PURPOSE

This transmits new text and Exhibits for IRM 4.72.14, Employee Plans Guidelines for Examining Multiemployer Plans.
IRM 4.72.

BACKGROUND

This IRM finalizes the multiemployer examination guidelines proposed in 1996 and reflects comments on the proposed guidelines, changes in the law and IRS policy.

NATURAL OF MATERIAL

IRM 4.72.14 provides guidance for examining multiemployer plans primarily for Employee Plans examinations. These guidelines will also be helpful to reviewers on the technical staff and Employee Plans determinations personnel working with multiemployer plans issues

INTENDED AUDIENCE

Employee Plans field personnel.

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4.72.14
Multiemployer Plan Examination Guidelines

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4.72.14.1 (05-04-2001)
Overview

(1) Technical guidance is provided on Multiemployer plans. This guidance is primarily for Employee Plans field personnel who examine multiemployer plans. This material is also helpful to reviewers in the technical staff and Employee Plans determinations personnel to use in working with multiemployer plans.

a. IRM 4.72.14.2 describes administrative structures and examination procedures unique to multiemployer plans.
b. IRM 4.72.14.3 provides a general discussion of applicable law and contains recommendations for examining multiemployer plans to determine compliance with the law.

(2) In examining multiemployer plans, an agent must ensure that the plan and trust have met all the requirements of IRC 401(a), 412, and 413(b), and that contributions are within the limits of IRC 404. The scope of an examination of a multiemployer plan may be broader than that of an examination of a Form 5500 return for a single employer plan, due to the nature of the collective bargaining process and the fact that more than one employer contributes to the plan. While the guidelines address only issues that are unique to multiemployer plans, or that may be more commonly encountered in multiemployer plans than single-employer plans, the agent is expected to exercise customary diligence and judgment in identifying and pursuing other issues affecting multiemployer plans, as well as issues that arise in all qualified plans.

(3) Although the focus of the guidance is on multiemployer plans, many of these special rules also apply to collectively bargained plans that are single-employer plans. This material is not intended to serve as a complete guide for the agent's examination; agents should use the multiemployer plan examination guidelines as a supplement to the general technical guidance already available.

4.72.14.2 (05-04-2001)
Background

(1) Multiemployer plans are concentrated in industries with high worker mobility or seasonal employment, such as the construction industry, or where the companies may be too small to justify single-employer plans. Some plans cover only a particular trade or craft, such as electrical workers, while other plans are industry-wide.

(2) Multiemployer plans are common in the following manufacturing industries: food, textiles, the garment industry, printing and publishing, leather products, lumber and wood products, furniture and fixtures, and metal-working.

(3) The following non-manufacturing industries also have multiemployer plans: mining, construction, transportation, wholesale and retail trades, services, entertainment, and communications. Fundamentals of Employee Benefit Programs, 5th Ed. (1997), pp. 149±155, Employee Benefit Research Institute (™EBRIƒ), Washington, D.C.

4.72.14.2.1 (05-04-2001)
Establishment of Multiemployer Plans and Related Documents

(1) The Labor Management Relations Act (LMRA), commonly known as the Taft-Hartley Act, was enacted in 1947 to regulate relations between unions and employers. Section 302(c)(5) of Taft-Hartley (section 186(c)(5) of the National Labor Relations Act as amended by the LMRA) governs the establishment of multiemployer benefit plans including retirement plans that are qualified under the Internal Revenue Code.

(2) In general, Taft-Hartley strictly prohibits employers from making payments to union representatives. However, section 302(c)(5)(NLRA section 186(c)(5)) provides an exception to this rule for trust funds established by the union for the exclusive benefit of the employer's employees and their beneficiaries, if certain conditions are met. These include requirements that the payments be held in trust; that the detailed basis on which payments are to be made be specified in a written agreement with the employer; that employees and employers be equally represented in the administration of the trust; and that payments intended to be used for providing pensions be paid to a separate trust which provides that those funds cannot be used for any other purpose.

4.72.14.2.1.1 (05-04-2001)
Trust Agreements

(1) Typically, the joint employer-union board of trustees described in Taft-Hartley is the group that establishes a multiemployer trust, adopts the multiemployer plan associated with the trust, and sets the terms of the plan including the benefits to be provided.

(2) The trust document may contain key provisions that govern the relationship of participating employers and the union to the plan. These frequently include a statement that the board of trustees may reject a collective bargaining agreement providing for the signatory employer's participation in the plan if the agreement contradicts plan provisions. This is important because any document augmenting the terms of the basic plan document (such as a collective bargaining agreement, side agreement with a participating employer, or reciprocity agreement with another plan) must not conflict with the terms of the plan document or else the plan may not satisfy the definite written program or definitely determinable benefit requirements of Regs. section 1.401-1. Another key provision in the trust document is a requirement that employers allow the trustees access to records relevant to administering the trust and maintaining the qualified status of the plan.

(3) In some cases, adherence to the trust agreement by a signatory employer is prescribed by standard language that the trustees require be added to any collective bargaining agreement providing for participation in the plan. In other cases, such adherence is effected through a participation agreement between the employer and the union which must be approved by the board of trustees. In most cases, the employer agrees to be bound by the trust agreement, by actions of the employer trustees, and by actions of the board of trustees pursuant to the trust agreement.

4.72.14.2.1.2 (05-04-2001)

Collective Bargaining Agreements

(1) The collective bargaining agreement that a union enters into with an employer satisfies the Taft-Hartley requirement that there be a written agreement that specifies the detailed basis on which the payments are to be made to the trust. In addition to labor matters unrelated to retirement benefits, a collective bargaining agreement establishes the obligation of the signatory employer to contribute to the plan on behalf of its employees; identifies the class of employees covered by the plan (™collectively bargained employeesſ); and in a multiemployer plan sets the rate of contribution.

(2) Collective bargaining agreements are usually entered into for a finite period, generally from one to five years. Termination of an agreement without renewal or replacement is generally considered a withdrawal by the employer from the plan with regard to work performed after the termination. If the parties bargain to renew or replace a terminating agreement, the old agreement (including the obligation to contribute to the plan) remains in effect until the parties have bargained to an impasse. In some cases, a collective bargaining agreement or the trust document may require an employer to continue participation in the plan until the employer has affirmatively notified the board of trustees of its intention to withdraw.

(3) Collective bargaining agreements are negotiated between a local, regional, or national union and individual employers or an association bargaining for a group of employers. Contributing employers may each negotiate individual bargaining agreements, or they may sign a single agreement as a group. Collective bargaining agreements serve essentially the same purpose as corporate board resolutions adopting plans.

(4) The contribution rate specified in the collective bargaining agreement may be for a sum per hour (or unit of time or work) per employee that is deposited directly in the multiemployer retirement trust. Alternatively, the required contribution for the retirement plan, along with contributions or payments for other purposes discussed in the collective bargaining agreement may be paid to a conduit trust, the funds of which are then allocated for the several different purposes including payment to the retirement trust. Other purposes may include health, apprenticeship, severance, or vacation funds.

4.72.14.2.1.3 (05-04-2001)

Participation and Reciprocity Agreements

(1) Multiemployer retirement plans may cover employees who are not collectively bargained employees, such as employees of the union, of the retirement fund and affiliated funds, or of the signatory employers. Participation by noncollectively bargained employees must be provided for in the plan document. The plan terms enabling coverage of noncollectively bargained employees must require the employer of such employees to enter into a ™participation agreement,ſ or ™side agreement,ſ with the trustees of the plan.

(2) Multiemployer plans may enter into reciprocity agreements with other multiemployer plans, usually ones in different locations that cover similar

type jobs and with affiliated chapters of the home fund's union. The terms of the plan must permit such agreements. These agreements allow participants to aggregate their service under several plans to qualify for a benefit from a plan, or spell out how much of the benefit is paid by each multiemployer plan. Reciprocity agreements are discussed at IRM 4.72.14.3.5.9.

4.72.14.2.2 (05-04-2001)

Administrative Features of Multiemployer Plans

(1) Multiemployer plans can vary greatly in size. Smaller plans are known as ™locals∫ because they cover collectively bargained employees of a local chapter of a union. There are also ™regional∫ and ™national∫ plans, and even ™international∫ plans that cover both U.S. residents and workers in other countries where the union has a presence, such as Canada. There can be significant administrative differences between locals and larger multiemployer plans.

(2) Like other plans, multiemployer plans can be either defined benefit or defined contribution plans. Once rare, multiemployer 401(k) plans are being established at an increasing rate. Only defined benefit plans are covered by Title IV of ERISA and the Pension Benefit Guaranty Corporation's guarantee program. The PBGC maintains a separate trust fund for multiemployer plans, funded under a different premium scale than the single-employer trust fund. Sponsors of plans that cover any employees that are collectively bargained must use Form 5303 to apply for determination letters.

(3) A multiemployer plan files only one annual information return, Form 5500, not one for each employer. The Form 5500 instructions contain more detailed information on multiemployer plan reporting requirements.

(4) In examining multiemployer plans, an agent will encounter an administrative structure that differs in many ways from its counterpart in single-employer plans. A multiemployer plan differs from a single-employer plan in that it is adopted and administered by a joint union/employer board of trustees, pursuant to Taft-Hartley, to provide benefits or contributions negotiated under a collective bargaining agreement between one or more unions and at least two employers. Under labor law, benefits are a mandatory subject of collective bargaining.

(5) Trustees are typically union officials and officers of the employers who meet to hear reports, discuss policies, and vote on matters requiring formal board action. The minutes of these meetings are an excellent source of information on service crediting practices, benefit payments, partial termination events, employer or participant suits, and other matters that may relate to a plan's qualification. Section 3(16) of Title I of ERISA specifies that the trustees are the plan sponsors and that, unless the plan document designates another, the trustees also serve as the plan administrator. Administrative duties may be performed by a joint labor-management committee or by a professional plan administrator (often called a ™fund manager∫). In larger plans, the board may empower committees of one or more trustees to make certain binding decisions or

to oversee various ongoing activities. Examples include a retirement committee empowered to act on retirement applications, or an investment committee formed to monitor the performance of trust assets and make buy/sell decisions in accordance with the full board's general investment policy.

(6) Many multiemployer plans grant past service credit to employees for service with the employer in order to encourage an employer who is not yet contributing to the plan to join. A multiemployer plan may grant past service for work in similar jobs before the plan began, or participants may claim prior service for an employer who has since gone out of business. To help verify the claim, multiemployer plans may obtain participants' permission to check their social security records as additional proof of this service.

(7) In single-employer plans, employee payroll data may feed automatically into the plan's participant database; in contrast, administrators of multiemployer plans must solicit that data from the employers. Due to multiple contributing employers, the unique portability of service, and the adversarial relationship between the employers and the union and among competing employers, multiemployer plan administrators must take extra care that the contributing employers provide the proper participant information. Multiemployer plans may use the monthly billings to solicit information from each employer; along with remitting the contribution owed, the employer provides the name, social security number, hours worked, date of birth, and other information for each employee for that period. In most multiemployer plans, service credit may not be determined until an employee actually applies for the benefit.

(8) Since obtaining correct information is essential for maintaining qualified status, multiemployer plans may also use field auditors to check on the accuracy of the employer's information. Field auditors visit the contributing employers to compare the remittance reports with their payroll and other personnel records, and with union dues and other records maintained by the union or affiliated health and welfare plans. Another verification method used by plans is to send monthly reports of credited service to the participants themselves, for their concurrence.

4.72.14.2.3 (05-04-2001)

Examination Practices for Multiemployer Plans

(1) The multiemployer plan administrative practices described above necessitate some changes to general examination techniques. Suggestions on how to approach specific issues appear throughout IRM 4.72.14.3.

(2) An agent should exercise judgment somewhat differently in examining a multiemployer plan. The initial and final interviews should be held with plan trustees, the administrator, or an individual with a power of attorney from the joint board. Trustees interviewed should include representatives of both the union and the contributing employers. In conversing with individual trustees, an agent should keep in mind that the union and employer trustees are formally in an adversarial relationship with each other.

(3) Since the joint board of trustees may meet infrequently, the minutes of the trustee meetings often contain more information than minutes of single-employer plan trustee meetings, and should be reviewed with care. Retirement, investment and other committees also keep minutes of their meetings, and those minutes will provide information on the areas under their jurisdiction.

(4) An agent will generally work only with the plan administrator or the trustees and their advisors, and have no direct contact with employers or participants, except in certain circumstances. These exceptions include a deduction disallowance, a failure to meet minimum funding levels, a coverage problem involving a specific employer's noncollectively bargained employees, or the inadequacy of the plan administrator's system for maintaining participant data records.

4.72.14.2.3.1 (05-04-2001)

Tracking Participant Data

(1) The most important difference in examining multiemployer plans for specific issues is the additional effort needed to ensure that the administrator's participant records, i.e., contribution rates, service, and personal data (birth date and marital status), are complete and accurate. This information is important for a variety of qualification requirements, including nondiscrimination, vesting, required minimum distributions, qualified joint and survivor, and others.

(2) First the agent should look at the collective bargaining agreement to determine what is covered service, and whether any former collectively bargained employees are deemed collectively bargained for coverage purposes. The agent should also look at any side agreements between the union and the employers addressing participation by noncollectively bargained employees. If noncollectively bargained employees participate in the plan, the agent should test the service credit and benefit calculations of a representative sample of those participants, and ask the plan administrator for copies of employer certifications or other evidence that the nondiscrimination requirements are satisfied for each such employer.

(3) The agent should ask the administrator how participant information is gathered from employers and verified. In larger plans, select a sampling of remittance reports of contributing employers should be selected for review to determine whether all eligible employees were included during the relevant period. Copies of confirmation reports to participants and employers, if sent, are another source for service information. The agent should check a sampling of weekly or monthly reports from the period under audit for inconsistencies. The agent may also seek access to records of the sponsoring union in order to cross-check the plan's participant information against the union's rolls maintained for payment of union dues. (Union dues records are not a perfect source for this purpose, as they may include union members who are not currently employed in covered service or, in a right-to-work state, will not include covered employees who choose not to be union members.) Evidence of employer reporting problems may appear in the field auditor's reports, correspondence files, or minutes of trustee and trust-committee meetings.

The agent should track a few participants who, during the period under audit, applied for and/or began to receive plan benefits, and check their service credit, benefit calculations, joint and survivor benefit elections, etc. The agent should confirm service credit for contiguous noncovered service, reciprocity service, and for periods when employers were delinquent in making required contributions.

(4) The agent should contact the contributing employers or participants if necessary. If there appear to be problems, the agent should ask the administrator about the plan's procedures for educating employers and insulating participants from the consequences of reporting errors.

(5) Some employers may neglect to list all participating employees on the remittance reports submitted to the plan administrator, and thus fail to contribute on their behalf. For instance, participating noncollectively bargained employees of the contributing employers may be at risk because the union does not maintain records for them in addition to records maintained by the plan. The plan may pick up the employer's failure in a field audit, or it may not surface until the employee applies for his or her benefits.

