

“(5) USE OF SHORTFALL METHOD NOT TO PRECLUDE OTHER OPTIONS.—Nothing in this subsection shall be construed to affect a multiemployer plan’s ability to adopt the shortfall funding method with the Secretary’s permission under otherwise applicable regulations or to affect a multiemployer plan’s right to change funding methods, with or without the Secretary’s consent, as provided in applicable rules and regulations.”

[Pub. L. 109-280, §201(b), set out above, applicable to plan years beginning after 2007, with special rule for certain amortization extensions, see section 201(d) of Pub. L. 109-280, set out as an Effective Date of 2006 Amendment note under section 1081 of this title.]

[Pub. L. 109-280, §201(b), set out above, inapplicable to plan years beginning after Dec. 31, 2014, with exception for certain funding improvement and rehabilitation plans, see section 221(c) of Pub. L. 109-280, set out as an Effective and Termination Dates of 2006 Amendment note under section 412 of Title 26, Internal Revenue Code.]

**SPECIAL RULE FOR CERTAIN BENEFITS FUNDED UNDER AN AGREEMENT APPROVED BY THE PENSION BENEFIT GUARANTY CORPORATION**

For applicability of this section to a multiemployer plan that is a party to an agreement that was approved by the Pension Benefit Guaranty Corporation prior to June 30, 2005, and that increases benefits and provides for certain withdrawal liability rules, see section 206 of Pub. L. 109-280, set out as a note under section 412 of Title 26, Internal Revenue Code.

**§ 1085. Additional funding rules for multiemployer plans in endangered status or critical status**

**(a) General rule**

For purposes of this part, in the case of a multiemployer plan in effect on July 16, 2006—

(1) if the plan is in endangered status—

(A) the plan sponsor shall adopt and implement a funding improvement plan in accordance with the requirements of subsection (c), and

(B) the requirements of subsection (d) shall apply during the funding plan adoption period and the funding improvement period, and

(2) if the plan is in critical status—

(A) the plan sponsor shall adopt and implement a rehabilitation plan in accordance with the requirements of subsection (e), and

(B) the requirements of subsection (f) shall apply during the rehabilitation plan adoption period and the rehabilitation period.

**(b) Determination of endangered and critical status**

For purposes of this section—

**(1) Endangered status**

A multiemployer plan is in endangered status for a plan year if, as determined by the plan actuary under paragraph (3), the plan is not in critical status for the plan year and, as of the beginning of the plan year, either—

(A) the plan’s funded percentage for such plan year is less than 80 percent, or

(B) the plan has an accumulated funding deficiency for such plan year, or is projected to have such an accumulated funding deficiency for any of the 6 succeeding plan years, taking into account any extension of amortization periods under section 1084(d) of this title.

For purposes of this section, a plan shall be treated as in seriously endangered status for a plan year if the plan is described in both subparagraphs (A) and (B).

**(2) Critical status**

A multiemployer plan is in critical status for a plan year if, as determined by the plan actuary under paragraph (3), the plan is described in 1 or more of the following subparagraphs as of the beginning of the plan year:

(A) A plan is described in this subparagraph if—

(i) the funded percentage of the plan is less than 65 percent, and

(ii) the sum of—

(I) the fair market value of plan assets, plus

(II) the present value of the reasonably anticipated employer contributions for the current plan year and each of the 6 succeeding plan years, assuming that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years,

is less than the present value of all nonforfeitable benefits projected to be payable under the plan during the current plan year and each of the 6 succeeding plan years (plus administrative expenses for such plan years).

(B) A plan is described in this subparagraph if—

(i) the plan has an accumulated funding deficiency for the current plan year, not taking into account any extension of amortization periods under section 1084(d) of this title, or

(ii) the plan is projected to have an accumulated funding deficiency for any of the 3 succeeding plan years (4 succeeding plan years if the funded percentage of the plan is 65 percent or less), not taking into account any extension of amortization periods under section 1084(d) of this title.

(C) A plan is described in this subparagraph if—

(i) (I) the plan’s normal cost for the current plan year, plus interest (determined at the rate used for determining costs under the plan) for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last date of the preceding plan year, exceeds

(II) the present value of the reasonably anticipated employer and employee contributions for the current plan year,

(ii) the present value, as of the beginning of the current plan year, of nonforfeitable benefits of inactive participants is greater than the present value of nonforfeitable benefits of active participants, and

(iii) the plan has an accumulated funding deficiency for the current plan year, or is projected to have such a deficiency for any of the 4 succeeding plan years, not taking into account any extension of amortization periods under section 1084(d) of this title.

(D) A plan is described in this subparagraph if the sum of—

- (i) the fair market value of plan assets, plus
- (ii) the present value of the reasonably anticipated employer contributions for the current plan year and each of the 4 succeeding plan years, assuming that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years,

is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the 4 succeeding plan years (plus administrative expenses for such plan years).

### **(3) Annual certification by plan actuary**

#### **(A) In general**

Not later than the 90th day of each plan year of a multiemployer plan, the plan actuary shall certify to the Secretary of the Treasury and to the plan sponsor—

- (i) whether or not the plan is in endangered status for such plan year and whether or not the plan is or will be in critical status for such plan year, and
- (ii) in the case of a plan which is in a funding improvement or rehabilitation period, whether or not the plan is making the scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.

