic form.

(iii) *Additional information in notice.* A notice given under paragraph (f)(1) of this section is permitted to include information in addition to the information that is required under paragraph (f)(2) of this section, including, if applicable, information relating to an application for partition under section 4233 of ERISA (such as the model notice at Appendix A of 29 CFR part 4233), provided that the requirements of paragraph (f)(3)(iv) of this section are satisfied.

(iv) *No false or misleading information.* A notice given under paragraph (f)(1) of this section may not include false or misleading information (or omit information in a manner that causes the information provided to be misleading).

(4) *Other notice requirement.* Any notice given under paragraph (f)(1) of this section satisfies the requirement for notice of a significant reduction in benefits described in section 4980F that would otherwise be required as a result of that suspension of benefits. To the extent that there are other reductions that accompany a suspension of benefits, such as a reduction in the future accrual rate described in section 4980F for active participants or a reduction in adjustable benefits under section 432(e)(8), notice that satisfies the requirements (including the applicable timing requirements) of section 4980F or section 432(e)(8), as applicable, must be provided.

(5) *Examples.* The following examples illustrate the requirement in paragraph (f)(1)(i) of this section to give notice to all participants, beneficiaries of deceased participants, and alternate payees, except those who cannot be contacted by reasonable efforts.

*Example 1. (i) Facts.* A plan sponsor distributes notice of a proposed suspension

of benefits to plan participants, beneficiaries of deceased participants, and alternate payees by mailing the notice to their last known mailing addresses, using the same information that it used to send the most recent annual funding notice. Of 5,000 such notices, 300 were returned as undeliverable. The plan sponsor takes no additional steps to contact the individuals for whom the notice was returned as undeliverable.

(ii) *Conclusion.* The plan sponsor did not make any effort beyond the initial mailing to locate the 300 individuals for whom the notice was returned as undeliverable. Therefore, the plan sponsor did not satisfy the requirement to provide notice to all participants, beneficiaries of deceased participants, and alternate payees under the plan (regardless of whether their benefits are proposed to be suspended), except those who cannot be contacted by reasonable efforts.

*Example 2.—(i) Facts.* The facts are the same as *Example 1*, but the plan sponsor contacts the bargaining parties for the plan and the plan administrators of any other employee benefit plans that the plan sponsor reasonably believes may have information useful for locating the missing individuals, and the plan sponsor requests contact information for the missing individuals. The plan sponsor then uses an Internet search tool, a credit reporting agency, and a commercial locator service to search for individuals for whom it was not able to obtain updated information from bargaining parties. Through these efforts, the plan sponsor locates the updated addresses of 250 of the 300 individuals whom it previously failed to contact. The plan sponsor mails notices to those individuals within one week of locating them.

(ii) *Conclusion.* By using effective search methods to find the previously missing individuals and promptly mailing the notice of suspension to them, the plan sponsor has satisfied the requirement to provide notice to all participants, beneficiaries of deceased participants, and alternate payees under the plan (regardless of whether their benefits are proposed to be suspended), except those who cannot be contacted by reasonable efforts.

(g) *Approval or denial of an application for suspension of benefits—*  
(1) *Application—(i) In general.* The plan sponsor of a plan in critical and declining status for a plan year that seeks to suspend benefits must submit an application for approval of the proposed suspension of benefits to the Secretary of the Treasury. The Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, will approve a complete application described in paragraph (g)(1)(ii) of this section upon finding that—

(A) The plan is eligible for the proposed suspension described in the application;

(B) The plan actuary and plan sponsor satisfy the requirements of section 432(e)(9)(C) in accordance with the rules of paragraph (c) of this section;

(C) The design of the proposed suspension described in the application

satisfies the criteria of section 432(e)(9)(D) in accordance with the rules of paragraphs (d) of this section; and

(D) The plan sponsor satisfies the requirements of section 432(e)(9)(E) and (F) in accordance with the rules of paragraphs (e) and (f) of this section.