4.72.14.3 (05-04-2001)
Technical Requirements

(1) This segment describes special technical requirements and issues for multiemployer plans.

4.72.14.3.1 (05-04-2001)
General

(1) A detailed description is provided of certain qualification and other rules unique to multiemployer plans of which the examining agent should be aware. Although the focus is on multiemployer plans, many of these special rules also apply to single-employer collectively bargained plans.

4.72.14.3.2 (05-04-2001)
Definitions

(1) This section defines certain terms applicable to multiemployer plans.

4.72.14.3.2.1 (05-04-2001)
Multiemployer Plan

(1) ™Multiemployer plan∫ is defined at IRC 414(f) as a plan maintained pursuant to one or more collective bargaining agreements and to which more than one employer is required to contribute. Multiemployer plans are not the same as ™multiple employer plans∫ which, although they are also plans to which more than one employer contributes, are not maintained pursuant to collective bargaining agreements. In addition, sponsors of certain existing plans that would otherwise have been multiemployer plans could have elected out of multiemployer status under IRC 414(f)(5) in the year following the enactment of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). Under IRC 414(f)(3), a plan retains its status as a multiemployer plan following termination if it was a multiemployer plan during the plan year prior to its termination date.

(2) Under ERISA, a plan would not have been considered a multiemployer plan under IRC 414(f) if more than 50% of a year's contributions were

attributable to one employer, or if benefits ceased to be payable to employees when their employers ceased to be required to contribute to the plan. Congress considered these requirements arbitrary, and removed them in MPPAA. Accordingly, a plan which otherwise meets the definition under IRC 414(f) will be a multiemployer plan even if all but a small percentage of the employees covered by the plan are employed by one employer who makes contributions to the plan on their behalf. For this purpose, all trades or businesses under common control are treated as a single employer.

Note: The regulations under IRC 414(f), at Reg. 1.414(f)-1, were issued prior to MPPAA.

(3) Note that the definition of multiemployer plan at IRC 414(f) does not require that each contributing employer maintain the plan pursuant to a collective bargaining agreement. Accordingly, for purposes of section 414(f), every employer who maintains the plan need not do so pursuant to a collective bargaining agreement in order for the plan to be a multiemployer plan. However, all employees who benefit under a multiemployer plan must do so pursuant to some form of participation agreement between their employer and the plan, even if the agreement is not collectively bargained. Furthermore, these employers may not enjoy all of the advantages that the collectively bargained employers enjoy, as discussed below.

Example 1: In addition to collectively bargained employees of various participating employers and noncollectively bargained employees of the sponsoring union, a multiemployer plan covers employees of an independent credit union established for members of the union. The plan continues to be a multiemployer plan under IRC 414(f), even though the credit union is not a signatory to a collective bargaining agreement with respect to the plan nor is it a member of the sponsoring union's controlled group.

4.72.14.3.2.2 (05-04-2001)

Collectively Bargained Plan

(1) Because multiemployer plans are maintained pursuant to collective bargaining agreements, they are subject to IRC 413. IRC 413(a) provides that the special rules of IRC 413(b) apply to a plan maintained pursuant to an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and more than one employer, and to each trust that is part of such a plan. The Department of Labor (DOL) has not established procedures for determining when an agreement is collectively bargained for purposes of retirement plans. (However, DOL has established criteria for determining when a multiple employer welfare arrangement is established or maintained pursuant to a collective bargaining agreement. See Proposed Reg. 2510.3-40 of the DOL Regulations.)

(2) IRC 413(b) describes how certain qualification and other rules apply to collectively bargained plans. In general, the vesting rules and the liability for the funding tax under IRC 4971 apply as though all participants who are employed by employers who are parties to the collective bargaining agreement were employed by a single employer. For purposes of

participation, nondiscrimination, and partial termination, all employees who are employed by employers who are parties to the collective bargaining agreement and also covered by the same benefit computation formula are considered to be employed by a single employer. For purposes of the exclusive benefit rule, funding standards under IRC 412, and deduction limits under IRC 404, all plan participants are considered as though they were employed by a single employer. As discussed below, other parts of the Code also contain special provisions for multiemployer plans, primarily for funding, vesting, and limitations on benefits.

(3) IRC 7701(a)(46) provides an overriding arms-length standard for determining whether a collective bargaining agreement is bona fide. The statute and Temp. Reg. 301.7701-17T provide that an organization will not be considered to be an employee representative if more than 50% of the membership of the employee representative consists of owners, officers, or executives of the employers covered by the plan. Thus, the plan would not be considered as being maintained pursuant to a collective bargaining agreement because the governing agreement would not have been the result of bona fide collective bargaining. Q&A-2 of the regulation notes that even if this standard is met, IRC 413(a) requires that the plan be maintained pursuant to an agreement which also meets DOL's standards. Q&A-2 further provides that the Service has the authority to determine if there is a collective bargaining agreement under the Code, even if the DOL's standards are met and the union has been recognized under IRC 501(c)(5).

(4) Since the enactment of ERISA, Congress has included special effective date provisions for collectively bargained plans. As discussed below, effective dates are generally later for collectively bargained plans. The ERISA effective date provision at section 1017(c) of ERISA is discussed in the ERISA legislative history at H.R. Rep. No. 93-807, 93d Cong. 2d Sess., p. 52 (1974), 1974-3 C.B. Supp. 236, 287. This report shows Congress intended to require that, in order for a plan to be eligible for the later effective date for collectively bargained plans for ERISA amendments, at least 25% of the employees covered by a plan be collectively bargained and that benefits for all participants be addressed in the agreement. Later statutes and regulations follow the ERISA standard and require that the arms-length standard of IRC 7701(a)(46) and the DOL standards also be met. See Regs. 1.401(a)-20, Q&A 40 (REA effective dates) and 1.410(b)-10(a)(2)(iii) (TRA '86 effective dates).

4.72.14.3.3 (05-04-2001)

Plan Amendments and Effective Dates

(1) In order for any plan to be qualified, its governing plan document must be amended timely to reflect any changes enacted to the qualification requirements of the Code.

(2) The form of the plan must satisfy all qualification requirements even if the existing plan provisions do not, in operation, deprive employees of any benefits or rights under the plan. See Fazi v. Commissioner, 102 T.C. 695 (1994); Pawlak v. Commissioner, T.C.M. 1995-7; Hamlin Development Corp. v. Commissioner, T.C.M. 1993-89; Stark Truss Co. v. Commissioner, T.C.M. 1991-329.

(3) Failure to amend timely will disqualify a plan, and there is no exception for multiemployer plans from this rule.

4.72.14.3.3.1 (05-04-2001)
Effective Dates

(1) In determining effective dates for changes in the law, Congress usually takes into account the nature of collectively bargained plans by permitting the plan sponsors to reach the next collective bargaining cycle before making the required amendments. When there are multiple agreements with staggered termination dates, the measuring date is the last termination date of the agreements in effect on the law's enactment without regard to subsequent extensions of any of the agreements.

4.72.14.3.3.2 (05-04-2001)
Retroactive Amendments

(1) IRC 401(b) permits the Commissioner, in his or her discretion, to allow plan sponsors to amend their plans retroactively during the remedial amendment period to eliminate certain disqualifying provisions resulting from changes in the qualification requirements. Under Reg. 1.401(b)-1(d)(2)(iii), the remedial amendment period for multiemployer plans ends on the last day of the tenth month following the end of the plan year in which the remedial amendment period began unless a different remedial amendment period has been specified. Under Reg. 1.401(b)-1(d), once the remedial amendment period has expired, a retroactive amendment to correct a qualification defect will not requalify a plan for past years, and the plan will be disqualified back to the effective date of the change in law. Under Reg. 1.401(b)-1(f), the remedial amendment period may be extended after the period's expiration at the Commissioner's discretion, as exercised in administrative pronouncements such as Rev. Rul. 82-66, 1982-1 C.B. 61, for instance. Remedial amendment is generally available only if a plan complies in operation with a new law as of its effective date (except as provided in Notice 92-36, discussed in paragraph (4) below.)

(2) Reg. 1.401(b)-1(b)(2) extended the remedial amendment period for correcting disqualifying provisions under ERISA, TEFRA, TRA '86, OBRA '86, and OBRA '87. The remedial amendment period for certain disqualifying provisions under TRA '86 was explicitly extended under the authority of TRA '86 (TAMRA, UCA, and OBRA '93). In addition, pursuant to Reg. 1.401(b)-1(b)(3), the remedial amendment period was extended for correcting disqualifying provisions under GATT, SBJPA, and TRA '97.

(3) Pursuant to the Commissioner's discretion, Notice 86-3, 1986-1 C.B. 388, as amended, extended until June 30, 1986 the remedial amendment period for some changes required by TEFRA, DEFRA, and REA. When application of the rules under IRC 401(b) for some qualification provisions results in a later date for a collectively bargained plan, then the later date is the remedial amendment date for the plan.

(4) Pursuant to the Commissioner's discretion, Notice 92-36, 1992-2 C.B. 364, extended the remedial amendment period for compliance with the provisions of TRA '86 to the end of the 1994 plan year for most individually designed plans, including collectively bargained plans. (Governmental plans and plans maintained by tax-exempt organizations,

some of which are collectively bargained plans, must be amended for TRA '86 and subsequent legislation by a later date.) Retroactive correction is permitted not only for form defects but also for operational defects for most changes enacted in TRA '86. See Field Directive on ™Operational Compliance During the TRA '86 Retroactive Amendment Period∫ from April, 1993.

(5) Pursuant to the Commissioner's discretion, Rev. Proc. 2000-27, 2000-26 I.R.B. 1272, extended the remedial amendment period for compliance with the provisions of GATT, SBJPA, TRA '97, and RRA '98 to the end of the 2001 plan year. This is the same remedial amendment period that applies to single employer plans, with the exception of the change under TRA '97 to the vesting schedule for collectively bargained employees under IRC 411(a)(2) as noted in Exhibit 4.72.14-1.

(6) Relief under IRC 401(b) and the regulations thereunder is available only for amendments correcting disqualifying provisions. A plan may generally be amended at any time, retroactively or prospectively, to add or delete terms that do not relate to the Code's qualification requirements, assuming that the amendment does not cut back participants' accrued benefits in violation of IRC 411(d)(6). Amendments that significantly reduce the rate of future benefit accrual under a plan are subject to the notice requirements of section 204(h) of ERISA. Amendments made under IRC 412(c)(8) must meet the requirements of that provision. See IRM 4.72.14.3.9.1.1 for a discussion of the rules governing amendments under IRC 412(c)(8).

(7) A chart providing the effective dates and amendment dates for multiemployer plans of changes in law enacted between 1982 and 2000 that require plan amendments appears in Exhibit 4.72.14-1. The chart generally lists only those provisions with different effective dates and/or remedial amendment periods than apply to single employer plans. Accordingly, most of the changes enacted in GATT, SBJPA, and TRA `97 are not listed. Agents should refer to the statutes and Rev. Proc. 2000-27, 2000-26 I.R.B. 1272, for guidance on the effective date and remedial amendment treatment for these provisions. With regard to earlier statutes, agents should refer to the statutory provisions and IRS guidance noted in the chart for additional requirements relating to plan amendments implementing each change in law.

4.72.14.3.3.3 (05-04-2001)
Examples of Retroactive Amendments

Example 2: A calendar year multiemployer plan's longest running current agreement was entered into on January 1, 1982, for a three year term ending December 31, 1984. The plan's limitation year is the same as its plan year. The effective date for the plan for the TEFRA changes to IRC 415 is the earlier of January 1, 1986, or January 1, 1985, the first day the agreement is no longer in effect. The IRC 415 amendments would have to be adopted by October 31, 1986 (10 months after the close of the 1985 plan year). If the plan is not amended by October 31, 1986, then it would be disqualified as of January 1, 1985.

Example 3: A calendar year multiemployer plan's longest running current agreement was entered into on January 1, 1986, for a four year term ending December 31, 1989. The effective date for the plan for the TRA '86 changes to IRC 410(b) is January 1, 1990: this is the later of January 1, 1989 or January 1, 1990 (the first day the agreement was no longer in effect). Since this date is not later than January 1, 1991, it determines the effective date of the TRA '86 changes for the plan. The IRC 410(b) amendments would have to be adopted by the end of the plan's 1994 plan year. If the plan is not amended by that date to the extent necessary to bring it into conformance with the statute, then it will be disqualified retroactively to January 1, 1990.

4.72.14.3.3.4 (05-04-2001)
Determining Timely Adoption of Amendments

(1) An agent should obtain a copy of the plan's latest favorable determination letter.

a. If an appropriate letter is not available, or if it appears the favorable letter was issued in error, the agent should determine the date the qualification amendments were adopted (if ever). (If the letter was issued in error, the plan may be eligible for relief under IRC 7805(b).) This can be done by reviewing the plan amendment pages and signature page for trustee signatures.
b. If signature pages are nonexistent or unreliable, the agent should check the minutes of trustee meetings for adoption actions.
c. If required amendments were adopted by the date(s) applicable to non-multiemployer plans, no further action is needed regarding timely adoption. If they were not, the agent should review the expiration dates of the collective bargaining contracts in effect at the time the new law was enacted.

4.72.14.3.4 (05-04-2001)
Minimum Participation and Nondiscrimination Rules

(1) IRC 413(b)(1) and (2) and the regulations thereunder provide that the rules of IRC 410 and 401(a)(4) are applied as if all employees of employers who are parties to the collective bargaining agreement, and who are subject to the same benefit computation formula, were employed by a single employer. IRC 413(b)(8) and (9) contain special rules for union employees and professional employees, respectively. Although the final regulations under IRC 410(b) and 401(a)(4) do not explicitly refer to IRC 413(b), the tests described below accommodate the IRC 413(b) structure. The minimum participation rules of IRC 401(a)(26) are applied to multiemployer defined benefit plans in a similar way.

(2) Multiemployer plans automatically satisfy the rules governing nondiscrimination in coverage and accruals of IRC 410(b) and IRC 401(a)(4), and the minimum participation rules of IRC 401(a)(26), for those participants who are collectively bargained. IRC 401(a)(26)(E) explicitly excepts the collectively bargained portion of a multiemployer plan from the minimum participation rules. Reg. 1.410(b)-2(b)(7) interprets the coverage rules of IRC 410(b) and 413(b) to reach the same result. The specific application of these rules to collectively bargained plans is detailed in the final regulations under IRC 410(b), and incorporated by reference in the regulations under IRC 401(a)(4). Accordingly, the rules described in the 410(b) regulations for determining who is a collectively bargained employee, etc., also apply to plans under IRC 401(a)(4). The IRC 401(a)(26) regulations contain some additional rules for collectively bargained plans under that section.