#### **(B) Actuarial projections of assets and liabilities**

##### **(i) In general**

In making the determinations and projections under this subsection, the plan actuary shall make projections required for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of such year. The actuary's projections shall be based on reasonable actuarial estimates, assumptions, and methods that, except as provided in clause (iii), offer the actuary's best estimate of anticipated experience under the plan. The projected present value of liabilities as of the beginning of such year shall be determined based on the most recent of either—

- (I) the actuarial statement required under section 1023(d) of this title with respect to the most recently filed annual report, or
- (II) the actuarial valuation for the preceding plan year.

##### **(ii) Determinations of future contributions**

Any actuarial projection of plan assets shall assume—

- (I) reasonably anticipated employer contributions for the current and succeeding plan years, assuming that the terms of the one or more collective bargaining agreements pursuant to which the plan is maintained for the current

plan year continue in effect for succeeding plan years, or

- (II) that employer contributions for the most recent plan year will continue indefinitely, but only if the plan actuary determines there have been no significant demographic changes that would make such assumption unreasonable.

##### **(iii) Projected industry activity**

Any projection of activity in the industry or industries covered by the plan, including future covered employment and contribution levels, shall be based on information provided by the plan sponsor, which shall act reasonably and in good faith.

#### **(C) Penalty for failure to secure timely actuarial certification**

Any failure of the plan's actuary to certify the plan's status under this subsection by the date specified in subparagraph (A) shall be treated for purposes of section 1132(c)(2) of this title as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title.

#### **(D) Notice**

##### **(i) In general**

In any case in which it is certified under subparagraph (A) that a multiemployer plan is or will be in endangered or critical status for a plan year, the plan sponsor shall, not later than 30 days after the date of the certification, provide notification of the endangered or critical status to the participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary.

##### **(ii) Plans in critical status**

If it is certified under subparagraph (A) that a multiemployer plan is or will be in critical status, the plan sponsor shall include in the notice under clause (i) an explanation of the possibility that—

- (I) adjustable benefits (as defined in subsection (e)(8)) may be reduced, and
- (II) such reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided for the first plan year in which the plan is in critical status.

##### **(iii) Model notice**

The Secretary of the Treasury, in consultation with the Secretary<sup>1</sup> shall prescribe a model notice that a multiemployer plan may use to satisfy the requirements under clause (ii).

#### **(c) Funding improvement plan must be adopted for multiemployer plans in endangered status**

##### **(1) In general**

In any case in which a multiemployer plan is in endangered status for a plan year, the plan sponsor, in accordance with this subsection—

<sup>1</sup> So in original. Probably should be followed by a comma.

(A) shall adopt a funding improvement plan not later than 240 days following the required date for the actuarial certification of endangered status under subsection (b)(3)(A), and

(B) within 30 days after the adoption of the funding improvement plan—

(i) shall provide to the bargaining parties 1 or more schedules showing revised benefit structures, revised contribution structures, or both, which, if adopted, may reasonably be expected to enable the multiemployer plan to meet the applicable benchmarks in accordance with the funding improvement plan, including—

(I) one proposal for reductions in the amount of future benefit accruals necessary to achieve the applicable benchmarks, assuming no amendments increasing contributions under the plan (other than amendments increasing contributions necessary to achieve the applicable benchmarks after amendments have reduced future benefit accruals to the maximum extent permitted by law), and

(II) one proposal for increases in contributions under the plan necessary to achieve the applicable benchmarks, assuming no amendments reducing future benefit accruals under the plan, and

(ii) may, if the plan sponsor deems appropriate, prepare and provide the bargaining parties with additional information relating to contribution rates or benefit reductions, alternative schedules, or other information relevant to achieving the applicable benchmarks in accordance with the funding improvement plan.

For purposes of this section, the term “applicable benchmarks” means the requirements applicable to the multiemployer plan under paragraph (3) (as modified by paragraph (5)).

**(2) Exception for years after process begins**

Paragraph (1) shall not apply to a plan year if such year is in a funding plan adoption period or funding improvement period by reason of the plan being in endangered status for a preceding plan year. For purposes of this section, such preceding plan year shall be the initial determination year with respect to the funding improvement plan to which it relates.

**(3) Funding improvement plan**

For purposes of this section—

**(A) In general**

A funding improvement plan is a plan which consists of the actions, including options or a range of options to be proposed to the bargaining parties, formulated to provide, based on reasonably anticipated experience and reasonable actuarial assumptions, for the attainment by the plan during the funding improvement period of the following requirements:

**(i) Increase in plan’s funding percentage**

The plan’s funded percentage as of the close of the funding improvement period

equals or exceeds a percentage equal to the sum of—

(I) such percentage as of the beginning of such period, plus

(II) 33 percent of the difference between 100 percent and the percentage under subclause (I).

**(ii) Avoidance of accumulated funding deficiencies**

No accumulated funding deficiency for any plan year during the funding improvement period (taking into account any extension of amortization periods under section 1084(d) of this title).

**(B) Seriously endangered plans**

In the case of a plan in seriously endangered status, except as provided in paragraph (5), subparagraph (A)(i)(II) shall be applied by substituting “20 percent” for “33 percent”.

**(4) Funding improvement period**

For purposes of this section—

**(A) In general**

The funding improvement period for any funding improvement plan adopted pursuant to this subsection is the 10-year period beginning on the first day of the first plan year of the multiemployer plan beginning after the earlier of—

(i) the second anniversary of the date of the adoption of the funding improvement plan, or

(ii) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of endangered status for the initial determination year under subsection (b)(3)(A) and covering, as of such due date, at least 75 percent of the active participants in such multiemployer plan.