(ii) *Complete application.* After receiving a submission, the plan sponsor will be notified within two business days whether the submission constitutes a complete application. A complete application will be treated as submitted on the date that it was originally submitted to the Secretary of the Treasury. If a submission is incomplete, the notification will inform the plan sponsor of the information that is needed to complete the submission and give the plan sponsor a reasonable opportunity to submit a complete application. In such a case, the complete application will be treated as submitted on the date on which the additional information needed to complete the application is submitted to the Secretary of the Treasury.

(iii) *Submission of application.* An application described in this paragraph (g)(1) must be submitted electronically in a searchable format.

(iv) *Requirements for application.* Additional guidance that may be necessary or appropriate with respect to applications described in this paragraph (g)(1), including procedures for submitting applications and the information required to be included in a complete application, may be published in the form of revenue procedures, notices, or other guidance in the Internal Revenue Bulletin.

(v) *Requirement to provide adequate time to process application—(A) General rule.* An application for suspension that is not submitted in combination with an application to PBGC for a plan partition under section 4233 of ERISA generally will not be accepted unless the proposed effective date of the suspension is at least nine months from the date on which the application is submitted.

(B) *Earlier effective date in appropriate circumstances.* Notwithstanding paragraph (g)(1)(v)(A) of this section, in appropriate circumstances the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, may permit a proposed suspension to have an earlier effective date.

(vi) *Plan sponsors that also apply for partition.* See part 4233 of the PBGC regulations for a coordinated application process that applies in the case of a plan sponsor that is submitting an application for suspension in

combination with an application to PBGC for a plan partition under section 4233 of ERISA.

(2) *Solicitation of comments—(i) In general.* Not later than 30 days after receipt of a complete application described in paragraph (g)(1) of this section—

(A) The application for approval of the suspension of benefits will be published on the Web site of the Department of the Treasury; and

(B) The Secretary of the Treasury will publish a notice in the **Federal Register** soliciting comments from contributing employers, employee organizations, and participants and beneficiaries of the plan for which an application was made, and other interested parties.

(ii) *Public comments.* The notice described in paragraph (g)(2)(i)(B) of this section will generally request that comments be submitted no later than 45 days after publication of that notice in the **Federal Register**, but the notice may specify a different deadline for comments in appropriate circumstances. Comments received in response to this notice will be made publicly available.

(3) *Special rules in the case of revision to proposed suspension—(i) Resubmission review available in certain circumstances.* The Secretary of the Treasury (in consultation with PBGC and the Secretary of Labor) has the discretion, in appropriate circumstances, to permit the plan sponsor to submit a revision of a proposed suspension that had been withdrawn for resubmission review. With respect to an application that is accepted for resubmission review—

(A) The rules of paragraph (g)(1)(v)(B) of this section will apply;

(B) The limitations of paragraph (d) of this section with respect to the revised proposed suspension may be applied using the same actuarial data (including the same fair market value of the plan assets) as was used in the initial application;

(C) The revision to the proposed suspension will be published, and comments solicited, in accordance with paragraph (g)(2) of this section; and

(D) The plan sponsor must provide notice of the revised proposed suspension in accordance with the requirements of paragraph (g)(3)(ii) of this section.

(ii) *Requirement to provide updated notice to affected participants—(A) General rule.* Except as provided in paragraph (g)(3)(ii)(B) of this section, a plan sponsor that revises a proposed suspension in accordance with this paragraph (g)(3) must provide notice of the suspension in accordance with the rules of paragraph (f) of this section.

(B) *Treatment of participants who are not affected by the revision.* If the revision to the proposed suspension changes neither the amount of the suspension as initially proposed nor the effective date of the proposed suspension for an affected individual, then the Secretary of the Treasury (in consultation with PBGC and the Secretary of Labor) may permit the plan sponsor to provide a simplified version of the notice of the suspension to that individual. For this purpose, the effective date of a suspension is determined without taking into account the second sentence of paragraph (a)(4)(iii)(C) of this section.