(3) For purposes of determining whether the deemed pass applies, the regulations divide a plan into two parts: one portion for employees covered (or treated as covered) by a collective bargaining agreement, to which the exception applies; and a second portion for participants not covered by a collective bargaining agreement which must satisfy the general rules on an employer-by-employer basis as though it were a multiple employer plan. Disaggregation of the collectively bargained employees is mandatory rather than at the discretion of the plan sponsor. Collectively bargained employees are ™excludable employeesʃ with regard to the noncollectively bargained employees of a sponsoring employer, whether or not those employees are covered by the plan, and those noncollectively bargained employees are excludable employees with regard to the collectively bargained employees. In testing the noncollectively bargained participants for each employer, including employees of the sponsoring union and the plan itself, the regular rules apply: participants who are employees of employers other than the employer being tested are excluded, and all nonexcludable employees of the employer – whether or not covered by the plan – are included. See Regs. 1.410-2(b)(7) and -7(c)(6); 1.401(a)(4)-1(c)(4) and (5); and 1.401(a)(26)-2(d)(1)(ii)(B).

4.72.14.3.4.1 (05-04-2001)

IRC 410(b) Definition of Collectively Bargained Employee

(1) Generally, an employee who performs hours of service during the plan year as both a collectively bargained employee and a noncollectively bargained employee is treated as collectively bargained with respect to the hours of service performed as a collectively bargained employee, and as noncollectively bargained with regard to the hours of service performed as a noncollectively bargained employee. See Reg. 1.410(b)-6(d)(2)(i).

(2) Reg. 1.410(b)-6(d)(2)(iii)(A) provides that, for purposes of the general rule discussed in paragraph (1), an employee is considered collectively bargained only if the employee is represented by a bona fide employee representative that is party to the collective bargaining agreement under which the plan is maintained. Thus, employees of the plan or the employee representative who are covered under the plan through

agreement between the employee representative and the plan are not considered collectively bargained (except as provided in paragraph (4)).

(3) In addition, all employees who are the subject of a collective bargaining agreement where more than two percent of the employees covered by the agreement are professional employees are regarded as not being covered by a collective bargaining agreement. This means that the entire group of employees subject to that agreement, and not just the professional employees, must satisfy the nondiscrimination rules as if the group were noncollectively bargained. No employees covered by such an agreement are excludable employees with respect to other participants who are not collectively bargained. See Reg. 1.410(b)-6(d)(iii)(B). ™Professional employee∫ is defined at Reg. 1.410(b)-9 as one who follows a certain enumerated professional career, such as an actuary or medical doctor, etc., and is highly compensated. Engineers are not considered professional employees for purposes of this definition. See also Reg. 1.401(a)(26)-8.

(4) Reg. 1.410(b)-6(d)(2)(ii) provides the following special rules that allow certain noncollectively bargained participants in a multiemployer plan who were formerly collectively bargained employees covered by the plan to continue to be treated as collectively bargained employees. This treatment is an exception to the general requirement that benefits provided to noncollectively bargained employees be tested under IRC 410(b) and 401(a)(4), and was added to meet the practical problems plan trustees may have in identifying and accounting for noncollectively bargained employees of different participating employers.

(5) As a threshold requirement, only employees who are or were members of a unit covered by a collective bargaining agreement, which agreement (or successor agreement) provides for these employees to benefit under the plan in the current year, may be deemed ™collectively bargained.∫ Note that it is the agreement rather than the plan that must provide for continued coverage, although provisions of a participation agreement or similar document may be taken into account.

(6) In addition to the threshold requirement, one of the following conditions must also be satisfied:

a. Part-year rule. An employee who performs services for one or more employers that are parties to the collective bargaining agreement, for the plan or related plans, or for the employee representative, as both a collectively bargained and noncollectively bargained employee during a plan year, may be treated as a collectively bargained employee for that year provided that at least half of the employee's hours of service for the year were as a collectively bargained employee.
b. Collective bargaining cycle rule. An employee who is collectively bargained (or treated as collectively bargained by virtue of the part-year rule of subparagraph 1 above or the transition rule of subparagraph 4 below) for all of his or her hours of service during a plan year may be treated as collectively bargained during the entire

collective bargaining cycle or, if later, until the end of the following plan year. The terms of the plan providing for benefit accruals may treat these employees no more favorably than similarly situated employees who are collectively bargained.

c. Alumni rule. Formerly collectively bargained employees under 2 above may continue to be treated as collectively bargained employees indefinitely, if (1) these employees are performing services for one or more of the employers who are parties to the collective bargaining agreement, for the plan, or for the employee representative; (2) the terms of the plan providing for benefit accruals treat these employees no more favorably than similarly situated employees who are collectively bargained; and (3) no more than 5% of the employees covered under the plan are noncollectively bargained employees.

d. Transition rule. For a plan year beginning before the regulations are effective, any employee who satisfies the threshold rule in subparagraph (a) above may be treated as collectively bargained for all of his or her hours of service for that plan year.

(7) The definition of who is collectively bargained under Regs. 1.410(b)-6(d)(2)(i) or (ii) must be applied to all employees on a reasonable and consistent basis for the plan year.

(8) It should be noted that the nondiscrimination testing methods described in the substantiation quality data revenue procedure provide an overlay to the regulation's definition of collectively bargained employee. Thus, for instance, if a plan sponsor elects to use the snapshot testing method, which looks at an employee's status as of a particular date during the plan year, and the employee is collectively bargained on that date, then the employee is considered collectively bargained for the entire year regardless of whether he or she has also worked hours as a noncollectively bargained employee during the year. See IRM 4.72.14.3.4.4 for a discussion of the substantiation quality data revenue procedure.

4.72.14.3.4.2 (05-04-2001)

IRC 401(a)(4) Defined Benefit Plan Safe Harbor

(1) The safe harbor tests under the nondiscrimination regulations at Regs. 1.401(a)(4)-2 and -3 generally require a plan to provide an amount of benefits to each participant that is the same percentage of compensation for the same years of service. Some multiemployer defined benefit plans grant retroactive benefit increases that are conditioned on employees completing a certain number of years of service in the future. These conditions are adopted as protection against potential windfalls to employees who return to work for a short period for any of the participating employers. Under a minimum-years-of-service condition participants may not all receive uniform benefits, which could cause the noncollectively bargained portion of the plan that is being tested to fall out of the safe harbors. Accordingly, Reg. 1.401(a)(4)-3(f)(10) contains a special rule permitting a multiemployer defined benefit plan to disregard such a service condition, provided that the condition applies to all employees in the plan (including collectively bargained employees), and

the future service required does not exceed five years. If a multiemployer plan adopts a future-years-of-service condition that does not meet the terms of the regulation, or if the amendment providing for the past service increase does not otherwise satisfy the safe harbors (without regard to this exception), then the noncollectively bargained portion of the plan must be tested under the general nondiscrimination rules instead of the safe harbor.

4.72.14.3.4.3 (05-04-2001)
IRC 401(a)(26)

(1) If a defined benefit plan benefits any employee not covered by a collective bargaining agreement, that portion of the plan must satisfy IRC 401(a)(26). (As of 1997, IRC 401(a)(26) does not apply to defined contribution plans.) However, the regulations provide that the plan will satisfy IRC 401(a)(26) if the plan as a whole benefits at least 50 employees, regardless of their collectively bargained status. See Reg. 1.401(a)(26)-1(b)(2).

(2) The regulations under IRC 401(a)(26) also provide that a multiemployer defined benefit plan will automatically pass the prior benefit structure rules if the plan provides meaningful benefits for more than 50 employees, or if more than 50 employees have meaningful accrued benefits in the plan. All employees under the plan, whether or not collectively bargained, are counted. See Reg. 1.401(a)(26)-3(d).

4.72.14.3.4.4 (05-04-2001)
Substantiation Quality Data

(1) Rev. Proc. 93-42, 1993-2 C.B. 540, provides special procedures plan sponsors may follow to substantiate the data they use in nondiscrimination testing. Because the plan administrator of a multiemployer plan may not have direct access to the employer-specific data that is needed for testing nondiscrimination, but that is not needed for determining participant benefits, section 6 of the revenue procedure provides additional ways for multiemployer plans to satisfy the nondiscrimination requirements. These rules supplement other methods in the revenue procedure, such as snapshot testing and using a 3-year testing cycle, which are also available to multiemployer plans.

(2) Each participating employer must satisfy the nondiscrimination rules for its disaggregated population of employees benefiting under the plan who are not treated as collectively bargained under Reg. 1.410(b)-6(d)(2). Failure of a multiemployer plan to satisfy the nondiscrimination rules results in disqualification of the plan for all of the participating employers. However, in a proper case, the Commissioner has the authority to retain the qualified status of a multiemployer plan for innocent employers. Pursuant to the revenue procedure, the Commissioner may exercise this authority where the plan administrator has followed procedures that are reasonably designed to obtain from each participating employer appropriate information substantiating that the disaggregated portion of the plan with respect to that employer (i.e., the portion benefiting the employer's noncollectively bargained employees) satisfies the nondiscrimination requirements, and it is reasonable for the plan administrator to rely on that information. For example, a plan

administrator may rely on a participating employer's certification that the portion of the plan benefiting its disaggregated population of noncollectively bargained employees satisfies the nondiscrimination requirements (providing it is reasonable to rely on the certification).

4.72.14.3.4.5 (05-04-2001)

Examining Coverage

(1) An agent should first determine if the plan terms permit coverage of noncollectively bargained employees. The agent should then refer to the collective bargaining agreements and any side agreements to see which, if any, noncollectively bargained employees are allowed to participate. Note that if any of the collectively bargained contracts contains benefits bargained for a professional individual (actuary, doctor, etc., but not engineer), and if more than 2% of the employees under the contract are professional individuals, then all the employees under that contract will be treated as not being covered by a collective bargaining agreement.

(2) The agent should ask the administrator to identify any eligible noncollectively bargained employees and their employers. If possible, the agent may cross-check against payroll audits and other records of a sample of eligible noncollectively bargained employees to confirm whether they actually participate and whether their employers are making contributions and crediting service as required. Evidence of contributions from sources other than contributing employers (e.g., the union) may indicate noncollectively bargained participants.

(3) Each separate employer of noncollectively bargained employees in the plan, or of employees treated as noncollectively bargained, must meet the requirements of IRC 410, 401(a)(4), and 401(a)(26) for that group of employees. The agent should ask the plan administrator for the employer certifications or other evidence of employer compliance with the nondiscrimination requirements as described in Rev. Proc. 93-42. If this evidence seems questionable, the agent should secure the employment records of each affected employer (including the union and affiliated plans if their own employees are covered) and see if coverage under the multiemployer plan is adequate within the context of that employer. If any of these employing parties fails to meet these requirements, the entire multiemployer plan is disqualified. However, the Commissioner has the authority to retain the qualified status of the plan for innocent employers. This authority is to be exercised in accordance with the standards stated at section 6 of Rev. Proc. 93-42.

4.72.14.3.5 (05-04-2001)

Vesting, Accruals, and Service Credit

(1) IRC 413(b)(4) provides in essence that, excepting special rules for terminations and partial terminations under IRC 411(d)(3) and breaks in service under regulations issued by the Secretary of Labor, the vesting rules of IRC 411 shall be applied as though all participating employers in a multiemployer plan were a single employer.

4.72.14.3.5.1 (05-04-2001)
Vesting Schedules

(1) Under IRC 411(a)(2), participants in plans with cliff vesting schedules are required to be fully vested in their accrued benefits within five years. Pursuant to section 1442(a) of SBJPA, this rule applies to multiemployer as well as single employer plans. Previously, when TRA '86 amended IRC 411(a)(2) to shorten cliff and graded vesting schedules for most plans, the ten year cliff schedule was retained for collectively bargained participants in multiemployer plans. (Noncollectively bargained participants in multiemployer plans were previously required to be vested according to the shorter schedules.) The five year vesting schedule only applies to collectively bargained participants in a plan who have at least one hour of service after the effective date of the new schedule for the plan. See Exhibit 4.72.14-1 to determine the law's effective date for a particular plan.

4.72.14.3.5.2 (05-04-2001)
Breaks in Service

(1) For participation and vesting purposes, multiemployer plans are subject to special years of service rules contained in DOL Reg. 2530.210. These rules permit multiemployer plans to disregard ™noncontiguous noncovered service∫ performed by the employee for purposes of participation or vesting. Generally this means that an employee will not get service credit if he moves from one participating employer to another participating employer, and either goes from noncovered service to covered service, or from covered service to noncovered service. By contrast, ™contiguous noncovered service∫ must be credited. This means that all of a participant's years of service must be counted where the participant moves from covered to noncovered service (or vice versa) with the same participating employer. All covered service with all participating employers must be credited.

(2) For purposes of these service crediting rules, each member of a common employer under IRC 414(b), 414(c), or 414(m) is treated as a separate employer. See DOL Reg. 2530.210(c)(3)(iv)(B). Thus, moving from covered service with one member of a controlled group to noncovered service with another member of the controlled group will result in noncontiguous noncovered service. Note that these rules apply for eligibility and vesting purposes only; for accrual purposes, only covered service need be credited. This is the same rule as applies to single-employer plans.

Example 4: Employers X, Y, and Z all participate in a multiemployer plan. For the 1996 plan year, the rule of parity and a 10 year cliff vesting schedule were in effect for collectively bargained employees. Employer X owns Employer Z. Employee J completes 3 years of covered service with X, and then enters into 1 year of noncovered service with Y, thus incurring a 1 year break in service. J then enters into 1 year of covered service with Y, thereby causing the 1 year of noncovered service with Y to become contiguous; accordingly, the plan is required to credit J with 5 years of service toward participation and vesting. J then enters into 5 years of noncovered service with Z, thereby incurring 5 consecutive 1-year breaks in service. The prior service with X and Y may be disregarded. J then enters into 1 year of covered service with Z. Because

the 5 years of noncovered service with Z are contiguous to the 1 year of covered service with Z, the plan is required to credit 6 years of service toward participation and vesting (in 1 year's accrual).

(3) SSA schedules are a good source of information for an agent examining a plan for compliance with the vesting requirements. Deferred vested employees do not need to be listed on the SSA until they have been gone from vesting service under the plan for two years. See Reg. 301.6057-1(b)(3) regarding record keeping requirements for multiemployer plans filing SSA schedules.

