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GUIDANCE UPDATE
[Revised April 5, 2011]

Re: Funding Rehabilitation Plan: When Default Schedule Is Imposed

Introduction

In accordance with the Pension Protection Act of 2006 ("PPA"), the Board of Trustees adopted a Funding Rehabilitation Plan on July 26, 2010 (a copy of which is available on the Pension Fund's website at www.lnipf.org). As required by the PPA, the Rehabilitation Plan provides for a Default Schedule and provides further that the Default Schedule will be imposed on a group under certain circumstances:

> "If the current collective bargaining agreement expires and the parties are unable to agree on either Schedule within 180 days thereafter, the Default Schedule will be imposed as a matter of law effective on the first day of the calendar month next following the 180th day or such other date set by the Board of Trustees." (Rehabilitation Plan, p. 4)

> "Already Expired Agreements: In the case of a group whose collective bargaining agreement expired before the adoption of the Rehabilitation Plan, the Default Schedule shall be imposed if the bargaining parties have not agreed on a Schedule by the 180th day following the date of adoption of the Rehabilitation Plan by the Board of Trustees." (Rehabilitation Plan, p. 12).

The purpose of this Guidance Update is to provide more detail about when the Default Schedule will be imposed. Note that imposition of the Default Schedule is not a choice made by the Pension Fund. Congress included in the PPA a requirement that the Default Schedule be imposed on a group after the 180-day period to provide an incentive for employers and unions to engage in timely negotiations over implementation of their pension fund's rehabilitation plan. *See* Section 305(e)(3)(C) of the Employee Retirement Income Security Act (ERISA) and Section 432(e)(3)(C) of the Internal Revenue Code, as amended by the PPA.

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<u>When does the 180-day period begin and end?</u>

Situation 1:

If the collective bargaining agreement ("CBA") requiring contributions to the Pension Fund was already in effect on July 26, 2010 (when the Funding Rehabilitation Plan was adopted), the Default Schedule cannot be imposed until after that agreement's term ends.

After that CBA terminates, the employer and union have a 180-day period within which to agree to adopt the Preferred Schedule or the Default Schedule. If they agree on the Preferred Schedule or the Default Schedule effective within the 180-day period, that Schedule will apply to the group as of the effective date selected by the parties (provided that the effective date is no later than the first day of the calendar month next following the 180th day).

If the employer and the union are unable to reach agreement on a Schedule within the 180-day period, the Pension Fund will impose the Default Schedule in compliance with the PPA and the Rehabilitation Plan.

Note that the term of the CBA cannot be extended by the employer and the union to avoid the 180-day rule or to prolong the 180-day period. The 180-day period begins at the end of the unextended term, even if the parties decide to extend the CBA's term. An exception to this rule applies in the case of a CBA whose term was extended by agreement of the parties before July 26, 2010; in which case, the end of the term under the pre-July 26, 2010 extension will be treated as the termination date of the CBA.

For example, if the term of a CBA was January 1, 2010 through December 31, 2012, the 180-day period would begin on January 1, 2013, even if the parties agreed (after July 26, 2010) to extend the term of the CBA to January 1, 2014. The Default Schedule would be imposed on July 1, 2013 (first day of the calendar month next following the 180th day) if the parties had not agreed to a Schedule effective before that date.

In the case of a CBA that has an "evergreen clause" automatically extending the term of the CBA if neither party gives notice to re-negotiate or terminate within a certain period before the end of the initial term, the 180-day period begins at the end of the initial term; that is, on the date on which the CBA would have expired if notice to re-negotiate or terminate had been given by either party. If the evergreen clause was triggered before July 26, 2010 and, therefore the CBA rolled over for a new term that expires after July 26, 2010, the 180-day period will begin when the new term expires (even if no notice to re-negotiate is given and the CBA rolls over again).

For example, assume that the initial term of a CBA was January 1, 2010 through December 31, 2010, but the CBA has an "evergreen clause" that automatically

extends the term of the CBA for another year (that is, until December 31, 2011) unless the Union or the Employer gives a notice to re-negotiate the CBA by November 1, 2010. The 180-day period began on January 1, 2011, even if neither party gave a timely notice to re-negotiate and the CBA rolled over for another year.