(4) *Approval or denial—(i) Deemed approval.* A complete application described in paragraph (g)(1)(ii) of this section will be deemed approved unless, within 225 days following the date that the complete application is submitted, the Secretary of the Treasury notifies the plan sponsor that its application does not satisfy one or more of the requirements described in this paragraph (g).

(ii) *Notice of denial.* If the Secretary of the Treasury denies a plan sponsor's application, the notification of the denial will detail the specific reasons for the denial, including reference to the specific requirement not satisfied.

(iii) *Special rules for systemically important plans.* If the Secretary of the Treasury approves a plan sponsor's application and the Secretary expects that the plan is or may be a systemically important plan (as defined in paragraph (h)(5)(iv) of this section), the Secretary will so notify the plan sponsor. In that case, and in the event of a vote to reject the suspension (as described in paragraph (h)(4) of this section), the plan sponsor may be required to supply individual participant data and any actuarial analyses that the Secretary may request, in order to assist the Secretary in determining whether to permit the implementation of the suspension that was approved by the Secretary but rejected by a majority of the eligible voters or the implementation of a modification of that suspension.

(iv) *Agreement to stay 225-day period.* The Secretary of the Treasury and the plan sponsor may mutually agree in writing to stay the 225-day period described in paragraph (g)(3)(i) of this section.

(5) *Consideration of certain factors.* In evaluating whether the plan sponsor has satisfied the requirement of paragraph (c)(3)(i)(A) of this section, the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, will review the plan sponsor's consideration

of each of the factors under paragraph (c)(3)(ii) of this section (and any other factor that the plan sponsor considered).

(6) *Standard for accepting plan sponsor determinations.* In evaluating the plan sponsor's application, the Secretary of the Treasury will accept the plan sponsor's determinations in paragraph (c)(3) of this section unless the Secretary concludes, in consultation with PBGC and the Secretary of Labor, that the determinations were clearly erroneous.

(7) *Plan sponsor certifications with respect to plan amendments.* The plan sponsor will not satisfy the requirements of paragraph (g)(1)(i)(B) and (D) of this section unless the plan sponsor certifies that if the plan sponsor receives final authorization to suspend as described in paragraph (h)(6) of this section with respect to the proposed benefit suspension (or, in the case of a systemically important plan, a proposed or modified benefit suspension), the plan sponsor chooses to implement the suspension, and the plan sponsor adopts the amendment described in paragraph (a)(1) of this section, then it will timely amend the plan to provide that—

(i) If the plan sponsor fails to make the annual determinations under section 432(e)(9)(C)(ii), then the suspension of benefits will cease as of the first day of the first plan year following the plan year in which the plan sponsor fails to make the annual plan sponsor determinations in paragraph (c)(4) of this section; and

(ii) Any future benefit improvement must satisfy the requirements of section 432(e)(9)(E).

(8) *Special Master.* The Secretary of the Treasury may appoint a Special Master for purposes of this section. If a Special Master is appointed, the Special Master will coordinate the implementation of this section and the review of applications for the suspension of benefits and other appropriate documents, and will provide recommendations to the Secretary of the Treasury with respect to decisions required under this section.

(h) *Participant vote on proposed benefit reduction—(1) Requirement for vote—(i) In general.* If an application for suspension is approved under paragraph (g) of this section, then the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, will administer a vote as described in section 432(e)(9)(H) and this paragraph (h). A suspension of benefits may not take effect before the vote and may only take effect after a final authorization to suspend benefits under paragraph (h)(6) of this section.