4.72.14.3.5.3 (05-04-2001)

Suspension of Benefits

(1) IRC 411(a)(3)(B) is one of the permitted forfeiture provisions with special rules for multiemployer plans. As interpreted by DOL Reg. 2530.203-3, IRC 411(a)(3)(B) generally provides that payment of benefits may be suspended upon a retiree's reemployment. A participant in a multiemployer plan is considered ™reemployed∫ if he or she returns to service for at least 40 hours per month in the same industry, in the same trade or craft, and in the same geographical region, as were covered by the plan at the time payment commenced. ™Industry∫ means all industries covered by the plan; ™trade or craft∫ is the employment skill of the employee; and ™geographical region∫ consists of all of the States or Canadian provinces in which employers are required to contribute to the plan, and the remainder of any part of a Standard Metropolitan Statistical Area that is partly located in such a State or province. It is irrelevant whether the new employer participates in the plan. Reemployment that satisfies these conditions is known as ™203(a)(3)(B) service.∫ See DOL Reg. 2530.203-3(c)(2), and Rev. Rul. 81-140, 1981-1 C.B. 180. 203(a)(3)(B) service is service after benefit payments commence or after the employee becomes eligible to receive the normal retirement benefit.

(2) The amount of benefits which may be withheld on a monthly basis is the amount equal to the monthly portion of an annuity payment attributable to the employer contribution. If the actual monthly amount is less than the annuity portion, then that amount is the maximum that may be withheld. Suspension cannot begin until the plan notifies the employee that payment of benefits will be suspended. The period of suspension lasts only while the employee is engaged in service with the new employer; however, the amount withheld during that period is permanently lost to the participant. See DOL Reg. 2530.203-3(b).

(3) If the employee works in 203(a)(3)(B) service past normal retirement age, the accrued benefit need not be actuarially adjusted as normally required under IRC 411(b)(1)(H). See Reg. section 1.411(c)-1(f)(i) and proposed Reg. section 1.411(b)-2(b)(4)(ii). However, if the employee continues in 203(a)(3)(B) service past his or her required beginning date, the plan must actuarially adjust the accrued benefit as of April 1 following the year in which the employee turns 70. See Q&A-3 of Notice 97-75, 1997-2 C.B. 337.

(4) DOL Reg. 2530.203-3(b)(3) sets forth limited circumstances under which benefit payments, that have been made under a plan to an employee

whose benefits could have been suspended because the employee was employed in 203(a)(3)(B) service, may be recouped. Payments may only be recouped under a plan by a ratable offset against future benefit payments made to the employee, and notice must be provided. In contrast, there are no provisions in the regulations allowing a plan that did not pay any benefits to an employee who was working in 203(a)(3)(B) service, and did not initially provide notice of suspension, to later withhold the full amount after notification.

(5) Correction of an improper suspension due to lack of notice must restore to the employee the normal retirement benefit to which he or she is entitled under the terms of the plan. Merely providing a suspension of benefit notice at the time the error is discovered is not adequate correction, although future payments may be forfeited once proper notice is provided if the employee continues in 203(a)(3)(B) service.

(6) If the employee's 203(a)(3)(B) service for which payments were improperly suspended is covered service under the plan, the employee must be provided the greater of: 1) the benefit provided for retirement after normal retirement age, if the plan provides such a benefit, or 2) the normal retirement benefit actuarially increased for the payments forfeited during the period of improper suspension (including interest on account of the delay in payment). If the second alternative is used, a plan may instead correct the forfeiture by providing a lump sum to the employee, in addition to his or her normal retirement benefit, that would be the present value of the payments improperly suspended (taking into account the delay in payment). If the 203(a)(3)(B) service is not covered service under the plan, the employee must be provided with the normal retirement benefit commencing at normal retirement age actuarially increased for the payments forfeited during the period of improper suspension (including interest on account of the delay in payment). For purposes of determining the appropriate correction, assumptions stated in the plan for determining actuarial equivalencies should be used.

(7) An amendment that reduces IRC 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate IRC 411(d)(6). In contrast, protected benefits may not be retroactively reduced on account of reemployment that is not 203(a)(3)(B) service. Because IRC 411(d)(6) only protects benefits from being reduced by amendment, receipt of protected benefits other than the normal retirement benefit may be conditioned on the participant's not performing any type of reemployment if the provision is present in the plan from its establishment. See DOL Reg. 2530.203-3(a).

Example 5: A multiemployer plan provides that a participant's benefit payments may be suspended on account of 203(a)(3)(B) service, such as non-union service performed in the industry covered by the plan. The plan is amended to provide that if an active participant engages in non-union service, that employee loses eligibility for the early retirement benefit available under the plan. Under DOL Reg. 2530.203-3, 203(a)(3)(B) service is service performed after benefit payment has commenced or the employee becomes eligible for normal retirement

benefits; it does not include service that affects a participant's eligibility for an early retirement benefit not yet in pay status. Because eligibility for an early retirement benefit is a protected benefit, and the prohibited employment is not 203(a)(3)(B) service, the amendment reducing eligibility on account of reemployment violates IRC 411(d)(6).

4.72.14.3.5.4 (05-04-2001)
Past Service Credit

(1) IRC 411(a)(3)(E) is another permitted forfeiture provision that applies specifically to multiemployer plans. Multiemployer plans often provide credit for past service to employees when their employers first join a plan, as an inducement for the employers to join. These grants can impose a heavy funding burden on participating employers. IRC 411(a)(3)(E) permits a multiemployer plan to provide that past service credit earned with an employer will be forfeited when the employer withdraws from the plan. See Elser v. I.A.M. National Pension Fund, 684 F.2d 648 (9th Cir. 1982).

(2) When a multiemployer plan grants past service credit it may choose to limit such grants to past covered service only, because crediting past service is more generous than either the Code or regulations require. As with the suspension of benefits forfeiture described above, a plan can be amended to add a forfeiture provision that satisfies IRC 41(a)(3)(E) without violating IRC 411(d)(6).

4.72.14.3.5.5 (05-04-2001)
Service Credit following Complete or Partial Withdrawal by Employer, or Plan Termination

(1) IRC 411(a)(4)(G) provides that a multiemployer plan is not required, for vesting purposes, to credit service with a participating employer, after a complete withdrawal of that employer from the plan, a partial withdrawal of that employer in conjunction with the decertification of the collective bargaining representative (to the extent permitted in Treasury regulations), or with any participating employer after the termination date of the plan under section 4048 of ERISA. Whether a complete or partial withdrawal, or a defined benefit plan termination, has occurred is determined under Title IV of ERISA.

4.72.14.3.5.6 (05-04-2001)
Service with Employer Who Fails to Make Required Contributions

(1) A pension plan (including a money purchase pension plan) under which service credit or allocation of contributions is conditioned on an employer's making required contributions violates the definitely determinable benefit rule for pension plans of Reg. 1.401-1(b)(1)(i). It does this by allowing an employer's actions, in effect, to determine the amount of benefits accrued by its employees. It also violates the requirement that all years of service with the employers maintaining the plan be taken into account for participation and vesting purposes as well. If the plan trustees are unable to collect the full amount owed, the plan may incur an accumulated funding deficiency. See DOL Reg. 2530.210 and Rev. Rul. 85-130, 1985-2 C.B. 137.

(2) In contrast, because the definitely determinable benefit rule does not apply to profit-sharing plans, multiemployer profit-sharing plans may provide that a delinquency in contributions will be allocated only to the delinquent employer's employees. This does not violate the definite

allocation formula requirement of Reg. sec. 1.401-1(b)(1)(ii). (Note that IRC 401(a)(27)(B) requires that a plan intended to be either a money purchase pension plan or a profit-sharing plan must be so designated in order to be a qualified plan.)

4.72.14.3.5.7 (05-04-2001)
Partial Terminations

(1) IRC 413(b)(2) provides that the partial termination rules of IRC 411(d)(3) shall be applied as if all participants who are subject to the same benefit computation formula and who are employed by employers who are parties to the collective bargaining agreement were employed by a single employer. Reg. 1.413-1(c)(3) explains that the determination of whether a partial termination has occurred is made separately with regard to each such group, and that a partial termination in one group has no bearing on whether a partial termination has occurred in another. ™Benefit computation formula∫ refers to the benefit that an employee earns rather than the contribution level to which his or her employer has agreed.

(2) An agent should first look at the plan's vesting schedule. If the plan provides for full and immediate vesting of benefits, there is no violation of IRC 411(d)(3) even if there is a partial termination. Next the agent should determine if the plan has filed Form 5303 indicating that a partial termination has occurred. The agent should ask the administrator about employer withdrawals, union local shutdowns, or other events that might have triggered a partial termination. If there is significant evidence of a partial termination, the agent should refer to the rules cited above and apply the same standards used in a single-employer plan.

4.72.14.3.5.8 (05-04-2001)
Accrual Rules under IRC 411(b)

(1) Reg.1.411(b)-1(b)(2)(ii)(F) provides that a plan shall not satisfy the 133-1/3 percent accrual rule if the base for computation of retirement benefits changes solely by reason of an increase in the number of years of participation. A plan could violate this requirement if the compensation base for determining accrued benefits changes solely by reason of the completion of a specified number of years of service. While the base may be changed because of factors such as salary increases, the base may not be changed, absent such factors, by reference to length of service. For example, a plan that provides that the accrued benefits for participants with less than 30 years of service are determined with reference to career average compensation, while the accrued benefits of participants with 30 or more years of service are determined with reference to final five-year average compensation, would not satisfy the 133-1/3 percent accrual rule. See Carollo v. Cement and Concrete Workers District Council Pension Plan, 964 F. Supp. 677 (E.D. N.Y. 1997).

4.72.14.3.5.9 (05-04-2001)
Reciprocity Agreements

(1) A unique feature of some multiemployer plans is the recognition of service or benefit accruals earned by union members under another multiemployer plan. These agreements are generally known as ™reciprocity agreements.∫ For instance, the trustees of two plans maintained by local or regional affiliates of a national union may enter

into a reciprocity agreement providing that each plan will apply covered service by the employee for an employer participating in the other plan toward the benefit earned under the employee's home plan.

(2) Reciprocity agreements can be designed in numerous ways. One common design is the ™money follows the manſ method, under which the plan benefiting a temporary participant collects contributions from the participant's temporary employer and transmits those contributions to the employee's home plan. The home plan provides a benefit based on the home plan's benefit formula. Another type of reciprocity agreement uses a prorated method under which the employee receives benefit accruals under each plan based on the relative hours of covered employment the employee performed under the plan. Under the prorated method, the benefit provided is calculated based on the hours worked under the plan divided by the total hours worked by the employee during the year. Sponsors use variations of these methods in designing reciprocity agreements to fit their needs.

(3) While reciprocity agreements raise certain issues, if they are properly designed they do not cause the signatory plans to become disqualified. For instance, IRC 401(a)(1) provides in part that a plan will be qualified if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions. Reg. 1.401-1(a)(2) requires a qualified plan to be maintained pursuant to a definite written program. IRC 413(b)(3) provides in part that the all employees participating in a collectively bargained plan are treated as employed by each of the employers maintaining the plan for purposes of the exclusive benefit rule. The money-follows-the-man type of reciprocity, for instance, appears to violate these qualification requirements because it provides for amounts to be contributed to the employee's home plan by a nonsignatory employer. However, if the terms of the home plan permit its trustees to enter into such agreements, the contract entered into by the trustees of the two plans may be considered to be a part of the home plan's ™definite written program.ſ Furthermore, the temporary employer will be considered to be maintaining the home plan for the limited purposes of satisfying IRC 401(a)(1) and the exclusive benefit rule.

(4) If the trustees of the plan under audit have entered into reciprocity agreements with other plans, the plan must contain language allowing for such agreements. If the plan brings reciprocity service up to date for new members, the agent should ask the plan administrator if records are maintained that accurately reflect the information furnished by new members. If the plan administrator does not inquire about reciprocity service until the participant applies for retirement, the plan procedures should require the administrator to explain reciprocity service to the participant, ask if they have any, and verify that service with the reciprocal plan and/or temporary employer.

4.72.14.3.6 (05-04-2001)
Deductible Limits

(1) Generally, IRC 404 applies to single and multiemployer plans in the same manner. However, IRC 404(a)(1)(D) does not apply to multiemployer plans. (IRC 404(a)(1)(D) provides that the maximum amount deductible for certain defined benefit plans is not less than the unfunded current liability of the plan.)

(2) IRC 413(b)(7) provides that each applicable limitation provided by IRC 404(a) shall be determined as if all participants in a collectively bargained plan were employed by a single employer. The amounts contributed to the plan by a participating employer, for the portion of the taxable year which is included in the plan year, shall be considered not to exceed a limitation of IRC 404(a) if the anticipated employer contributions for such plan year do not exceed such limitation. For this purpose, anticipated employer contributions are determined in a manner consistent with the manner in which actual contributions are determined.

(3) IRC 404(a)(6) provides an exception to the general rule that an employer may only claim a deduction in the taxable year in which the amount is contributed. Under IRC 404(a)(6), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year.

(4) Some employers have claimed deductions under IRC 404(a)(6) for contributions to multiemployer plans for the first several months of the following taxable year by arguing that they were treated the same as contributions made for the prior year. However, courts have held that such contributions were not made ™on account of∫ the prior taxable year and therefore were not deductible under IRC 404(a)(6). See American Stores v. Commissioner, 170 F.3d 1267 (10th Cir. 1999), cert. denied 120 S.Ct. 182 (1999); Airborne Freight Corp. v. Commissioner, 153 F.3d 967 (9th Cir. 1998); Lucky Stores v. Commissioner, 153 F.3d 964 (9th Cir. 1998), cert. denied 119 S.Ct. 1755 (1999). These courts have also agreed with the Service, in dicta, that accelerating deductions is not consistent with IRC 413(b)(7) because plan administrators would be unable to arrive at meaningful figures for anticipated contributions if employers were able to attribute to a taxable year payments based on work performed after that year. Lucky Stores at 967.

(5) Trustees of multiemployer plans under which the contributions exceed the IRC 404 limits often correct the problem by adopting amendments increasing benefits. If the amendment is to have retroactive effect, however, it must satisfy the requirements of IRC 412(c)(8).

4.72.14.3.6.1 (05-04-2001)
Examination of Deduction Issues

(1) If the plan is a defined benefit plan, the aggregate deductible limit for all employers for the plan year should appear in the actuarial valuation. Communication by the plan actuary or trustees to the contributing employers of the deductible limit for each year is a good administrative practice.

(2) The agent should first compare the limit in the actuarial valuation report with the contributions received during the same plan year. Although this comparison disregards the effects of payment timing for IRC 404 and 412 purposes and the varying tax years of the contributing employers, it can provide some indication of compliance with IRC 404. The agent should also check for a pattern of contributions that exceeds the deductible limit and refer excess deductions to either the Large and Mid-sized Business or Small Business and Self Employed division as necessary, or pursue discrepancy adjustments against employers' Forms 1120. While not a qualification problem, recurring excess contributions may lead trustees to pass recurring benefit increases that can potentially result in section 415 violations and heavy funding burdens in the future as the retiree-to-active ratio increases.