**(B) Seriously endangered plans**

In the case of a plan in seriously endangered status, except as provided in paragraph (5), subparagraph (A) shall be applied by substituting “15-year period” for “10-year period”.

**(C) Coordination with changes in status**

**(i) Plans no longer in endangered status**

If the plan’s actuary certifies under subsection (b)(3)(A) for a plan year in any funding plan adoption period or funding improvement period that the plan is no longer in endangered status and is not in critical status, the funding plan adoption period or funding improvement period, whichever is applicable, shall end as of the close of the preceding plan year.

**(ii) Plans in critical status**

If the plan’s actuary certifies under subsection (b)(3)(A) for a plan year in any funding plan adoption period or funding improvement period that the plan is in critical status, the funding plan adoption period or funding improvement period, whichever is applicable, shall end as of the close of the plan year preceding the first

plan year in the rehabilitation period with respect to such status.

**(D) Plans in endangered status at end of period**

If the plan's actuary certifies under subsection (b)(3)(A) for the first plan year following the close of the period described in subparagraph (A) that the plan is in endangered status, the provisions of this subsection and subsection (d) shall be applied as if such first plan year were an initial determination year, except that the plan may not be amended in a manner inconsistent with the funding improvement plan in effect for the preceding plan year until a new funding improvement plan is adopted.

**(5) Special rules for seriously endangered plans more than 70 percent funded**

**(A) In general**

If the funded percentage of a plan in seriously endangered status was more than 70 percent as of the beginning of the initial determination year—

(i) paragraphs (3)(B) and (4)(B) shall apply only if the plan's actuary certifies, within 30 days after the certification under subsection (b)(3)(A) for the initial determination year, that, based on the terms of the plan and the collective bargaining agreements in effect at the time of such certification, the plan is not projected to meet the requirements of paragraph (3)(A) (without regard to paragraphs (3)(B) and (4)(B)), and

(ii) if there is a certification under clause (i), the plan may, in formulating its funding improvement plan, only take into account the rules of paragraph (3)(B) and (4)(B) for plan years in the funding improvement period beginning on or before the date on which the last of the collective bargaining agreements described in paragraph (4)(A)(ii) expires.

**(B) Special rule after expiration of agreements**

Notwithstanding subparagraph (A)(ii), if, for any plan year ending after the date described in subparagraph (A)(ii), the plan actuary certifies (at the time of the annual certification under subsection (b)(3)(A) for such plan year) that, based on the terms of the plan and collective bargaining agreements in effect at the time of that annual certification, the plan is not projected to be able to meet the requirements of paragraph (3)(A) (without regard to paragraphs (3)(B) and (4)(B)), paragraphs (3)(B) and (4)(B) shall continue to apply for such year.

**(6) Updates to funding improvement plan and schedules**

**(A) Funding improvement plan**

The plan sponsor shall annually update the funding improvement plan and shall file the update with the plan's annual report under section 1024 of this title.

**(B) Schedules**

The plan sponsor shall annually update any schedule of contribution rates provided

under this subsection to reflect the experience of the plan.

**(C) Duration of schedule**

A schedule of contribution rates provided by the plan sponsor and relied upon by bargaining parties in negotiating a collective bargaining agreement shall remain in effect for the duration of that collective bargaining agreement.

**(7) Imposition of default schedule where failure to adopt funding improvement plan**

**(A) In general**

If—

(i) a collective bargaining agreement providing for contributions under a multi-employer plan that was in effect at the time the plan entered endangered status expires, and

(ii) after receiving one or more schedules from the plan sponsor under paragraph (1)(B), the bargaining parties with respect to such agreement fail to adopt a contribution schedule with terms consistent with the funding improvement plan and a schedule from the plan sponsor,

the plan sponsor shall implement the schedule described in paragraph (1)(B)(i)(I) beginning on the date specified in subparagraph (B).

**(B) Date of implementation**

The date specified in this subparagraph is the date which is 180 days after the date on which the collective bargaining agreement described in subparagraph (A) expires.

**(C) Failure to make scheduled contributions**

Any failure to make a contribution under a schedule of contribution rates provided under this paragraph shall be treated as a delinquent contribution under section 1145 of this title and shall be enforceable as such.

**(8) Funding plan adoption period**

For purposes of this section, the term "funding plan adoption period" means the period beginning on the date of the certification under subsection (b)(3)(A) for the initial determination year and ending on the day before the first day of the funding improvement period.

**(d) Rules for operation of plan during adoption and improvement periods**

**(1) Special rules for plan adoption period**

During the funding plan adoption period—

(A) the plan sponsor may not accept a collective bargaining agreement or participation agreement with respect to the multiemployer plan that provides for—

(i) a reduction in the level of contributions for any participants,

(ii) a suspension of contributions with respect to any period of service, or

(iii) any new direct or indirect exclusion of younger or newly hired employees from plan participation,

(B) no amendment of the plan which increases the liabilities of the plan by reason of any increase in benefits, any change in

the accrual of benefits, or any change in the rate at which benefits become nonforfeitable under the plan may be adopted unless the amendment is required as a condition of qualification under part I of subchapter D of chapter 1 of title 26 or to comply with other applicable law, and

(C) in the case of a plan in seriously endangered status, the plan sponsor shall take all reasonable actions which are consistent with the terms of the plan and applicable law and which are expected, based on reasonable assumptions, to achieve—

(i) an increase in the plan's funded percentage, and

(ii) postponement of an accumulated funding deficiency for at least 1 additional plan year.