(ii) *Communication by plan sponsor.* The plan sponsor must take reasonable steps to inform eligible voters about the proposed suspension. This includes all eligible voters who may be contacted by reasonable efforts in accordance with paragraph (f)(1) of this section. Any eligible voter whom the plan sponsor has been able to locate through these means (or who has otherwise been located by the plan sponsor) must be—

(A) Included on the voting roster described in paragraph (h)(3)(iii)(B) of this section; and

(B) Sent a ballot described in paragraph (h)(3) of this section.

(iii) *Eligible voters—(A) General definition.* For purpose of this paragraph (h), the term “eligible voters” means all plan participants (that is, active plan participants, deferred vested participants, and retirees) and beneficiaries of deceased participants.

(B) *Voting roster.* The voting roster includes those eligible voters to whom the notices described in paragraph (f) of this section were sent. If there is a plan participant or beneficiary who did not receive a notice but who is subsequently located by the plan sponsor, that individual must be included on the roster. Similarly, if an individual becomes a plan participant after the date the notices were sent, then the individual must be included on the roster. If a plan sponsor learns after the date the notices described in paragraph (f) of this section were sent that an eligible voter has died, then that deceased individual must not be included on the roster (but if that participant has a beneficiary entitled to benefits under the plan, the beneficiary must be added to the roster).

(2) *Participant vote—(i) In general.* The participant vote described in paragraph (h)(1)(i) of this section requires completion of the following steps—

(A) Distribution of the ballot package described in paragraph (h)(2)(iii) of this section to the eligible voters;

(B) Voting by eligible voters and collection and tabulation of the votes, as described in paragraph (h)(2)(iv) of this section; and

(C) Determination of whether a majority of the eligible voters has voted to reject the suspension, as described in paragraph (h)(2)(v) of this section.

(ii) *Designation of service provider for limited functions.* The Secretary of the Treasury is permitted to designate one or more service providers to perform, under the supervision of the Secretary, any of the functions of the Secretary described in paragraphs (h)(2)(i)(A) and (B) of this section. If the Secretary designates a service provider to perform

these functions then the service provider will provide the Secretary with a written report of the results of the vote, including (as applicable)—

(A) The number of ballot packages distributed to eligible voters;

(B) The number of eligible voters to whom ballot packages have not been provided (because the individuals could not be located);

(C) The number of eligible voters who voted (specifying the number of affirmative votes and the number of negative votes cast); and

(D) Any other information that the Secretary requires.

(iii) *Distribution of the ballot package to the eligible voters—(A) Ballot package.* The ballot package distributed to each eligible voter consists of—

(1) A ballot, approved under paragraph (h)(3)(iii) of this section, which contains the items described in section 432(e)(9)(H)(iii) and paragraph (h)(3)(i) of this section; and

(2) A voter identification code assigned to the eligible voter for use in voting.

(B) *Plan sponsor responsibilities—(1) In general.* This paragraph (h)(2)(iii)(B) sets forth the responsibilities of the plan sponsor with respect to the distribution of the ballot package to the eligible voters.

(2) *Furnish information regarding eligible voters.* No later than 7 days following the date the Secretary of the Treasury has approved an application for a suspension of benefits under paragraph (g) of this section, the plan sponsor must furnish the following—

(i) The voting roster described in paragraph (h)(1)(iii)(B) of this section;

(ii) Plan information (such as participant identification codes used by the plan) to enable the Secretary of the Treasury to verify the identity of each eligible voter;

(iii) For each eligible voter on the voting roster, the last known mailing address (or, if the plan sponsor has been unable to locate that individual using the standards that apply for purposes of paragraph (f)(1)(i) of this section, an indication that the individual could not be located through reasonable efforts);

(iv) Current electronic mailing addresses for those eligible voters identified in paragraph (h)(2)(iii)(B)(4) of this section; and

(v) The individualized estimates described in paragraph (f)(2)(i)(A) of this section (or, if an individualized estimate is no longer accurate for an eligible voter, a corrected version of that estimate).