(3) If a deductibility issue cannot be resolved in a manner similar to that described in the preceding paragraph, it will be necessary to adjust the employers' returns and assess the corresponding IRC 4972 tax. To the extent the information is readily available, make the adjustments to the employers' returns (and assess the corresponding IRC 4972 tax) using the discrepancy adjustment procedures. If there are other employers for which the discrepancy adjustments cannot be made, refer them to the procedures relating to the Large and Mid-sized Business (LMSB) or Small Business and Self-Employed (SBSE) divisions as appropriate, in accordance with the procedures in IRM Part 4. Any questions regarding allocation of the adjustment among the employers should be directed to a field actuary.

(4) The agent should also determine whether the deductible limits of any defined contribution plans were not exceeded. A similar determination should be made regarding the deductible limits under IRC 404(a)(7) applicable to a combination of defined benefit and defined contribution plans.

(5) The agent should examine the deductible limit section of the actuarial valuation for evidence that the limit was adjusted upward using IRC 404(a)(1)(D), which is not available for multiemployer plans.

4.72.14.3.6.2 (05-04-2001)

IRC 4972 Tax Liability Issues

(1) IRC 4972 imposes on a contributing employer a tax equal to 10% of the nondeductible contributions under the plan (as determined as of the close of the taxable year of the employer). There is no exemption in the statutory language of IRC 4972 for employers contributing to a multiemployer plan from the tax imposed by IRC 4972. Because the amount of nondeductible contributions is determined with respect to the plan as a whole, and not with respect to individual employers, the amount of nondeductible contributions must be allocated among the employers maintaining the plan in order to determine each employer's individual tax liability. No regulations have been issued providing additional guidance on the application of IRC 4972 to contributions to multiemployer plans.

4.72.14.3.7 (05-04-2001)
Distribution Issues

(1) There are no special distribution rules for multiemployer plans. However, certain multiemployer administrative practices can lead to distribution violations.

4.72.14.3.7.1 (05-04-2001)
IRC 401(a)(13)

(1) One issue may arise under the IRC 401(a)(13) prohibition against alienation of benefits. For example, some unions that sponsor multiemployer plans also sponsor arrangements to which retirees pay premiums for continued health coverage. When the annuity is paid from the multiemployer plan to the retiree, the plan may withhold an amount from each payment to cover the health premium. If the amount withheld exceeds the 10% exception under Reg. 1.401(a)-13(d)(1) for certain voluntary and revocable assignments, or does not meet the special rule for certain arrangements under Reg. 1.401(a)-13(e), the plan will violate IRC 401 (a)(13).

(2) An agent should ask the administrator if the plan offers such an assignment option and, if so, how it works. While reviewing retirement application files for proper benefit calculations, the agent should check for any reductions and corresponding election forms signed by the retiree. The purpose of any assignments should be stated on the election form.

4.72.14.3.7.2 (05-04-2001)
IRC 401(a)(9)

(1) Certain peculiarities of multiemployer plans – benefit portability features, itinerant participant populations, and distant communication between contributing employers and plan administrators – combine to make multiemployer plans especially vulnerable to violations of the required minimum distribution rules of IRC 401(a)(9). Consider, for instance, a plan in the construction trade, or food industry, that may cover tens of thousands of employees. Participants may move in and out of covered service with many different employers over the course of their careers, be entitled to reciprocity credit from other plans, and change addresses a number of times. Employers may be remiss in collecting necessary data, such as employees' birth dates, and communicating that data to the plan administrator. Employees who participate only for a short time may never apply for their benefits. Absent an adequate system to ensure compliance, the plan may violate IRC 401(a)(9) on more than an occasional basis.

(2) A multiemployer plan that is poorly administered is especially vulnerable to violations of the required minimum distribution rules. The agent should ask the administrator his or her method of ensuring that plan records contain participants' birth-dates and their latest known addresses. This information is frequently transmitted by employers to plan administrators on remittance reports that accompany their monthly contributions. An agent should also ask if the IRS/SSA locator service is regularly used.

(3) The IRC 401 (a)(9)(C) definition of required beginning date was amended in 1996 to be April 1 of the calendar year following the later of the calendar year in which the employee attains age 70-1/2 or the calendar year in which the employee retires. However, if the employee is a 5% owner within the meaning of IRC 416 with respect to the plan year

ending in the calendar year in which the employee attains age 70-1/2, the required beginning date continues to be April 1 of the year following attainment of age 70-1/2. Plans were not required to be amended for this change in law, and many multiemployer plans may continue to use the old definition of required beginning date.

(4) For plans that have been amended to apply the new definition, however, two issues may arise. First, the addition of the ™year of retirementƒ part of the required beginning date necessitates that a plan have procedures in place, if not plan language, for determining the date when an employee has retired. Multiemployer plans in particular need such language or procedures because the plan administrator's lack of access to participants' current employment data means there is no independent method of determining whether or not an employee has retired or is merely incurring a break in service.

(5) In practice, many plans may determine a participant's retirement date as being the date on which a participant who is eligible to receive benefits applies for those benefits. Such a provision violates section 401(a)(9) with regard to terminated vested participants when the plan fails to begin payment even though the participant is neither still in service with a participating employer nor is younger than 70-1/2. (It should be noted,however, that this definition of retirement does not violate IRC 401(a)(14)). See Reg. section 1.401(a)-14(a).)

(6) The second issue concerns the determination of whether a participant is a 5% owner. Some multiemployer plans cover industries in which it is common for a participant to act as a self-employed contractor (thus becoming a 5% - really 100% - owner) on a job for which he or she was the successful bidder and as an employee of the successful bidder on the next job, and for both types of work to be covered employment under the plan. Thus the participant can change status many times, often within a single calendar year. Plans covering such participants should have procedures in place for determining the status of these participants for purposes of IRC 401(a)(9).

4.72.14.3.7.3 (05-04-2001)

™Thirteenth check Distributions

(1) Some multiemployer plans distribute additional benefits to pay-status participants. These participants receive distributions in excess of the benefits they would be entitled to receive as computed under the formula contained in the plan document. This practice is commonly known as issuing a ™thirteenth checkƒ to each such participant, i.e., a check that is additional to the twelve monthly checks the participant regularly receives. A plan may contain language permitting thirteenth check distributions. An agent should look at the minutes of trustees meetings to determine if plan amendments have been executed authorizing such distributions. Because these distributions may be authorized for only a limited period of time, the authorizing amendments may never become part of a restated plan document.

(2) If a plan does not contain such language, these distributions may violate a number of Code provisions. For instance, the definitely determinable

benefit requirement of Reg. 1.401-1 (b)(1) might not be satisfied because the actual benefit received would be different from what a participant could determine from the plan terms. In addition, a generous payment may exceed the IRC 415 limits or cause accruals to be impermissibly back-loaded under IRC 411(b). Also, the operation of the plan would not be in accordance with the plan document.

(3) Thirteenth checks that are part of the participant's accrued benefit are also subject to the qualified joint and survivor requirements. If any retirees receiving thirteenth checks are noncollectively bargained, those benefits must also satisfy the nondiscrimination rules for former employees under Reg. 1.401(a)(4)-10. Finally, even if the plan is amended to provide thirteenth check distributions, if the amendments are made on a regular basis the series of amendments – even though each is ad hoc – may give rise to an expectation of a benefit that is subject to IRC 411(d)(6) protection.

4.72.14.3.8 (05-04-2001)
IRC 415 Limits

(1) There are a number of special rules for applying the IRC 415 limits to multiemployer plans:

a. Reg. 1.415-2(b)(6) provides that the limitation year for multiemployer plans is the calendar year unless the plan administrator elects otherwise in accordance with the method described in Reg. 1.415-2(b)(2).
b. Reg. 1.415-3(f)(2) provides that the $10,000 exception of IRC 415(b)(4) applies to a participant in a multiemployer plan without regard to whether that participant ever participated in one or more other plans maintained by an employer who also maintains the multiemployer plan, provided that none of the other plans was maintained as a result of collective bargaining involving the same employee representative as the multiemployer plan.
c. Reg. 1.415-8(e) provides that two or more multiemployer plans are not aggregated for determining the benefits limited under IRC 415. A multiemployer plan is aggregated with a non-multiemployer plan for purposes of IRC 415, however, to the extent that benefits under the multiemployer plan are provided by an employer with respect to a participant in both plans. If the multiemployer plan covers union officials, the agent should determine if the officials are also covered under single-employer plans maintained by the national or local unions and if the IRC 415 levels have been exceeded for these employees. If the plans are not brought into compliance, the plans other than multiemployer plans are the first to be disqualified.

Example 6: An officer of a regional union participates in two multiemployer defined contribution plans: one maintained by the regional union and various collectively bargained employers, and the other maintained by an affiliated local union and various collectively bargained employers. The officer also participates in a noncollectively bargained defined contribution plan maintained for the staff of the regional union. Pursuant to Reg. 1.415-8(e), only contributions to the staff plan must be aggregated with contributions to the regional plan for determining whether

the contributions to the regional defined contribution plan exceed the limitation under IRC 415(c). Similarly, only contributions to the staff plan must be aggregated with contributions to the local plan for determining whether the contributions to the local exceed the limitation under IRC 415(c). However, the contributions to both multiemployer plans must be aggregated with the contributions to the staff plan for determining if the staff plan contributions exceed the limitations under IRC 415(c).

d. Reg. 1.415-9(b)(3)(ii) provides that if there are 2 plans, neither of which has terminated during the limitation year in which the limits of IRC 415 have been exceeded as a result of the IRC 415 aggregation rules, and one of the plans is a multiemployer plan, the non-multiemployer plan is the plan disqualified.
e. IRC 415(b)(7) contains an exception for certain collectively bargained plans to the compensation limit of IRC 415(b)(1)(B) and an adjustment of the dollar limit under IRC 415(b)(1)(A). This exception is seldom used.

(2) Reg. 1.415-1(e)(2) provides two alternatives for applying the IRC 415 limits to participants in multiemployer plans:

a. Under the first alternative, for purposes of applying the limitations of IRC 415 with respect to a participant of an employer maintaining the plan, benefits or contributions attributable to the participant from all of the employers maintaining the plan must be taken into account. In other words, the limitations are applied to the aggregate benefits or contributions of the participant and based on the participant's aggregate compensation. The total compensation received by the participant from all of the employers maintaining the plan may be taken into account.
b. Under the second alternative, only the benefits or contributions provided by the employer of the participant are taken into account. Here the limitations are applied on an employer by employer basis taking into account only the compensation and the benefits or contributions attributable to service with that employer. The benefit provided by the employer equals the excess of the plan benefit over the plan benefit computed as if the participant had no covered service with that employer.

Example 7: Participant A has a plan benefit equal to $375 per month, due to 5 years of service each with Employers X, Y, and Z, and the benefit provided by Employers X, Y, and Z is $20 (per month per year of service), $25, and $30, respectively. The benefit provided by Employer X is equal to $100, i.e., the excess of (i) $375 per month over (ii) $275 (the sum of 5 times $25 plus 5 times $30). Under the second alternative, only A's $100 benefit for service with Employer X is taken into account when determining whether A's benefit exceeds the limits of IRC 415 (solely with respect to A's service with Employer X). A's benefits for service with Employers Y and Z would also be computed and compared to A's benefit limitations under IRC 415 to test whether IRC 415 is satisfied with respect to A's service with Employers Y and Z.

(3) The IRC 415 compensation percentage limits may sometimes be exceeded due to the flat benefit formulas common among multiemployer plans, in which benefits or contributions are determined without regard to compensation. In defined benefit plans, the reductions in the dollar limitation for early benefit commencement can also cause problems. In defined contributions plan, the 25% limit may prove troublesome in a low-wage industry.

(4) Because multiemployer plan contributions are not necessarily related to compensation, contributions to a defined contribution plan on behalf of the lowest paid participants could exceed the percentage of compensation limits, especially in plans that provide relatively high allocations in comparison to wages earned. The agent should read the applicable collective bargaining agreements to determine: (a) the highest possible hourly contribution rate and (b) the lowest possible hourly wage for employees covered by those agreements. Generally, if (a) divided by (b) is 25% or less, there is no problem.

(5) A similar problem can occur in defined benefit plans that are designed with flat benefit formulas unrelated to compensation. If plans provide for generous flat benefit formulas, benefits for participants with long service and lower compensation levels may exceed the compensation limitation under IRC 415(b)(1)(B). The agent should also determine whether benefits for highly compensated employees who participate in plans with unreduced early retirement benefits exceed the dollar limitation under IRC 415(b)(1)(A).

Example 8 (defined benefit computation limit): A defined benefit multiemployer pension plan provides for a flat benefit formula of $40 per month at retirement age for each year of service. Because the benefit formula applies to all years of service, a retiree who has completed 35 years of service will receive a monthly benefit equal to $1,400 (or an annual benefit of $16,800) under the benefit formula. The retiree has not worked for several years, and his average high 3 year compensation (as defined in IRC 415(b)(3) is $14,000. The retiree's maximum benefit under the compensation limitation of IRC 415(b)(1)(B) is limited to $14,000, and the plan would fail to comply with IRC 415 if benefits in excess of $14,000 were paid out to the retiree.

Example 9 (defined contribution limits): Employees in a craft industry are covered by a multiemployer, money purchase pension plan. The plan document contains the required IRC 415 language. The governing collective bargaining agreements reveal a journeyman wage of $20 per hour, and an apprenticeship wage scale starting at 40% of the journeyman's, or $8 per hour. The agreements also show a required contribution of $3 per hour of regular, non-overtime, covered work for each participant regardless of status. The annual additions to the plan do not violate the dollar limit of IRC 415(c)(1)(A), nor is the percentage limit of IRC 415(c)(1)(B) violated for the journeyman allocations. However, it is possible for contributions to the account of an apprentice who is paid at the lowest end of the wage scale, and who receives no overtime or other non-regular pay, to violate the percentage limit:

Contribution = $6,240 ($3 x 40 hrs x 52 wks);
Compensation = $16,640 ($8 x 40 hrs x 52 wks);
IRC 415(c)(1)(B) limit = $4,160 (25% of $16,640).

Because the contribution of $6,240 exceeds the apprentice's IRC 415(c)(1)(B) limit of $4,160, the plan fails to comply with IRC 415.

Example 10 (defined benefit dollar limitation): A defined benefit multiemployer pension plan, covering a trade where early retirement is common, provides compensation-based benefits. An unreduced early retirement annuity benefit, equal to 100% of average high-3 consecutive year compensation, is provided to those participants who have at least 30 years of service and are at least 50 years of age. In 1997, an unmarried participant in the plan with average high-3 consecutive year compensation of $40,000. The employee's annual benefit, as calculated under the terms of the plan, is $40,000. However, the dollar limitation of IRC 415(b)(1)(A) in 1997 is $125,000. For this participant, for benefits commencing in 1997 at age 50, the reduced dollar limitation is $38,119. Therefore, the annual benefit payable to the participant upon early retirement at age 50 must be limited to $38,119 in order for the plan to comply with IRC 415. (This example assumes that a social security retirement age of 66, 5% interest, and the applicable mortality table under Rev. Rul. 95-6, 1995-1 C.B. 80. Note that, because the benefit is a nondecreasing annuity payable for the participant's life, the example assumes the form of the benefit is not subject to IRC 417(e)(3).) This participant's benefit may be recalculated in future years as the dollar limitation increases if the plan provides for IRC 415 COLA adjustments to retiree benefits.