Situation 2:

If the CBA requiring contributions to the Pension Fund terminated before July 26, 2010 and the employer and union had not yet agreed on a new CBA as of July 26, 2010, the 180-day began on July 26, 2010 when the Funding Rehabilitation Plan was adopted. This is true even if the CBA expired months before July 26, 2010.

For example, if the CBA expired on March 31, 2010 and the parties had still not reached agreement on a new CBA by July 26, 2010, the 180-day began on July 26, 2010. That means that the Default Schedule would be imposed on the parties effective February 1, 2011 (which is the first day of the calendar month next following January 22, 2011, the 180th day after July 26, 2010), unless the parties agree on a Schedule and it becomes effective before then.

This assumes that the employer has continued to contribute to the Pension Fund following expiration of the CBA to comply with its legal obligation to maintain terms and conditions of employment during collective bargaining. If the employer has ceased to make contributions, the Pension Fund may treat the employer as having withdrawn from the Fund.

Situation 3:

If the CBA terminated before July 26, 2010, and after that date the employer and union entered into a new CBA requiring contributions but did not adopt the Preferred Schedule or Default Schedule as part of that new CBA, the180-day began on July 26, 2010 when the Funding Rehabilitation Plan was adopted.

Agreement by the parties on a new CBA that does not include a Schedule does not stop the 180-day period from running. If the parties do not amend the CBA to include the Preferred Schedule or the Default Schedule before February 1, 2011, the Default Schedule will be imposed as of that date.

Situation 4:

If the employer and the union entered into their first CBA requiring contributions to the Pension Fund after July 26, 2010 but did not adopt the Preferred Schedule or Default Schedule as part of their first CBA, the parties have 180 days from July 26, 2010 within which to adopt the Preferred Schedule or the Default Schedule. If the parties do not amend the CBA to include the Preferred

Schedule or the Default Schedule before February 1, 2011, the Default Schedule will be imposed as of that date. If the first CBA is not adopted until after February 1, 2011, the group will be permitted to participate in the Pension Fund only if the CBA includes an election of either the Preferred Schedule or the Default Schedule.

Note, however, that the Rehabilitation Plan authorizes the Board of Trustees to grant a variance for new groups:

> "New Employers & Groups. If an employer or group wishes to join or renew its participation in the Pension Fund, the employer or group will be subject to the Rehabilitation Plan and will be required to adopt a Schedule. However, the Board of Trustees may, in its discretion, grant or require a variance from the terms thereof if the Board, in its discretion, concludes that the Pension Fund would benefit from such new or renewed participation or that the variance is necessary or appropriate to protect the Fund." (Rehabilitation Plan, p. 12).

Could the parties adopt the Preferred Schedule after the Default Schedule is Imposed?

Yes, but, the effective date of the Preferred Schedule could make a big difference in the group's benefit rights. Compare Situations 5 and 6 below.

Situation 5:

If collective bargaining parties for a group of employees agree to the Preferred Schedule after the expiration of the 180-day rule period, but make that agreement retroactively effective to the end of the 180-day period, the Pension Fund would treat the group as if the parties had adopted the Preferred Schedule within the 180-day period, assuming that the employer retroactively complies with the contribution rate increase required by the Preferred Schedule.

> For example: The 180-day period for a particular group expired on January 22, 2011 without the bargaining parties adopting a Schedule. The Pension Fund, as required, imposed the Default Schedule on the group as of February 1, 2011. On May 1, 2011, the bargaining parties agreed to adopt the Preferred Schedule with a retroactive effective date of February 1, 2011. The employer pays the 10% contribution rate increase, retroactively (back to February 1st) and prospectively. The Pension Fund would treat the group as having been covered by the Preferred Schedule as of February 1, 2011 as if the Default Schedule had not been imposed.

Note that retroactivity requires that the employer make up any contribution shortage. In other words, if the employer contributed at the 8% higher rate required by the Default Schedule during the retroactive period, the employer would have to make up the 2% difference consistent with the Preferred Schedule's required 10% contribution rate

increases. If the employer had continued to pay the Contribution Surcharge of 10% during the retroactive period, retroactive contributions might not be required.

The availability of this retroactive correction period is the result of an amendment to the Rehabilitation Plan adopted by the Board of Trustees on April 5, 2011 to give bargaining parties more time to understand the Rehabilitation Plan and its Schedules and consider their options.