(3) *Communication with eligible voters.* In accordance with section 432(e)(9)(H)(iv) and paragraph (h)(1)(ii)

of this section, the plan sponsor is responsible for communicating with eligible voters, which includes—

(i) Notifying the eligible voters described in paragraph (h)(2)(iii)(B)(4) of this section that a ballot package will be mailed to them by first-class U.S. mail; and

(ii) Making reasonable efforts (using the standards that apply for purposes of paragraph (f)(1)(i) of this section) as necessary to locate eligible voters for whom the plan sponsor has received notification that the mailed ballot packages are returned as undeliverable (so that ballot packages can be sent to those eligible voters).

(4) *Eligible voters to receive electronic notification.* Those eligible voters whom the plan sponsor must notify electronically are—

(i) Eligible voters who previously received the notice described in paragraph (f) of this section in electronic form (as permitted under paragraph (f)(3)(ii) of this section), and

(ii) Any other eligible voters who regularly receive plan-related communications from the plan sponsor in electronic form.

(5) *Method of notifying certain eligible voters.* The notification described in paragraph (h)(2)(iii)(B)(3)(i) of this section for an eligible voter must be made using the electronic form normally used to send plan-related communications to that voter (or the form used to provide the notice in paragraph (f) of this section, if different). The plan sponsor must send this notification promptly after being informed of the ballot distribution date (within the meaning of paragraph (h)(2)(iii)(D) of this section) and the notification must include the ballot distribution date.

(6) *Pay costs associated with distribution.* The plan sponsor is responsible for paying all costs associated with printing, assembling, and distributing the ballot package, including postage.

(C) *Required method of distributing ballot package.* Ballot packages must be distributed to eligible voters by first-class U.S. mail. A supplemental copy of the mailed ballot package may also be sent by an electronic communication to an eligible voter who has consented to receive electronic communications.

(D) *Timing.* Ballot packages will be distributed to eligible voters no later than 30 days after the Secretary of the Treasury has approved an application for a suspension of benefits under paragraph (g) of this section. The date on which the ballot packages are mailed to the eligible voters is referred to as the ballot distribution date.

(iv) *Collection and tabulation of votes cast by eligible voters—*(A) *Voting period.* The voting period is the period during which a vote received from an eligible voter will be counted. The voting period begins on the ballot distribution date. The voting period generally remains open until the 30th day following the date the Secretary of the Treasury has approved an application for a suspension of benefits under paragraph (g) of this section. However, the voting period will not close earlier than 21 days after the ballot distribution date. In addition, the Secretary (in consultation with PBGC and the Secretary of Labor) may specify a later date to end the voting period in appropriate circumstances.

(B) *Automated voting system must be provided.* An automated voting system that meets the requirements of paragraph (h)(2)(iv)(C) of this section must be made available to voters for casting their votes. In appropriate circumstances, the Secretary may, in consultation with PBGC and the Secretary of Labor, allow voters to cast votes by mail in lieu of using the automated voting system.

(C) *Automated voting system.* An automated voting system meets the requirements of this paragraph (h)(2)(iv)(C) only if the system—

(1) Collects votes cast by eligible voters both electronically (through a Web site) and telephonically (through a toll-free number allowing voters to cast their votes using both a touch-tone voting system and an interactive voice response system); and

(2) Accepts only votes cast during the voting period by an eligible voter who provides the eligible voter's identification code described in paragraph (h)(2)(iii)(A)(2) of this section.

(D) *Policies and procedures.* The Secretary of the Treasury (in consultation with PBGC and the Secretary of Labor) may establish such policies and procedures as may be necessary to facilitate the administration of the vote under this paragraph (h)(2). These policies and procedures may include, but are not limited to, establishing a process for an eligible voter to challenge the vote.