4.72.14.3.9 (05-04-2001)
Minimum Funding

(1) The following is a description of funding rules for multiemployer plans.

4.72.14.3.9.1 (05-04-2001)
Reasonable Funding Methods

(1) IRC 412(c)(3) provides that costs and liabilities under a multiemployer plan must be determined using actuarial assumptions and methods which, in the aggregate, are reasonable. See Reg. 1.412(c)(3)-1 for a description of reasonable actuarial funding methods. These regulations apply to all defined benefit plans subject to IRC 412, including multiemployer plans.

(2) The plan population and its characteristics must satisfy Reg. 1.412(c)(3)-1(c)(3) for the funding method to be reasonable. In plans covering large numbers of employers and employees in high turnover industries such as retailing and food service, the plan actuary may conclude that it is reasonable to rely on estimates rather than raw census data provided by the contributing employers. In this case the agent should ask the plan actuary for the rationale behind any estimates and consult with the field actuary.

4.72.14.3.9.1.1 (05-04-2001)

Retroactive Plan Amendments under IRC 412(c)(8)

(1) IRC 412(c)(8) provides that, in the case of a multiemployer plan, any amendment applying to a plan year that (a) is adopted no later than two years after the close of such plan year, (b) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and (c) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances, shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year.

(2) With respect to funding, the plan administrator is required to make an election in order for the retroactive amendment to be deemed to have been made on the first day of the plan year to which the amendment applies for purposes of computing costs for the year under IRC 412. For 1995 and later years the plan administrator makes the election directly on the plan's annual information return, Form 5500, Schedule R. (In earlier years, a statement of election was attached to the Form 5500, if the plan was a money purchase plan, or the Schedule B if the plan was a defined benefit plan.) The statement of election should follow the format described in Temp. Reg. 11.412(c)-7. See also the appropriate line of the Form 5500 relating to the statement of election.

(3) A retroactive amendment under IRC 412(c)(8) that either increases or decreases benefits under the plan may be taken into account for funding purposes. The Secretary of the Treasury has delegated to the IRS Employee Plans Division the authority to approve or disapprove amendments that reduce accrued benefits. (Reorganization Plan No. 4, effective December 31, 1978, transferred the authority of the Secretary of Labor under IRC 412(c)(8) to the Secretary of the Treasury. See Prop. Reg. 1.412(c)(8)-1.) Absent IRS approval, a plan amendment that decreases accrued benefits will violate IRC 411(d)(6). Rev. Proc. 94-42, 1994-1 C.B. 717, provides current procedures for plans submitting a ruling request to the National Office under IRC 412(c)(8). An approved amendment that reduces the accrued benefit of any participant may be deemed to have been made on the first day of the plan year to which the amendment applies.

(4) An amendment that retroactively increases accrued benefits (or decreases, with required approval) must be adopted no later than two years after the close of the plan year to which the amendment applies. Note that, where an amendment retroactively increasing plan benefits is adopted within two years after the end of the plan year, it is generally not taken into account for funding purposes as of the retroactive effective date, but it may be taken into account if the sponsor files an election under IRC 412(c)(8). Generally, in the case of a retroactive benefit increase, an application to the Secretary of Treasury is not required. If contributions exceed the deductible limit as originally calculated or as adjusted downward upon examination, the plan sponsor may elect to amend the plan retroactively to increase the defined benefit, and thus the deductible limit, enough to cover the contributions actually made. The agent should check the plan's Form 5500, Schedule R, to determine that a proper election was made.

(5) The agent should check the valuation reports for the current and prior years to determine if a funding waiver or an extension under 412(e) was in effect and, if so, check whether a plan amendment was adopted which increased the liabilities of the plan. If the liabilities of the plan were increased for any of the above-listed reasons, the agent should determine whether the plan received a private letter ruling issued by the National Office stating that such increase in liabilities was reasonable and de minimis.

(6) The agent should inspect the union contract and the actuarial valuations and verify with the plan actuary whether future increases are regularly included. The agent should note any benefit increases scheduled to take effect in future years and determine for each plan year whether or not they were recognized and included in that year's cost calculation. The effect of future increases may either be included in current costs or deferred until the years when the increases go into effect. However, the choice made is part of the funding method and cannot be changed without the approval of the Director, EP Rulings and Agreements or automatic approval under an applicable revenue procedure.

4.72.14.3.9.1.2 (05-04-2001)

Shortfall Method

(1) The shortfall method was promulgated in 1980 in Reg. 1.412(c)(1)-2. The shortfall method is a method of determining charges to the funding standard account by adapting the underlying funding method of certain collectively bargained plans. The only plans that may use the shortfall method are plans that are collectively bargained (single-employer as well as multiemployer), in which contributions to the plan are made at a rate specified under the terms of a legally binding agreement applicable to the plan.

(2) The shortfall method modifies regular funding methods to take into account the funding method typical of multiemployer plans, in which contribution rates are specified in the collective bargaining agreements. On a short-term basis, this funding mechanism does not reflect a plan's actual experience, such as the effect of work-force fluctuations, actual investment return, or actual mortality experience. Because contributions to the plan are determined by the number of units or hours actually worked, the shortfall method allows a funding shortfall, in a year in which the number of units or hours worked was less than expected, to be made up in future years. Conversely, the shortfall method allows a funding surplus in a year in which the number of units or hours worked was more than expected to be made up in future years.

(3) Under the shortfall method, the basic charge to the funding standard account is based on the estimate of the number of hours or units worked, and includes an amortization of the difference between the regular net charges to the funding standard account and the net charge under the shortfall method. Thus, the shortfall method prevents an accumulated funding deficiency in a year in which the collective bargaining agreement requires contributions that otherwise would be insufficient to satisfy the minimum funding requirement.

(4) The shortfall method is solely intended to correct for year-to-year fluctuations in the hours of service (or units of production) on which the actual employer contributions are based. The shortfall method is not intended to correct funding shortfalls that may result if the bargained contribution rate is set at too low a level to fund the benefit liabilities adequately.

(5) Under the shortfall method, the charges to the funding standard account are computed on the basis of an estimated number of units of service or production for which a certain amount per unit is to be charged. The plan actuary is responsible for this estimate, which must be based on the past experience of the plan and reasonable expectations of the plan for the plan year. Expectations will not be considered reasonable if, for example, they fail to reflect a consistent and substantial decline in actual base units that has occurred in recent years and is expected to continue. However, the determination of reasonableness is independent of determinations made under IRC 412(c)(3) of the reasonableness of actuarial assumptions. An estimated unit charge is calculated by dividing an ™annual computation charge∫ (the otherwise applicable net charges under IRC 412(b)(2) and 412(b)(3)(B), plus any prior shortfall amortization charge or credit amount, but disregarding any credit balance or funding deficiency) by the estimated number of units (hours, tons, etc.) produced. This estimated unit charge is then multiplied by the actual number of units produced. The resulting amount is the amount charged to the funding standard account on Schedule B to Form 5500, rather than the annual computation charge from which the unit charge was calculated. The excess of the amount charged over the annual computation charge becomes a shortfall gain (if positive) or a shortfall loss (if negative).

(6) For a multiemployer plan, the amortization of a shortfall gain or loss must begin in the earlier of two years: the fifth plan year following the plan year in which the shortfall gain or loss arose, or the first plan year beginning after the latest scheduled expiration date of a collective bargaining agreement in effect with respect to the plan during the plan year in which the shortfall gain or loss arose. A contract expiring on the last day of a plan year is deemed renewed for the same period of years as the succeeding contract. The amortization must end with the 20th plan year following the plan year in which the shortfall gain or loss arose, as provided under Reg. 1.412(c)(1)-2(g)(2)(ii).

Example 11: The 2000 ™annual computation charge∫ of a plan choosing to use the shortfall method is $120,000. The number of hours of covered employment for 2000 was estimated, as of the 2000 valuation date, to be 150,000 hours. The estimated unit charge applicable to 2000 is then computed to be $.80 per hour of covered employment (120,000/1 50,000 = $.80). During 2000, there were 125,000 actual hours of covered employment. Thus, the net shortfall charge for the plan year is 125,000 x $.80 which equals $100,000. In this case, the excess of the shortfall charge ($100,000) over the ™annual computation charge∫ used to calculate the unit charge ($120,000) is negative, meaning there is a

shortfall loss of $20,000 which would be amortized as a shortfall charge base of $20,000, over the period of years described above.

(7) To elect the shortfall method, the plan administrator should follow the rules in Reg. 1.412(c)(1)-2(i)(1). These rules require a statement on an attachment to Form 5500 for a plan year stating that the shortfall method is adopted for that plan year. In addition, unless the shortfall method was adopted in the late 1970's or early 1980's (when the shortfall regulation was published and IRC 412 first applied to plans), the plan administrator will need to obtain approval from the Service to use the shortfall method under IRC 412(c)(5)(A). Approval is also required if the shortfall method is discontinued. In addition, in accordance with Rev. Proc. 2000-40, 2000-42 I.R.B. 357, approval to change automatically from one underlying funding method to another is not granted unless the new underlying funding method also makes use of the shortfall method. Use of the shortfall method should be indicated on the plan's Schedules B and actuarial valuations.

4.72.14.3.9.2 (05-04-2001)
Special Rules under IRC 412

(1) This section describes special rules under IRC 412 for multiemployer plans.

4.72.14.3.9.2.1 (05-04-2001)
Amortization Periods for Multiemployer Plans

(1) MPPAA changed some of the amortization periods used in the funding standard account under IRC 412(b) for multiemployer plans. In addition, certain amortization periods used for multiemployer plans are different from the amortization periods used for single-employer plans.

(2) Prior to the enactment of MPPAA, a multiemployer plan which was in existence on January 1, 1974 amortized its unfunded liability (and any changes in unfunded liabilities due to plan amendments) over a period of 40 years (starting on the first day of the first plan year to which IRC 412 applies). Experience gains and losses were amortized over 20-year periods, changes in liabilities due to changes in actuarial assumptions were amortized over 30-year periods, and waivers of the minimum funding standard were amortized over 15-year periods.

(3) The enactment of MPPAA changed the amortization period both for the initial unfunded liability of a new plan, and any changes in the unfunded liabilities of an existing plan due to a plan amendment, from 40 years to 30 years. The amortization period for experience gains and losses was reduced from 20 years to 15 years. Amortization periods due to changes in actuarial assumptions and minimum funding waivers remained at 30 years and 15 years, respectively. Essentially, MPPAA changed the amortization periods for multiemployer plan to the same periods then in effect for single-employer plans. (Some of the amortization periods required for single-employer plans were later changed by OBRA '87. These changes did not affect multiemployer plans.)

(4) There are special amortization periods for certain charges and credits that arose before the enactment of MPPAA. A plan may continue to amortize certain bases in accordance with these rules for many years,

including years after the enactment of MPPAA. Under IRC 412(b)(6), a multiemployer plan that comes into existence after January 1, 1974, and that establishes an unfunded liability or creates a increase or decrease in the unfunded liabilities of the plan from plan amendments, amortizes such amounts over a 40 year period, if the amounts arose in plan years beginning before the date MPPAA was enacted. In addition, experience gains and losses of multiemployer plans are amortized over 20 year periods, if the gain or loss arose in a plan year beginning before the enactment date of MPPAA. Experience gains and losses of multiemployer plans that arose in plan years beginning after the enactment date of MPPAA are amortized over 15 years.

(5) IRC 412(l) does not apply to multiemployer plans. Accordingly, the funding standard account in Schedule B (Form 5500) should not include an additional funding charge. If it does, the minimum funding requirement is overstated.

4.72.14.3.9.2.2 (05-04-2001)

Funding Waiver Provisions

(1) Several rules with regard to funding waivers are different for multiemployer plans. Most of these differences arose with the enactment of OBRA '87. The amortization period is 15 years for multiemployer plans, rather than 5 years. The interest rate used to amortize a waiver for a multiemployer plan is the rate determined under IRC 6621(b) for waiver requests submitted to the National Office after April 7, 1986 (the effective date of SEPPAA). The rates under IRC 6621 are published quarterly in revenue rulings in the Internal Revenue Bulletin. The rates used for the amortization of funding waivers may be derived by subtracting 2 percentage points from the overpayment rates listed in these revenue rulings (equivalently, one could subtract 3 percentage points from the underpayment rates). For instance, Rev. Rul. 94-39, 1994-1 C.B. 296, lists the underpayment and overpayment interest rates for calendar quarters from January 1, 1987 through September 30, 1994 (rates prior to 1987 are listed for semi-annual periods, and are the same for both underpayments and overpayments). In contrast, the rate used for a single-employer plan is the greater of (1) 150% of the federal mid-term rate (as in effect under IRC 1274 for the first month of such plan year), or (2) the rate of interest used under the plan in determining costs.

(2) The statutory maximum number of waivers is also different for multiemployer plans. A multiemployer plan may not receive waivers for more than 5 of any 15 consecutive plan years, while a single-employer plan may not receive waivers for more than 3 of any 15 consecutive plan years. Additionally, a multiemployer plan generally has one year after the end of the plan year to request a waiver, while single-employer plans must submit requests for waivers within 2 months after the end of the plan year for which the waiver is requested.

(3) An employer generally must demonstrate substantial business hardship in order for a funding waiver to be granted. However, the statutory criteria are slightly different for multiemployer and single-employer plans. Under IRC 412(d)(1), a multiemployer plan must demonstrate that 10 percent or

more of the number of employers contributing to or under the plan are unable to satisfy the minimum funding standard for a plan year without substantial business hardship.

4.72.14.3.9.2.3 (05-04-2001) (1)

Additional Funding Requirement under 412(l) and Quarterly Contribution Requirement under 412(m)

The additional funding requirement under IRC 412(l) and the quarterly contribution requirement under 412(m) apply only to plans that are not multiemployer plans. IRC 412(l) requires additional contributions by certain plans which have unfunded current liabilities, and IRC 412(m) concerns quarterly contribution requirements for plans other than multiemployer plans.

4.72.14.3.9.2.4 (05-04-2001) (1)

Reasonableness of Actuarial Assumptions

Under IRC 412(c)(3), all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the case of a multiemployer plan, are reasonable in the aggregate. In the case of a plan other than a multiemployer plan, each of these factors must be individually reasonable, or in the aggregate result in a total contribution equivalent to that which would be determined if each such assumption and method were reasonable.