Actions under subparagraph (C) include applications for extensions of amortization periods under section 1084(d) of this title, use of the shortfall funding method in making funding standard account computations, amendments to the plan's benefit structure, reductions in future benefit accruals, and other reasonable actions consistent with the terms of the plan and applicable law.

**(2) Compliance with funding improvement plan**

**(A) In general**

A plan may not be amended after the date of the adoption of a funding improvement plan so as to be inconsistent with the funding improvement plan.

**(B) No reduction in contributions**

A plan sponsor may not during any funding improvement period accept a collective bargaining agreement or participation agreement with respect to the multiemployer plan that provides for—

(i) a reduction in the level of contributions for any participants,

(ii) a suspension of contributions with respect to any period of service, or

(iii) any new direct or indirect exclusion of younger or newly hired employees from plan participation.

**(C) Special rules for benefit increases**

A plan may not be amended after the date of the adoption of a funding improvement plan so as to increase benefits, including future benefit accruals, unless the plan actuary certifies that the benefit increase is consistent with the funding improvement plan and is paid for out of contributions not required by the funding improvement plan to meet the applicable benchmark in accordance with the schedule contemplated in the funding improvement plan.

**(e) Rehabilitation plan must be adopted for multiemployer plans in critical status**

**(1) In general**

In any case in which a multiemployer plan is in critical status for a plan year, the plan sponsor, in accordance with this subsection—

(A) shall adopt a rehabilitation plan not later than 240 days following the required

date for the actuarial certification of critical status under subsection (b)(3)(A), and

(B) within 30 days after the adoption of the rehabilitation plan—

(i) shall provide to the bargaining parties 1 or more schedules showing revised benefit structures, revised contribution structures, or both, which, if adopted, may reasonably be expected to enable the multiemployer plan to emerge from critical status in accordance with the rehabilitation plan, and

(ii) may, if the plan sponsor deems appropriate, prepare and provide the bargaining parties with additional information relating to contribution rates or benefit reductions, alternative schedules, or other information relevant to emerging from critical status in accordance with the rehabilitation plan.

The schedule or schedules described in subparagraph (B)(i) shall reflect reductions in future benefit accruals and adjustable benefits, and increases in contributions, that the plan sponsor determines are reasonably necessary to emerge from critical status. One schedule shall be designated as the default schedule and such schedule shall assume that there are no increases in contributions under the plan other than the increases necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits the reduction or elimination of which are not permitted under section 1054(g) of this title) have been reduced to the maximum extent permitted by law.

**(2) Exception for years after process begins**

Paragraph (1) shall not apply to a plan year if such year is in a rehabilitation plan adoption period or rehabilitation period by reason of the plan being in critical status for a preceding plan year. For purposes of this section, such preceding plan year shall be the initial critical year with respect to the rehabilitation plan to which it relates.

**(3) Rehabilitation plan**

For purposes of this section—

**(A) In general**

A rehabilitation plan is a plan which consists of—

(i) actions, including options or a range of options to be proposed to the bargaining parties, formulated, based on reasonably anticipated experience and reasonable actuarial assumptions, to enable the plan to cease to be in critical status by the end of the rehabilitation period and may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions, if agreed to by the bargaining parties, or any combination of such actions, or

(ii) if the plan sponsor determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan can not reasonably be expected to emerge from critical status by the end of the rehabilitation period, rea-

sonable measures to emerge from critical status at a later time or to forestall possible insolvency (within the meaning of section 1426 of this title).

A rehabilitation plan must provide annual standards for meeting the requirements of such rehabilitation plan. Such plan shall also include the schedules required to be provided under paragraph (1)(B)(i) and if clause (ii) applies, shall set forth the alternatives considered, explain why the plan is not reasonably expected to emerge from critical status by the end of the rehabilitation period, and specify when, if ever, the plan is expected to emerge from critical status in accordance with the rehabilitation plan.

**(B) Updates to rehabilitation plan and schedules**

**(i) Rehabilitation plan**

The plan sponsor shall annually update the rehabilitation plan and shall file the update with the plan's annual report under section 1024 of this title.

**(ii) Schedules**

The plan sponsor shall annually update any schedule of contribution rates provided under this subsection to reflect the experience of the plan.

**(iii) Duration of schedule**

A schedule of contribution rates provided by the plan sponsor and relied upon by bargaining parties in negotiating a collective bargaining agreement shall remain in effect for the duration of that collective bargaining agreement.

**(C) Imposition of default schedule where failure to adopt rehabilitation plan**

**(i) In general**

If—

(I) a collective bargaining agreement providing for contributions under a multiemployer plan that was in effect at the time the plan entered critical status expires, and

(II) after receiving one or more schedules from the plan sponsor under paragraph (1)(B), the bargaining parties with respect to such agreement fail to adopt a to adopt a<sup>2</sup> contribution schedule with terms consistent with the rehabilitation plan and a schedule from the plan sponsor under paragraph (1)(B)(i),

the plan sponsor shall implement the default schedule described in the last sentence of paragraph (1) beginning on the date specified in clause (ii).

**(ii) Date of implementation**

The date specified in this clause is the date which is 180 days after the date on which the collective bargaining agreement described in clause (i) expires.

**(iii) Failure to make scheduled contributions**

Any failure to make a contribution under a schedule of contribution rates pro-

vided under this subsection shall be treated as a delinquent contribution under section 1145 of this title and shall be enforceable as such.