(v) *Determination of whether a majority of the eligible voters has voted to reject the suspension.* Within 7 calendar days after the end of the voting period, the Secretary of the Treasury (in consultation with PBGC and the Secretary of Labor) will—

(A) Certify that a majority of all eligible voters has voted to reject the suspension that was approved under paragraph (g) of this section, or

(B) Issue a final authorization to suspend as described in paragraph (h)(6) of this section.

(3) *Ballots—*(i) *In general.* The plan sponsor must provide a ballot for the vote that includes the following—

(A) A description of the proposed suspension and its effect, including the effect of the suspension on each category or group of individuals affected by the suspension and the extent to which they are affected;

(B) A description of the factors considered by the plan sponsor in designing the benefit suspension, including but not limited to the factors in paragraph (d)(6)(ii) of this section;

(C) A description of whether the suspension will remain in effect indefinitely or will expire by its own terms (and, if it will expire by its own terms, when that will occur);

(D) A statement from the plan sponsor in support of the proposed suspension;

(E) A statement in opposition to the proposed suspension compiled from comments received pursuant to the solicitation of comments pursuant to paragraph (g)(2) of this section;

(F) A statement that the proposed suspension has been approved by the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor;

(G) A statement that the plan sponsor has determined that the plan will become insolvent unless the proposed suspension takes effect (including the year in which insolvency is projected to occur without a suspension of benefits), and an accompanying statement that this determination is subject to uncertainty;

(H) A statement that insolvency of the plan could result in benefits lower than benefits paid under the proposed suspension and a description of the projected benefit payments in the event of plan insolvency;

(I) A statement that insolvency of PBGC would result in benefits lower than benefits otherwise paid in the case of plan insolvency;

(J) A statement that the plan's actuary has certified that the plan is projected to avoid insolvency, taking into account the proposed suspension of benefits (and, if applicable, a proposed partition of the plan), and an accompanying statement that the actuary's projection is subject to uncertainty;

(K) A statement that the suspension will go into effect unless a majority of all eligible voters vote to reject the suspension and that, therefore, a failure to vote has the same effect on the outcome of the vote as a vote in favor of the suspension;

(L) A copy of the individualized estimate described in paragraph (f)(2)(i)(A) of this section (or, if that individualized estimate is no longer accurate, a corrected version of that estimate); and

(M) A description of the voting procedures, including the deadline for voting.

(ii) *Additional rules*—(A) *Readability requirement*. A ballot provided under section 432(e)(9)(H)(iii), in accordance with the rules of paragraph (h)(3)(i) of this section, must be written in a manner that is readily understandable by the average plan participant.

(B) *No false or misleading information*. A ballot provided under section 432(e)(9)(H)(iii), in accordance with the rules of paragraph (h)(3)(i) of this section, may not include false or misleading information (or omit information in a manner that causes the information provided to be misleading).

(iii) *Ballot must be approved*. Any ballot provided under section 432(e)(9)(H)(iii), in accordance with the rules of paragraph (h)(3)(i) of this section, must be approved by the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, before it is provided.

(iv) *Statement in opposition to the proposed suspension*. The statement in opposition to the proposed suspension that is prepared from comments received on the application, as required under section 432(e)(9)(H)(iii)(II), will be compiled by the Secretary of Labor and will be written in accordance with the rules of paragraph (h)(3)(ii) of this section. If no comments in opposition are received, the statement in opposition to the proposed suspension will include a statement indicating that there were no such comments.

(v) *Model ballot*. Model language for use in the ballot may be published in the Internal Revenue Bulletin.

(4) *Implementing suspension following vote*—(i) *In general*. Unless a majority of all eligible voters vote to reject the suspension that was approved under paragraph (g) of this section, the suspension will be permitted to take effect. If a majority of all eligible voters vote to reject the suspension that was approved under paragraph (g) of this section, a suspension of benefits will not be permitted to take effect except as provided under paragraph (h)(5)(iii) of this section relating to the implementation of a suspension for a systemically important plan (as defined in paragraph (h)(5)(iv) of this section).