Situation 6:

If collective bargaining parties for a group of employees agree to the Preferred Schedule after the expiration of the 180-day rule period, but do not make that agreement retroactively effective to the end of the 180-day period, the Default Schedule's benefit provisions would apply to the benefits earned by the participants before the Default Schedule was imposed and to the benefits earned while the Default Schedule was in effect. The Preferred Schedule's benefit provisions would apply only to benefits earned after the Preferred Schedule became effective and while it remained in effect.

This means, for example, that upon his retirement such a participant would not be eligible for a subsidized early retirement pension for the benefits he earned before and while the Default Schedule was in effect. He would be eligible for a subsidized early retirement pension with regard to the benefits he earned while the Preferred Schedule was in effect. If he chose to retire before age 65, his pension would be calculated partially based on the Default Schedule and partially based on the Preferred Schedule.

What are the consequences of an employer refusing or failing to comply with an imposed Default Schedule?

Once the Default Schedule is imposed and becomes applicable to a group, the employer's contribution rate must be increased by 8% each year-on-year for 10 years. If the employer refuses or fails to increase the contribution rate by the required amount in any year, the Pension Fund will deem the employer to have withdrawn from the Fund. The consequences of a withdrawal include:

(1) the employer may be assessed employer withdrawal liability if the Fund's actuary calculates that such liability is due under ERISA and the Fund's rules

(2) the employees' "past service credit" for employment with the employer before it became obligated to contribute to the Fund will be cancelled; and

(3) the employees' pension rights will be based on the Default Schedule and, accordingly, they will not be eligible for subsidized early retirement pensions or disability pensions and their beneficiaries will not be eligible for death benefits.

ERISA provides the Pension Fund a cause of action to sue the employer (and any or all

companies in the same controlled group) in federal court to recover, among other relief:

(1) any unpaid contributions, including contribution increases required by the Default Schedule up to the withdrawal date;

(2) any unpaid employer withdrawal liability;

(3) interest on the delinquent contributions (at the rate of 1.5% per month compounded monthly);

(4) an amount equal to the unpaid interest (in other words, double interest); and

(5) reimbursement by the employer of the Pension Fund's attorneys fees and costs of collection.

What are the consequences of an employer refusing or failing to make any contributions to the Pension Fund?

If an employer has failed to make contributions to the Pension Fund for more than six (6) months, the Pension Fund may deem the employer to have ceased to have an obligation to contribute to the Pension Fund and, accordingly to have withdrawn from the Fund, as of the date on which the employer ceased to make contributions to the Fund. An employer withdrawal liability study will be performed and if the employer is determined to have withdrawal liability under the Fund's rules, a demand letter shall be sent to the employer by the Fund.

The employer withdrawal liability provisions of the Pension Fund's Rules & Regulations, shall apply. The Rules & Regulations provide employers with a right to appeal to the Board of Trustees within a certain period. If an employer believes that it has not withdrawn, it has a right of appeal.

Can the Default Schedule be imposed on "Special Class" (non-bargaining unit) participants?

Yes. The Rehabilitation Plan provides as follows with regard to "Special Class" groups (p. 9):

> "The same Schedule that becomes effective for the bargaining unit employees of a contributing employer will automatically apply to the employer's special class (non-bargaining unit) employees as of the same effective date. The special class is considered a different group than the bargaining unit employee group, but the same Schedule will apply to both."

Accordingly, if the Default Schedule is imposed on a group covered by a CBA, any Special Class participants of the same employer will become subject to the Default Schedule at the same time as the participants covered by the CBA.

Will the employer contribution surcharge cease when the Default Schedule is imposed on an employer?

Yes. The employer will no longer be obligated to pay the employer contribution surcharge for months after the Default Schedule becomes applicable to the employer and its employee-participants. However, as explained above, the employer will be obligated to pay the increased contribution rate required by the Default Schedule once that Schedule is imposed. If the employer refuses or fails to do so, there would be consequences, as explained above.

Is there any way to appeal to the Pension Fund for an extension of the date on which the Default Schedule will be imposed?

Yes. The Funding Rehabilitation Plan provides that the Board of Trustees can grant an extension under extraordinary circumstances in which the extension would serve the purposes of the Rehabilitation Plan.

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For further information regarding this Guidance Update, the Funding Rehabilitation Plan, or the Pension Fund, feel free to contact the Fund Office at 202-737-1664.