**(4) Rehabilitation period**

For purposes of this section—

**(A) In general**

The rehabilitation period for a plan in critical status is the 10-year period beginning on the first day of the first plan year of the multiemployer plan following the earlier of—

(i) the second anniversary of the date of the adoption of the rehabilitation plan, or

(ii) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of critical status for the initial critical year under subsection (a)(1) and covering, as of such date at least 75 percent of the active participants in such multiemployer plan.

If a plan emerges from critical status as provided under subparagraph (B) before the end of such 10-year period, the rehabilitation period shall end with the plan year preceding the plan year for which the determination under subparagraph (B) is made.

**(B) Emergence**

A plan in critical status shall remain in such status until a plan year for which the plan actuary certifies, in accordance with subsection (b)(3)(A), that the plan is not projected to have an accumulated funding deficiency for the plan year or any of the 9 succeeding plan years, without regard to the use of the shortfall method but taking into account any extension of amortization periods under section 1084(d) of this title.

**(5) Rehabilitation plan adoption period**

For purposes of this section, the term "rehabilitation plan adoption period" means the period beginning on the date of the certification under subsection (b)(3)(A) for the initial critical year and ending on the day before the first day of the rehabilitation period.

**(6) Limitation on reduction in rates of future accruals**

Any reduction in the rate of future accruals under the default schedule described in the last sentence of paragraph (1) shall not reduce the rate of future accruals below—

(A) a monthly benefit (payable as a single life annuity commencing at the participant's normal retirement age) equal to 1 percent of the contributions required to be made with respect to a participant, or the equivalent standard accrual rate for a participant or group of participants under the collective bargaining agreements in effect as of the first day of the initial critical year, or

(B) if lower, the accrual rate under the plan on such first day.

The equivalent standard accrual rate shall be determined by the plan sponsor based on the standard or average contribution base units which the plan sponsor determines to be representative for active participants and such

<sup>2</sup>So in original. See 2008 Amendment note below.

other factors as the plan sponsor determines to be relevant. Nothing in this paragraph shall be construed as limiting the ability of the plan sponsor to prepare and provide the bargaining parties with alternative schedules to the default schedule that establish lower or higher accrual and contribution rates than the rates otherwise described in this paragraph.

**(7) Automatic employer surcharge**

**(A) Imposition of surcharge**

Each employer otherwise obligated to make contributions for the initial critical year shall be obligated to pay to the plan for such year a surcharge equal to 5 percent of the contributions otherwise required under the applicable collective bargaining agreement (or other agreement pursuant to which the employer contributes). For each succeeding plan year in which the plan is in critical status for a consecutive period of years beginning with the initial critical year, the surcharge shall be 10 percent of the contributions otherwise so required.

**(B) Enforcement of surcharge**

The surcharges under subparagraph (A) shall be due and payable on the same schedule as the contributions on which the surcharges are based. Any failure to make a surcharge payment shall be treated as a delinquent contribution under section 1145 of this title and shall be enforceable as such.

**(C) Surcharge to terminate upon collective bargaining agreement renegotiation**

The surcharge under this paragraph shall cease to be effective with respect to employees covered by a collective bargaining agreement (or other agreement pursuant to which the employer contributes), beginning on the effective date of a collective bargaining agreement (or other such agreement) that includes terms consistent with a schedule presented by the plan sponsor under paragraph (1)(B)(i), as modified under subparagraph (B) of paragraph (3).

**(D) Surcharge not to apply until employer receives notice**

The surcharge under this paragraph shall not apply to an employer until 30 days after the employer has been notified by the plan sponsor that the plan is in critical status and that the surcharge is in effect.

**(E) Surcharge not to generate increased benefit accruals**

Notwithstanding any provision of a plan to the contrary, the amount of any surcharge under this paragraph shall not be the basis for any benefit accrual under the plan.

**(8) Benefit adjustments**

**(A) Adjustable benefits**

**(i) In general**

Notwithstanding section 1054(g) of this title, the plan sponsor shall, subject to the notice requirements in subparagraph (C), make any reductions to adjustable benefits which the plan sponsor deems appropriate, based upon the outcome of collec-

tive bargaining over the schedule or schedules provided under paragraph (1)(B)(i).

**(ii) Exception for retirees**

Except in the case of adjustable benefits described in clause (iv)(III), the plan sponsor of a plan in critical status shall not reduce adjustable benefits of any participant or beneficiary whose benefit commencement date is before the date on which the plan provides notice to the participant or beneficiary under subsection (b)(3)(D) for the initial critical year.

**(iii) Plan sponsor flexibility**

The plan sponsor shall include in the schedules provided to the bargaining parties an allowance for funding the benefits of participants with respect to whom contributions are not currently required to be made, and shall reduce their benefits to the extent permitted under this subchapter and considered appropriate by the plan sponsor based on the plan's then current overall funding status.

**(iv) Adjustable benefit defined**

For purposes of this paragraph, the term "adjustable benefit" means—

(I) benefits, rights, and features under the plan, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits,

(II) any early retirement benefit or retirement-type subsidy (within the meaning of section 1054(g)(2)(A) of this title) and any benefit payment option (other than the qualified joint and survivor annuity), and

(III) benefit increases that would not be eligible for a guarantee under section 1322a of this title on the first day of initial critical year because the increases were adopted (or, if later, took effect) less than 60 months before such first day.