4.72.14.3.9.2.5 (05-04-2001) (1)

Valuation of Plan Assets

Under IRC 412(c)(2)(A), the value of a plan's assets must be determined on the basis of ™any reasonable actuarial method of valuation which takes into account fair market value.ʃ Under IRC 412(c)(2)(B), the plan administrator of a multiemployer plan may elect to value a bond or other debt instrument that is not in default at book value, rather than market value. The determination on the basis of book value means the bond is valued on an amortized basis running from initial cost at purchase to par value at maturity or earliest call date.

4.72.14.3.9.2.6 (05-04-2001) (1)

Exception from Security Requirement upon Adoption of Plan Amendment Resulting in Significant Underfunding

Multiemployer plans are exempt from IRC 401(a)(29). IRC 401(a)(29) requires the contributing sponsor of a plan to provide security to the plan, if the plan has a funded current liability percentage of less than 60% and an amendment is adopted that increases the current liability under the plan.

4.72.14.3.9.2.7 (05-04-2001)

Application of Minimum Funding Standards to a Terminated Multiemployer Plan

(1) IRC 412(j) provides that minimum funding standards of IRC 412 apply to a terminated multiemployer plan until the last day of the plan year in which the plan year terminates, within the meaning of section 4041A(a)(2) of ERISA. Section 4041A(a)(2) of ERISA provides that a multiemployer plan termination occurs as the result of the withdrawal of every employer from the plan or the cessation of the obligation of all employers to contribute under the plan.

4.72.14.3.9.3 (05-04-2001)

IRC 4971 Tax Liability Issues

(1) IRC 4971(a) provides that a tax of 5% is imposed in the case of a multiemployer plan that has an accumulated funding deficiency (for plans other than multiemployer plans the tax rate is 10%).

(2) IRC 413(b)(6) provides that for a plan year, the liability under IRC 4971 for collectively bargained plans of each employer who maintains the plan shall be determined first on the basis of their respective delinquencies in meeting required employer contributions under the plan, and then on the basis of their respective liabilities for contributions under the plan.

(3) The tax under IRC 4971 relates to an accumulated funding deficiency under a plan. However, the funding deficiency is determined with respect to the plan as a whole, not with respect to individual employers. Therefore, the deficiency must be allocated among employers adopting the plan in order to determine their individual excise tax liability. In general, the Service will use Prop. Reg. 54.4971-3 as a guide for allocating the excise tax. In the case of a multiemployer plan, if the employer adopting the plan is a member of a controlled group within the meaning of IRC 414(b), (c), (m), or (o) the employer shall not be jointly and severally liable for taxes imposed under IRC 4971 on other members of the controlled group.

(4) A funding deficiency under a plan may be attributable entirely to the delinquency of one or several employers in making required contributions to the plan under the terms of the collective bargaining agreement. If only one employer is delinquent, that delinquent employer is solely liable for the IRC 4971 tax. If more than one employer is delinquent in its contributions, the IRC 4971 tax will generally be allocated in proportion to each employer's share of the delinquency. See Prop. Reg. 54.4971-3(b)(2).

(5) A funding deficiency may sometimes result not from any delinquent contributions, as described above, but from the aggregate failure of employers to avoid an accumulated funding deficiency. If the employers contribute exactly what they are required to contribute in accordance with the collective bargaining agreement, but the contributions are not sufficient to satisfy the minimum funding requirement, the funding deficiency arises from a failure in the aggregate of the employers to satisfy the funding requirement. This can occur, for example, when the net charges of the funding standard account exceed the cumulative contributions required for all employers maintaining the plan under the collective bargaining agreement for the year because some employers

have withdrawn from the plan and withdrawal liability payments may not cover the gap. In the case of an aggregate failure to avoid a deficiency, the Service will generally allocate the tax to an individual employer by multiplying the total tax attributable to the aggregate failure by a fraction. The fraction is equal to the contribution the employer is required to make for the plan year divided by the total contribution all employers are required to make for the plan year. See Prop. Reg. 54.4971-3(b)(3).

4.72.14.3.9.3.1 (05-04-2001)

Withdrawal liability

(1) An employer who withdraws from a plan remains liable for the tax imposed under IRC 4971 with respect to the portion of an accumulated funding deficiency attributable to that employer for plan years up to and including the year of withdrawal. The employer is not liable for taxes imposed with respect to accumulated funding deficiencies for plan years subsequent to withdrawal. Withdrawal liability payments made by withdrawn employers are, however, credited to the funding standard account as contributions and, accordingly, can help to prevent an accumulated funding deficiency. Where a withdrawing employer fails to make withdrawal liability payments (due to bankruptcy or some other reason) employers remaining in the plan may have to increase their contributions to avoid a funding deficiency. See Prop. Reg. 54.4971-3(e).

4.72.14.3.9.4 (05-04-2001)

Plans in Reorganization and Insolvent Plans

(1) A multiemployer plan that is in serious financial difficulty may be returned to financial health through ™reorganization∫ as described in IRC 418 through 418E. If a plan is in reorganization for a particular plan year, its minimum funding requirement may be modified under 418B. Certain accrued benefits may be allowed to be cut back to the level guaranteed by the PBGC. See IRC 418D.

(2) IRC 418(b) provides rules for determining whether a plan is in reorganization. If the ™reorganization index∫ is greater than zero for a plan year, a plan is in reorganization for that plan year. The reorganization index is defined as the excess of the ™vested benefits charge∫ over the ™net charge to the funding standard account.∫ The vested benefits charge is the annual amount required to amortize the unfunded vested benefits over a period of 10 years (for persons in pay status) and over a period of 25 years (for all other plan participants). The net charge to the funding standard account is the sum of the regular charges and credits under the funding standard account, including normal cost and amortizations of unfunded liabilities, plan amendments, gains and losses, etc. Thus, if the contribution required under the regular funding standard account is less than the contribution required if unfunded vested benefits were paid over 10 years for persons in pay status and 25 years for all other persons, the plan will be in reorganization.

(3) IRC 418A provides that the plan sponsor notify participants if the plan is in reorganization or accrued benefits are reduced. IRC 418B(b)(1) provides rules for determining the minimum contribution requirement for a plan in reorganization. Generally, the minimum contribution requirement is equal to the vested benefits charge plus any increase in the normal cost

for the plan year (determined under the entry age normal method) that is attributable to plan amendments adopted while the plan was in reorganization, minus any overburden credit. IRC 418C provides rules for determining a plan's overburden credit. The overburden credit provides relief from the minimum contribution requirement in certain situations (e.g., where retired participants outnumber active participants, resulting in an increased vested benefits charge). IRC 418D provides rules that allow certain accrued benefits to be cut back to the level guaranteed by the PBGC. However, accrued benefits generally may not be reduced below the accrued benefit level that existed 5 years prior to the date of reorganization.

(4) A plan is insolvent under IRC 418E if the plan's available resources (cash, marketable assets, contributions, withdrawal liability payments, and earnings) are not sufficient to pay benefits under the plan as they become due during a particular plan year. If an insolvent plan finds that its required benefit payments for that year exceed its available resources, benefit payments must be reduced to the ™resource benefit level,ſ the highest level of monthly benefits that can be paid out of the plan's available resources. However, benefit payments must not be reduced below the level of basic benefits guaranteed by the PBGC. A plan that is insolvent may not necessarily be in reorganization status, although this is rarely the case.

4.72.14.3.10 (05-04-2001)

Prohibited Transactions

(1) Soon after the passage of ERISA, DOL and the Service issued two Prohibited Transaction Exemptions tailored to prohibited transactions arising in multiemployer plans under IRC 4975(c)(1) and the parallel provision of Title I of ERISA. See Prohibited Transaction Exemptions (PTEs) 76-1, 1976-1 C.B. 357, and 77-10, 1977-2 C.B. 435

(2) As noted above at IRM 4.72.14.3.5.5 (service crediting), the failure to make required contributions can violate a number of provisions. In addition to the problems associated with refusal to credit service, a plan fiduciary's failure to enforce contribution requirements can be a prohibited transaction. Plan fiduciaries may hesitate to enforce timely contribution for fear of jeopardizing collection of the full amount due. However, if reasonable efforts are not made to collect delinquent contributions pursuant to established procedures, or the failure to collect is the result of an arrangement, express or implied, between plan fiduciaries and the delinquent employer, failure to collect the contribution may be deemed a prohibited transaction. See Part A of PTE 76-1.

(3) The agent should determine total employer liability for the relevant period, based on the contribution obligations imposed by the contract, and verify payments or deposits. The agent should note all accounts receivable, including those of the union sponsor if the union has employees participating in the plan, and determine if the plan has procedures on the collection of delinquent contributions and whether they were followed. The agent should review any field audit reports and correspondence for

indications of long-standing delinquencies and actions taken to eliminate them. Any material long-standing delinquencies will likely be discussed in the trustee minutes.

(4) Part B of PTE 76-1 provides a limited exemption from IRC 4975(c)(1) for certain construction loans made by multiemployer plans maintained in the building trades to participating employers, if certain conditions are met. The exemption does not extend to longer-term mortgages.

(5) Multiemployer plans, especially smaller ones, often rent space in buildings owned by the sponsoring union. Part C of PTE 76-1 provides a limited exemption from IRC 4975(c)(1) for the leasing, sharing, or sale of office space, administrative services, and goods between the plan and disqualified persons such as the plan's union sponsor, if certain conditions are met. PTE 77-10 provides an exemption from section 406(b)(2) of Title I of ERISA for the same transactions. The agent should check plan returns, balance sheets, records of plan assets, and investment transactions for the years under examination for evidence of plan involvement with the sponsoring union. The agent should be alert to evidence that the retirement plan is bearing administrative costs that are more properly allocated to related benefit plans. Any agreements between the plan and the union, or between the retirement plan and related plans, must comply with PTE 76-1 and 77-10. Alternatively, the plan may have received an individual exemption from DOL.

(6) In reviewing the plan's balance sheet, the agent should be alert to evidence that assets have been shifted from one trust to another. Some multiemployer plan trustees may believe that shifting assets among pension and welfare trusts is permitted, because collective bargaining agreements often treat employer contributions under the agreement as one pot of money to be used for a variety of purposes. However, with the limited exception of assignments permitted under IRC 401(a)(13)(A), shifting assets once they are deposited in the qualified trust is a prohibited transaction. Redirecting contributions away from a retirement plan before they are deposited in the plan trust is also a prohibited transaction if the contributions are employee contributions or elective deferrals. That is because section 2510.3-102(a) provides that such contributions are plan assets for purposes of the prohibited transaction rules of IRC 4975.

(7) The agent should also take a look at the plan's 401(h) account, if any. Because of the increased pressure on funding health care benefits that all employers have faced in recent years, a 401(h) account may be a significant part of the plan. Multiemployer plans are not allowed to engage in section 420 transfers of retirement assets to 401(h) accounts.

4.72.14.3.11 (05-04-2001)

Top-heavy Rules

(1) Reg. 1.416-1, T-38, provides that a collectively bargained plan need not include the top-heavy provisions if, in operation, the plan is not top-heavy, and if it covers only collectively bargained employees or employees of the sponsoring union. In determining whether the plan is not top-heavy in

operation for purposes of T-38, IRC 416(g) and the regulations thereunder are applied to the entire multiemployer plan.

(2) Any multiemployer plan that covers other noncollectively bargained employees, such as noncollectively bargained employees of a contributing employer, does not meet the requirements of Reg. 1.416-1, T-38, and must contain language satisfying IRC 416. This requirement dovetails with the application of IRC 416, as the top-heavy provisions are applied on an aggregated basis (either required or permissive) to all of the plans maintained by an employer.

(3) Q&A T-2 and T-3 of Reg. 1.416-1 provide guidance on how the top-heavy rules are applied to multiemployer plans. T-2 provides that a multiemployer plan is treated as a plan of a contributing employer only to the extent that benefits under the plan are provided to employees of the employer because of service with that employer. T-3 provides that collectively bargained plans are treated like other plans maintained by an employer for purposes of determining the composition of a required aggregation group or a permissive aggregation group. However, collectively bargained employees do not benefit from the special vesting and top-heavy minimum requirements.

Example 12: A multiemployer plan covers 100 employees, including 10 collectively bargained and 3 noncollectively bargained employees of one contributing employer. One of these 3 noncollectively bargained employees is a key employee, who also participates in another, noncollectively bargained plan maintained by the same contributing employer. For purposes of top-heavy testing for that employer, the key employee's required aggregation group includes the 13 multiemployer plan participants who have benefits under the plan attributable to service with that employer. The other participants in the multiemployer plan, regardless of whether they are collectively bargained or not, are not included in the required aggregation group. If it is determined that the plans in the required aggregation group are top-heavy, the 3 noncollectively bargained employees of that employer who participate in the multiemployer plan are entitled to receive the required top-heavy minimum, and their benefits are entitled to vest at least as rapidly as the top-heavy vesting schedules require. No other participants in the multiemployer plan are entitled to either the top-heavy minimum or faster vesting.

4.72.14.3.12 (05-04-2001)

Return of Contributions

(1) ERISA section 403(c)(2) describes a number of circumstances under which plan fiduciaries may permit the return of contributions to employers without violating the exclusive purpose rule of section 403(c)(1). These include the return of (A) contributions made in mistake of fact or law, (B) contributions conditioned upon the initial qualification of the plan, and (C) contributions conditioned on deductibility. Section 403(c)(2)(A)(ii) repeats the language used in IRC 401(a)(2). Withdrawal liability payments to a multiemployer plan may also be returned under these provisions.

(2) IRC 401(a)(2) provides that the return of mistaken contributions from multiemployer plans, within six months of the date the plan administrator determines the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is an IRC 401(a) plan or the associated trust exempt under IRC 501(a)), shall not be construed as a violation of the exclusive benefit rule of IRC 401(a)(2) and its prohibition against reversions. Rev. Rul. 91-4, 1991-1 C.B. 57, holds that a plan may provide for the return of contributions in accordance with any of the exceptions described in ERISA section 403(c)(2) without violating IRC 401 (a)(2).

(3) For multiemployer plans, contributions or withdrawal liability payments are most often returned to an employer on account of mistake of fact or law. Proposed reg. 1.401(a)-3 also provides guidance on the return of mistaken contributions. For purposes of determining whether the mistaken contribution is returned within the six-month period described in IRC 401(a)(2), it is sufficient that the employer establish a right to a refund of that amount by filing a claim with the plan administrator within six months from the date in which the plan administrator determines that a mistake occurred. The amount to be returned to the employer is the excess of the amount contributed over the amount that would have been contributed had no mistake occurred. Any earnings attributable to the mistaken contribution must be retained by the plan, while any losses must reduce the amount to be returned. In no event may a participant's account be reduced to an amount less than that amount which would properly have been in that participant's account had no mistake occurred. The amount returned is includible in the employer's income in the taxable year in which it is returned if the mistaken contribution resulted in a tax benefit in a prior year.