(ii) *Effect of not sending ballot*. Any eligible voters to whom ballots have not been provided (because the individuals could not be located) will be treated as

voting to reject the suspension at the same rate (in other words, in the same percentage) as those to whom ballots have been provided.

(5) *Systemically important plans*—(i) *In general*. If a majority of all eligible voters vote to reject the suspension that was approved under paragraph (g) of this section, the Secretary of the Treasury will consult with PBGC and the Secretary of Labor to determine if the plan is a systemically important plan. This determination will be made no later than 14 days after the results of the vote are certified.

(ii) *Recommendations from Participant and Plan Sponsor Advocate*. If the plan is determined to be a systemically important plan, then, no later than 44 days after the results of the vote are certified, the Participant and Plan Sponsor Advocate selected under section 4004 of ERISA may submit recommendations to the Secretary of the Treasury with respect to the suspension that was approved under paragraph (g) of this section or any modifications to the suspension.

(iii) *Implementation of original or modified suspension by systemically important plans*. If a plan is a systemically important plan for which a majority of all eligible voters vote to reject the suspension that was approved under paragraph (g) of this section, then the Secretary of the Treasury must determine whether to permit the implementation of the suspension that was approved under paragraph (g) of this section or whether to permit the implementation of a modification of that suspension. Under any such modification, the plan must be projected to avoid insolvency in accordance with section 432(e)(9)(D)(iv). No later than 60 days after the results of a vote to reject a suspension are certified, the Secretary of the Treasury will notify the plan sponsor that the suspension or modified suspension is permitted to be implemented.

(iv) *Systemically important plan defined*—(A) *In general*. For purposes of this paragraph (h)(5), a systemically important plan is a plan with respect to which PBGC projects that the present value of its financial assistance payments will exceed \$1.0 billion (adjusted in accordance with paragraph (h)(5)(iv)(B) of this section to the calendar year in which the application is submitted) if the suspension is not implemented.

(B) *Indexing*. For calendar years beginning after 2015, the dollar amount specified in paragraph (h)(5)(iv)(A) of this section will be replaced with an amount equal to the product of the dollar amount and a fraction, the

numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act) for the preceding calendar year and the denominator of which is the contribution and benefit base for calendar year 2014. If the amount otherwise determined under this paragraph (h)(5)(iv)(B) is not a multiple of \$1.0 million, the amount will be rounded to the next lowest multiple of \$1.0 million.

(6) *Final authorization to suspend*—(i) *In general*. In any case in which a suspension is permitted to take effect following a vote pursuant to section 432(e)(9)(H)(ii) and paragraph (h)(4) of this section, the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, will issue a final authorization to suspend with respect to the suspension not later than seven days after the vote.

(ii) *Systemically important plans*. In any case in which a suspension is permitted to take effect following a determination under paragraph (h)(5) of this section that the plan is a systemically important plan, the Secretary of the Treasury, in consultation with PBGC and the Secretary of Labor, will issue a final authorization to suspend, at a time sufficient to allow the implementation of the suspension prior to the end of the 90-day period beginning on the date the results of the vote are certified.

(iii) *Plan partitions*. Notwithstanding any other provision of this section, in any case in which a suspension of benefits with respect to a plan is made in combination with a partition of the plan, the suspension of benefits is not permitted to take effect prior to the effective date of the partition.

(i) [Reserved].

(j) *Effective/applicability date*. This section applies with respect to suspensions for which the approval or denial is issued on or after April 26, 2016 and, in the case of a systemically important plan, any modification described in paragraph (h)(5)(iii) of this section that is implemented on or after April 26, 2016.

#### Section 1.432(e)(9)–1T [Removed]

■ **Par. 3.** Section 1.432(e)(9)–1T is removed.

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement.*

Approved: April 21, 2016.

**Mark J. Mazur,**

*Assistant Secretary of the Treasury (Tax Policy).*

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