**(B) Normal retirement benefits protected**

Except as provided in subparagraph (A)(iv)(III), nothing in this paragraph shall be construed to permit a plan to reduce the level of a participant's accrued benefit payable at normal retirement age.

**(C) Notice requirements**

**(i) In general**

No reduction may be made to adjustable benefits under subparagraph (A) unless notice of such reduction has been given at least 30 days before the general effective date of such reduction for all participants and beneficiaries to—

(I) plan participants and beneficiaries,

(II) each employer who has an obligation to contribute (within the meaning of section 1392(a) of this title) under the plan, and

(III) each employee organization which, for purposes of collective bargaining, represents plan participants employed by such an employer.

**(ii) Content of notice**

The notice under clause (i) shall contain—

(I) sufficient information to enable participants and beneficiaries to understand the effect of any reduction on their benefits, including an estimate (on an annual or monthly basis) of any affected adjustable benefit that a participant or beneficiary would otherwise have been eligible for as of the general effective date described in clause (i), and

(II) information as to the rights and remedies of plan participants and beneficiaries as well as how to contact the Department of Labor for further information and assistance where appropriate.

**(iii) Form and manner**

Any notice under clause (i)—

(I) shall be provided in a form and manner prescribed in regulations of the Secretary of the Treasury, in consultation with the Secretary,

(II) shall be written in a manner so as to be understood by the average plan participant, and

(III) 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 Secretary of the Treasury shall in the regulations prescribed under subclause (I) establish a model notice that a plan sponsor may use to meet the requirements of this subparagraph.

**(9) Adjustments disregarded in withdrawal liability determination**

**(A) Benefit reductions**

Any benefit reductions under this subsection shall be disregarded in determining a plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability under section 1381 of this title.

**(B) Surcharges**

Any surcharges under paragraph (7) shall be disregarded in determining the allocation of unfunded vested benefits to an employer under section 1391 of this title, except for purposes of determining the unfunded vested benefits attributable to an employer under section 1391(c)(4) of this title or a comparable method approved under section 1391(c)(5) of this title.

**(C) Simplified calculations**

The Pension Benefit Guaranty Corporation shall prescribe simplified methods for the application of this paragraph in determining withdrawal liability.

**(f) Rules for operation of plan during adoption and rehabilitation period**

**(1) Compliance with rehabilitation plan**

**(A) In general**

A plan may not be amended after the date of the adoption of a rehabilitation plan under subsection (e) so as to be inconsistent with the rehabilitation plan.

**(B) Special rules for benefit increases**

A plan may not be amended after the date of the adoption of a rehabilitation plan

under subsection (e) so as to increase benefits, including future benefit accruals, unless the plan actuary certifies that such increase is paid for out of additional contributions not contemplated by the rehabilitation plan, and, after taking into account the benefit increase, the multiemployer plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan.

**(2) Restriction on lump sums and similar benefits**

**(A) In general**

Effective on the date the notice of certification of the plan's critical status for the initial critical year under subsection (b)(3)(D) is sent, and notwithstanding section 1054(g) of this title, the plan shall not pay—

(i) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 1054(b)(1)(G) of this title), to a participant or beneficiary whose annuity starting date (as defined in section 1055(h)(2) of this title) occurs after the date such notice is sent,

(ii) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, and

(iii) any other payment specified by the Secretary of the Treasury by regulations.

**(B) Exception**

Subparagraph (A) shall not apply to a benefit which under section 1053(e) of this title may be immediately distributed without the consent of the participant or to any makeup payment in the case of a retroactive annuity starting date or any similar payment of benefits owed with respect to a prior period.

**(3) Adjustments disregarded in withdrawal liability determination**

Any benefit reductions under this subsection shall be disregarded in determining a plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability under section 1381 of this title.

**(4) Special rules for plan adoption period**

During the rehabilitation plan adoption period—

(A) the plan sponsor may not accept a collective bargaining agreement or participation agreement with respect to the multiemployer plan that provides for—

(i) a reduction in the level of contributions for any participants,

(ii) a suspension of contributions with respect to any period of service, or

(iii) any new direct or indirect exclusion of younger or newly hired employees from plan participation, and

(B) no amendment of the plan which increases the liabilities of the plan by reason of any increase in benefits, any change in the accrual of benefits, or any change in the rate at which benefits become nonforfeitable



under the plan may be adopted unless the amendment is required as a condition of qualification under part I of subchapter D of chapter 1 of title 26 or to comply with other applicable law.

**(g) Expedited resolution of plan sponsor decisions**

If, within 60 days of the due date for adoption of a funding improvement plan under subsection (c) or a rehabilitation plan under subsection (e), the plan sponsor of a plan in endangered status or a plan in critical status has not agreed on a funding improvement plan or rehabilitation plan, then any member of the board or group that constitutes the plan sponsor may require that the plan sponsor enter into an expedited dispute resolution procedure for the development and adoption of a funding improvement plan or rehabilitation plan.

**(h) Nonbargained participation**

**(1) Both bargained and nonbargained employee-participants**

In the case of an employer that contributes to a multiemployer plan with respect to both employees who are covered by one or more collective bargaining agreements and employees who are not so covered, if the plan is in endangered status or in critical status, benefits of and contributions for the nonbargained employees, including surcharges on those contributions, shall be determined as if those nonbargained employees were covered under the first to expire of the employer's collective bargaining agreements in effect when the plan entered endangered or critical status.