Example 13: Contributions are made to the trust of a multiemployer plan. Under the terms of the plan and the collective bargaining agreements, individuals owning more than a 10% ownership interest in a contributing employer are not eligible to receive benefits under the plan and contributions are not required on their behalf. Over several years, contributions have been made to the trust on behalf of 10% owners under the mistaken belief that such contributions were required. Because these contributions were based on a mistake of law as to the proper interpretation of the eligibility requirements of the plan and collective bargaining agreements, the employers who made the mistaken contributions may obtain a refund of the excess contributions. If, instead of mistaking the eligibility requirements of the plan, an employer made a computational error in calculating the amount to be contributed, the arithmetical error would be a mistake of fact and the employer could receive a receive a refund on that basis.

4.72.14.3.13 (05-04-2001)

IRC 401(k) Plans

(1) In recent years, an increasing number of new multiemployer plans are cash or deferred arrangements (CODAs) under IRC 401(k). The regulations under IRC 401(k) provide special rules for collectively bargained plans. These rules are generally designed to conform the

requirements of IRC 401(k) to those qualification rules that are different for collectively bargained plans, particularly the nondiscrimination rules.

(2) Reg. 1.401(k)-1(g)(11) discusses the application of the coverage rules under IRC 410(b) to single and multiemployer collectively bargained plans. 1.401(k)-1(g)(11)(ii)(B) provides that a plan that benefits both collectively bargained and noncollectively bargained employees is treated as separate plans. This subparagraph (B) applies separately with respect to each collective bargaining unit. At the option of the employer (or the plan administrator if the plan is a multiemployer plan), two or more separate collective bargaining units may be treated as a single collective bargaining unit, provided that the combinations of units are determined on a basis that is reasonable and reasonably consistent from year to year.

a. For instance, if a plan benefits employees covered under two different collective bargaining agreements, along with a group of noncollectively bargained employees, the employer (or the plan administrator) may treat the plan as comprising three separate plans.
b. Alternatively, the two collective bargaining units may be aggregated so that the plan is treated as comprising two separate plans – one benefiting the collectively bargained employees and the other the noncollectively bargained employees.

(3) If the plan is a multiemployer plan, the portion of the plan that is maintained pursuant to a collective bargaining agreement within the meaning of Reg. sec. 1.413-1(a)(2) is treated as a single plan maintained by a single employer that employs all the employees benefiting under the same benefit computation formula and covered pursuant to that collective bargaining agreement. The noncollectively bargained portion of the plan is treated as maintained by one or more employers, depending on whether the noncollectively bargained employees are employed by one or more employers.

(4) Reg. sec. 1.401(k)-1 (a)(7) describes certain consequences to CODAs maintained pursuant to collective bargaining agreements when they become nonqualified. The regulation provides that employer contributions to a nonqualified CODA are treated as satisfying IRC 401(a)(4) if the arrangement is part of a collectively bargained plan that automatically satisfies the requirements of IRC 410(b). See IRM 4.72.14.3.4. Elective contributions under the arrangement are generally treated as employer contributions; however, for purposes of IRC 402(a), they are treated as employee contributions and not excludable from gross income.

Example 14: Employers A and B are contributing employers to a multiemployer 401(k) plan on behalf of their collectively bargained employees. Employer A and Employer B maintain workforces that are compensated at the same rate, and both have chosen a benefit computation formula allowing their employees to elect deferrals up to 7% of compensation including overtime. Because the plan administrator has elected to aggregate employees under collective bargaining agreements that benefit under the same computation formula, the portion of the plan benefiting the employees of Employer A and Employer B is treated as a

single plan. On account of overtime, several of Employer A's employees (but none of Employer B's) are highly compensated for the year and all elect to defer the full 7% allowed under the plan. None of the employees of Employer B, or the nonhighly compensated employees of Employer A, elect to defer more than 4% of their compensation. Because contributions from Employer A on behalf of its employees cause the portion of the plan that covers employees of Employer A and Employer B to fail the actual deferral percentage test of IRC 401(k)(3), the CODA becomes nonqualified. The contributions of Employer A and Employer B on behalf of their employees are considered to be nondiscriminatory under IRC 401(a)(4) and are generally treated as employer contributions under the plan. However, the elective contributions must be included in income by the employees of both Employer A and Employer B.

(5) Reg. section 54.4979-1(a)(2) provides that, in the case of a collectively bargained plan, all employers who are parties to the collective bargaining agreement and whose employees are participants in the plan are jointly and severally liable for the tax owed under IRC 4979 for excess contributions to a 401(k) plan.

(6) One of the difficulties for plan administrators of multiemployer 401(k) plans is obtaining accurate compensation data for participants from the various contributing employers for purposes of conducting the average deferral percentage (™ADPƒ) test. Employers may not be forthcoming in response to an administrator's request for compensation data as it is generally regarded as proprietary information. One practice used by some plan administrators is to multiply the hours worked during the year by the participant by the negotiated hourly wage under the current collective bargaining agreement covering that participant. Another source of information is the contribution remittance reports filed by each employer with the plan. However, the Service does not permit ADP testing using data that is not accurate with regard to each participant. If the plan administrator performs the ADP test using a method that only approximates each participant's compensation data then a back-up method for verifying the accuracy of the data must also be used.

4.72.14.3.14 (05-04-2001)

Closing Agreements

(1) Some taxpayers have argued that a multiemployer retirement trust need not be associated with a plan that satisfies IRC 401(a) in order to be exempt from taxation, because it is nonetheless an exempt labor organization under IRC 501(c)(5). While this argument was upheld by the Second Circuit in Morganbesser v. United States, 984 F.2d 560 (2d Cir. 1993), the Service did not acquiesce (see Action on Decision CC-1995-016 (December 8, 1995), 1995-52 I.R.B. 4) and other appellate courts have ruled in favor of the Service (Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States, 129 F.3d 195 (D.C. Cir. 1997), cert. denied 119 S.Ct. 43 (1998); Tupper v. United States, 134 F.3d 444 (1st Cir. 1998)). Reg. Sec. 1.501(c)(5)-1(b), effective December 21, 1995, reflects the Service's position that IRC 501(a) provides the only source of exemption from federal income tax for a trust associated with a retirement plan.

(2) Accordingly, in revocations arising in venues other than the Second Circuit, agents should determine the tax effects upon disqualification of a multiemployer plan as though the trust were not eligible for exemption under IRC 501(c)(5). Thus, not only will participants in such a plan be liable for taxes owed under IRC 402(b) and contributing employers be able to claim deductions only to the extent available under IRC 404(a)(5) (for nonqualified plan contributions), but the trust income for the open years in which the plan was disqualified will also be subject to taxation. Likewise, taxes owed on the trust income should be included in calculating the maximum payment amount for a multiemployer plan that is the subject of negotiation under the Audit Closing Agreement Program. In audits of multiemployer plans based in the Second Circuit for open years following the effective date of section 1.501(c)(5)-1(b) of the regulations (December 21, 1995), agents should determine the tax effects of disqualification in the same manner as for multiemployer plans located in other venues. For open years prior to the regulation's effective date, however, agents may take Morganbesser into account as a litigating hazard for plans located within the Second Circuit to the extent consistent with the Service's policies regarding Actions on Decisions.

(3) The annual technical advice revenue procedure (Rev. Proc. 2001-5, 2001-1 I.R.B. 164, at section 4.04), provides that proposed adverse and proposed revocation letters on collectively bargained plans are the subject of mandatory technical advice requests. Accordingly, a multiemployer plan trust may not be disqualified until it has been submitted to the National Office for technical advice in accordance with the revenue procedure.

(4) In March of 1995 guidance was issued on the payment of CAP sanctions from trust assets, an issue that may arise when negotiating closing agreements for multiemployer plans. As a rule, CAP sanctions should be paid by parties other than the trust. Exceptions are allowed only in very narrow circumstances. The text of the field directive appears at IRM 7.9.2, EPCRS.

(5) In examinations of single-employer plans, an agent is used to dealing with a corporate officer (if the employer maintaining the plan is a corporation) who is also a plan trustee, and who can bind both the employer and the trust to an agreement, a statute extension, or a power of attorney. There is rarely a single individual with all these powers in the multiemployer plan hierarchy. As a result, an agent may reasonably expect a delay in extensions or the adoption of corrective plan amendments, etc., until after the joint board has convened. No trustee can execute a statute extension, power of attorney or tax agreement on behalf of a contributing corporation unless the trustee has the appropriate standing as an officer/employee of that corporation. No single trustee can bind the trust in this way unless that trustee has been delegated such authority by the board.

Exhibit 4.72.14-1 (05-04-2001)
Chart of Effective Dates and Remedial Amendment Periods

Legislative Source	Code Provision	Effective Date	Amendment Date	RAP Source
TEFRA 235(g)(2)	415	LY ≥ earlier of 1/1/86 or Tcba ***Note:*** Tcba is the termination date of the last collective bargaining agreement in effect as of the date of enactment of the statute, unless otherwise specified. TEFRA was enacted 9/3/82.	10 mo. > PYE of yr of Eff. Date	1.401(b)-1(c) Not. 83-10, Q&A T-2
TEFRA 242, DEFRA 521 (c)(5)	401(a)(9)	Earlier of PY ≥ 1/1/88 or Tcba ***Note:*** DEFRA was enacted 7/18/84.	1994 PYE	Prop. Reg. 1.401(a)(9)-1, Q&A-4
REA 302(b), TRA '86 1898	401 (a)(11) 41 1(a)(11)	Earlier of 7/1/88 or PY ≥ Tcba ***Note:*** REA was enacted 8/23/84. TRA '86 sec. 1898 extended the effective date of the REA provisions for collectively bargained plans to 7/1/88, with the exception of QDROs, 411(d)(6), and 417 (except that the provision relating to spousal consent to changes in benefit form is effective for plan years beginning after 10/22/86).	6/30/86 ***Note:*** This date only applies if the effective date for these provisions is determined to be earlier than 6/30/86, as measured by the last effective collective bargaining agreement. This is also true for amendments implementing IRC 417	Not. 86-3
REA 302(b) and 303(c)(3), TRA '86 1898	417	Earlier of 1/1/87 or PY ≥ Tcba ***Note:*** REA 303(c)(3) provides that elections after 12/31/84 not to take a joint and survivor annuity are subject to IRC 417(a)(2).	6/30/86	Not. 86-3

Exhibit 4.72.14-1 (Cont. 1) (05-04-2001)
Chart of Effective Dates and Remedial Amendment Periods

Legislative Source	Code Provision	Effective Date	Amendment Date	RAP Source
REA 303(a), TRA '86 1898	410(a)(5)(E) 411(a)(6)(E)	Earlier of 7/1/88 or PY ≥ Tcba	PY ≥ earlier of 1/1/87 or first date plan amended for REA ***Note:*** It is unlikely that this date would be later than the effective date of the provisions unless the plan had a plan year beginning later than July 1.	REA 303(b)
REA 302(d)(2), TRA '86 1898	401(a)(25) 411 (d)(6)	4/1/85	6/30/86	Not. 86-3
TRA '86 1112 (e)(2)-(4), TAMRA 1011 (h)(6)-(9)	410(b) 401 (a)(26)	PY ≥ later of 1/1/89 or Tcba in effect on 2/28/86, but < 1/1/91. ***Note:*** TRA '86 was enacted 10/22/86.	PYE 1994 ***Note:*** However, if the plan is maintained by a government or tax-exempt entity the remedial amendment treatment described in Notices 94-13 and 96-64, and Rev. Proc. 99-23, applies.	Rev. Pr. 95-12
TRA '86 1111(c), TAMRA 1011(g)(4)	401 (a)(5) 401(l)	PY ≥ later of 1/1/89 or Tcba in effect on 2/28/86, but < 1/1/91	PYE 1994	Rev. Pr. 95-12
TRA '86 111 3(f)(2)-(4), OBRA '89 7861 (a)(3)-(4)	410(a)	PY ≥ later of 1/1/89 or Tcba in effect on 2/28/86, but < 1/1/91	PYE 1994	Rev. Pr. 95-12

Exhibit 4.72.14-1 (Cont. 2) (05-04-2001)
Chart of Effective Dates and Remedial Amendment Periods

Legislative Source	Code Provision	Effective Date	Amendment Date	RAP Source
TRA '86 1116(f)(2)-(7), TAMRA 1011 (k)(8)- (10)	401(k) (except for 401(k)(3))	PY ≥ later of 1/1/89 or Tcba in effect on 2/28/86, but < 1/1/91	PYE 1994	Rev. Pr. 95-12
TRA '86 1116(f)(2)-(7), TAMRA 1011 (k)(8)-(10)	401(k)(3)	PY ≥ earlier of 1/1/89 or Tcba in effect on 2/28/86	PYE 1994	Rev. Pr. 95-12
TRA '86 1117 (d)(2)- (4), TAMRA 1011 (l)(12)	401(m)	PY ≥ earlier of 1/1/89 or Tcba in effect on 2/28/86 ***Note:*** If the plan is a collectively bargained 403(b) plan, the effective date is the same as for 410(b) above.	PYE 1994	Rev. Pr. 95-12
TRA '86 1106(l), TAMRA 1011(d)(5) and 6062(a)	415	LY ≥ 10/1/91	PYE 1994	Rev. Pr. 95-12
TRA '86 1113	411(a)(2)	PY ≥ later of 1/1/89 or Tcba in effect on 2/28/86, but < 1/1/91	PYE 1994	Rev. Pr. 95-12
TRA '86 1105	402(g)	PY ≥ later of 1/1/89 or	PYE 1994	Rev. Pr. 95-12

Exhibit 4.72.14-1 (Cont. 3) (05-04-2001)
Chart of Effective Dates and Remedial Amendment Periods

Legislative Source	Code Provision	Effective Date	Amendment Date	RAP Source
		Tcba in effect on 2/28/86, but < 1/1/91 ***Note:*** TAMRA modified ™Tcba∫ to mean the termination of the collective bargaining agreement covering the individual subject to the 402(g) limit. The probable effect of the TAMRA change was to require multiemployer plans to look at the first of the collective bargaining agreements terminating after 2/28/86 rather than the last in order to determine the appropriate effective date for 402(g).		
UCA 522(a)(1)	401(a)(31) 402(f) 3405(c)	Distributions > 12/31/92	Later of PYE 1994 or the filing date, incl. ext., for 1120	UCA 523 Rev. Pr. 95-12
OBRA '93 13212(d)(2)	401(a)(17)	PY ≥later of 1/1/94 or Tcba, but < 1/1/97. ***Note:*** OBRA '93 was enacted on 8/10/93	Later of last day of 10th month > PYE 1994 or the PYE Tcba.	Rev. Pr. 95-12
SBJPA 1442(a)(2)	411 (a)(2)	PY ≥ the later of 1/1/97 or Tcba, but < 1/1/99. ***Note:*** SBJPA was enacted on 8/20/96.	PYE 2000	Rev. Pr. 97-41 Rev. Pr. 99-23