**(2) Nonbargained employees only**

In the case of an employer that contributes to a multiemployer plan only with respect to employees who are not covered by a collective bargaining agreement, this section shall be applied as if the employer were the bargaining party, and its participation agreement with the plan were a collective bargaining agreement with a term ending on the first day of the plan year beginning after the employer is provided the schedule or schedules described in subsections (c) and (e).

**(i) Definitions; actuarial method**

For purposes of this section—

**(1) Bargaining party**

The term “bargaining party” means—

(A)(i) except as provided in clause (ii), an employer who has an obligation to contribute under the plan; or

(ii) in the case of a plan described under section 404(c) of title 26, or a continuation of such a plan, the association of employers that is the employer settlor of the plan; and

(B) an employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer who has an obligation to contribute under the plan.

**(2) Funded percentage**

The term “funded percentage” means the percentage equal to a fraction—

(A) the numerator of which is the value of the plan's assets, as determined under section 1084(c)(2) of this title, and

(B) the denominator of which is the accrued liability of the plan, determined using actuarial assumptions described in section 1084(c)(3) of this title.

**(3) Accumulated funding deficiency**

The term “accumulated funding deficiency” has the meaning given such term in section 1084(a) of this title.

**(4) Active participant**

The term “active participant” means, in connection with a multiemployer plan, a participant who is in covered service under the plan.

**(5) Inactive participant**

The term “inactive participant” means, in connection with a multiemployer plan, a participant, or the beneficiary or alternate payee of a participant, who—

(A) is not in covered service under the plan, and

(B) is in pay status under the plan or has a nonforfeitable right to benefits under the plan.

**(6) Pay status**

A person is in pay status under a multiemployer plan if—

(A) at any time during the current plan year, such person is a participant or beneficiary 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), or

(B) to the extent provided in regulations of the Secretary of the Treasury, such person is entitled to such a benefit under the plan.

**(7) Obligation to contribute**

The term “obligation to contribute” has the meaning given such term under section 1392(a) of this title.

**(8) Actuarial method**

Notwithstanding any other provision of this section, the actuary's determinations with respect to a plan's normal cost, actuarial accrued liability, and improvements in a plan's funded percentage under this section shall be based upon the unit credit funding method (whether or not that method is used for the plan's actuarial valuation).

**(9) Plan sponsor**

In the case of a plan described under section 404(c) of title 26, or a continuation of such a plan, the term “plan sponsor” means the bargaining parties described under paragraph (1).

**(10) Benefit commencement date**

The term “benefit commencement date” means the annuity starting date (or in the case of a retroactive annuity starting date, the date on which benefit payments begin).

(Pub. L. 93-406, title I, §305, as added Pub. L. 109-280, title II, §202(a), Aug. 17, 2006, 120 Stat. 868; amended Pub. L. 110-458, title I, §102(b)(1)(B)-(G), Dec. 23, 2008, 122 Stat. 5100, 5101.)

TERMINATION OF SECTION

*For termination of section by section 221(c) of Pub. L. 109-280, see Effective and Termination Dates note below.*

## PRIOR PROVISIONS

A prior section 1085, Pub. L. 93-406, title I, §305, Sept. 2, 1974, 88 Stat. 873, related to alternative minimum funding standard, prior to repeal by Pub. L. 109-280, title I, §101(a), (d), Aug. 17, 2006, 120 Stat. 784, 789, applicable to plan years beginning after 2007.

## AMENDMENTS

2008—Subsec. (b)(3)(C). Pub. L. 110-458, §102(b)(1)(B), substituted “section 1021(b)(1)” for “section 1021(b)(4)”.

Subsec. (b)(3)(D)(iii). Pub. L. 110-458, §102(b)(1)(C), substituted “The Secretary of the Treasury, in consultation with the Secretary” for “The Secretary”.

Subsec. (c)(7)(A)(ii). Pub. L. 110-458, §102(b)(1)(D)(i), substituted “to adopt a contribution schedule with terms consistent with the funding improvement plan and a schedule from the plan sponsor,” for “to agree on changes to contribution or benefit schedules necessary to meet the applicable benchmarks in accordance with the funding improvement plan.”

Subsec. (c)(7)(B), (C). Pub. L. 110-458, §102(b)(1)(D)(ii), (iii), added subpars. (B) and (C) and struck out former subpar. (B). Prior to amendment, text read as follows: “The date specified in this subparagraph is the earlier of the date—

“(i) on which the Secretary certifies that the parties are at an impasse, or

“(ii) which is 180 days after the date on which the collective bargaining agreement described in subparagraph (A) expires.”

Subsec. (e)(3)(C)(i)(II). Pub. L. 110-458, §102(b)(1)(E)(i)(I), substituted “to adopt a contribution schedule with terms consistent with the rehabilitation plan and a schedule from the plan sponsor under paragraph (1)(B)(i),” for “contribution or benefit schedules with terms consistent with the rehabilitation plan and the schedule from the plan sponsor under paragraph (1)(B)(i),”.

Subsec. (e)(3)(C)(ii), (iii). Pub. L. 110-458, §102(b)(1)(E)(i)(II), (III), added cls. (ii) and (iii) and struck out former cl. (ii). Prior to amendment, text read as follows: “The date specified in this clause is the earlier of the date—

“(I) on which the Secretary certifies that the parties are at an impasse, or

“(II) which is 180 days after the date on which the collective bargaining agreement described in clause (i) expires.”

Subsec. (e)(4)(A)(ii). Pub. L. 110-458, §102(b)(1)(E)(ii)(I), struck out “the date of” before “the due date”.

Subsec. (e)(4)(B). Pub. L. 110-458, §102(b)(1)(E)(ii)(II), substituted “but taking” for “and taking”.

Subsec. (e)(6). Pub. L. 110-458, §102(b)(1)(E)(iii), substituted “the last sentence of paragraph (1)” for “paragraph (1)(B)(i)” in introductory provisions and “establish” for “established” in concluding provisions.

Subsec. (e)(8)(C)(iii). Pub. L. 110-458, §102(b)(1)(E)(iv), substituted “the Secretary of the Treasury, in consultation with the Secretary” for “the Secretary” in subcl. (I) and “Secretary of the Treasury” for “Secretary” in concluding provisions.

Subsec. (e)(9)(B). Pub. L. 110-458, §102(b)(1)(E)(v), substituted “the allocation of unfunded vested benefits to an employer” for “an employer’s withdrawal liability”.

Subsec. (f)(2)(A)(i). Pub. L. 110-458, §102(b)(1)(F), inserted at end “to a participant or beneficiary whose annuity starting date (as defined in section 1055(h)(2) of this title) occurs after the date such notice is sent.”

Subsec. (g). Pub. L. 110-458, §102(b)(1)(G), inserted “under subsection (c)” before “or a rehabilitation plan under subsection (e)”.

## EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110-458 effective as if included in the provisions of Pub. L. 109-280 to which the amendment relates, except as otherwise provided, see section 112 of Pub. L. 110-458, set out as a note under section 72 of Title 26, Internal Revenue Code.

## EFFECTIVE AND TERMINATION DATES

Section applicable with respect to plan years beginning after 2007, with special rules for certain notices and certain restored benefits, see section 202(f) of Pub. L. 109-280, set out as an Effective and Termination Dates of 2006 Amendment note under section 1082 of this title.

Section inapplicable to plan years beginning after Dec. 31, 2014, with exception for certain funding improvement and rehabilitation plans, see section 221(c) of Pub. L. 109-280, set out as an Effective and Termination Dates of 2006 Amendment note under section 412 of Title 26, Internal Revenue Code.

## TEMPORARY DELAY OF DESIGNATION OF MULTIEMPLOYER PLANS AS IN ENDANGERED OR CRITICAL STATUS

For provisions allowing election of delay of status designation of endangered or critical multiemployer plans for purposes of this section, see section 204 of Pub. L. 110-458, set out as a note under section 432 of Title 26, Internal Revenue Code.

## TEMPORARY EXTENSION OF THE FUNDING IMPROVEMENT AND REHABILITATION PERIODS FOR MULTIEMPLOYER PENSION PLANS IN CRITICAL AND ENDANGERED STATUS FOR 2008 OR 2009

For provisions allowing election of extension of funding improvement period or rehabilitation period of endangered or critical multiemployer plans for purposes of this section, see section 205 of Pub. L. 110-458, set out as a note under section 432 of Title 26, Internal Revenue Code.

## SPECIAL RULE FOR CERTAIN BENEFITS FUNDED UNDER AN AGREEMENT APPROVED BY THE PENSION BENEFIT GUARANTY CORPORATION

For applicability of this section to a multiemployer plan that is a party to an agreement that was approved by the Pension Benefit Guaranty Corporation prior to June 30, 2005, and that increases benefits and provides for certain withdrawal liability rules, see section 206 of Pub. L. 109-280, set out as a note under section 412 of Title 26, Internal Revenue Code.

**§§ 1085a, 1085b, 1086. Repealed. Pub. L. 109-280, title I, § 101(a), Aug. 17, 2006, 120 Stat. 784**

Section 1085a, Pub. L. 93-406, title I, §306, as added Pub. L. 99-272, title XI, §11015(a)(1)(A)(ii), Apr. 7, 1986, 100 Stat. 264; amended Pub. L. 100-203, title IX, §9306(e)(2), Dec. 22, 1987, 101 Stat. 1330-355; Pub. L. 101-239, title VII, §7891(a)(1), Dec. 19, 1989, 103 Stat. 2445, related to security for waivers of minimum funding standard and extensions of amortization period.

Section 1085b, Pub. L. 93-406, title I, §307, as added Pub. L. 100-203, title IX, §9341(b)(2), Dec. 22, 1987, 101 Stat. 1330-370; amended Pub. L. 101-239, title VII, §7881(i)(1)(B)-(3)(A), (4)(B), Dec. 19, 1989, 103 Stat. 2442, related to security required upon adoption of plan amendment resulting in significant underfunding.

Section 1086, Pub. L. 93-406, title I, §308, formerly §306, Sept. 2, 1974, 88 Stat. 874, renumbered §307, Pub. L. 99-272, title XI, §11015(a)(1)(A)(i), Apr. 7, 1986, 100 Stat. 264; renumbered §308, Pub. L. 100-203, title IX, §9341(b)(1), Dec. 22, 1987, 101 Stat. 1330-370; amended Pub. L. 101-239, title VII, §7894(h)(3), Dec. 19, 1989, 103 Stat. 2451, related to effective dates of part.

## EFFECTIVE DATE OF REPEAL

Repeal applicable to plan years beginning after 2007, see section 101(d) of Pub. L. 109-280, set out as an Effective Date note under section 1082 of this title.

## APPLICABILITY OF AMENDMENTS BY SUBTITLES A AND B OF TITLE I OF PUB. L. 109-280

For special rules on applicability of amendments by subtitles A (§§101-108) and B (§§111-116) of title I of Pub.