

Takeaways from NCCMP

Euclid Specialty underwriters enjoyed attending the National Coordinating Committee for Multiemployer Plans (“NCCMP”) Annual Conference. We thought it was the most informative NCCMP conference in recent years. For those of you who could not attend, here are our thoughts on the major topics discussed at the conference.

1. Multiemployer Funding Levels Are Improving. In his annual report, Josh Shapiro, Deputy Executive Director for Research and Education for NCCMP, reported that multiemployer plans are “on the path to recovery.” Although “it will take many years,” they are now in a “positive direction.” He reported that many of their surveyed funds had utilized the 2010 statutory relief tools, including thirty-year amortization, 10-year smoothing of assets, and the 130% corridor. Specifically, in 2011, multiemployers funds in the NCCMP survey were 84% funded on the PPA actuarial value basis and 75% on a market value basis (with no actuarial smoothing). This compares to 2009 survey funding levels of 77% on an actuarial value basis and 65% on a market value basis. In 2011, 59% of the funds were in the green zone, 17% in the yellow zone, and 24% in the red zone; this compares to 2008 survey results of 76% green zone, 15% yellow zone, and 9% red zone.

2. Apprenticeship and Training Funds: The most contentious topic of the conference was the Department of Labor’s “DOL’s” continued enforcement crackdown on expenses for graduation ceremonies for apprenticeship and training funds. Phyllis Borzi, Assistant Secretary of Labor and head of the Employee Benefits Security Administration, said the DOL is trying to settle the 120-plus pending investigations of apprenticeship funds. To her, the question is what is reasonable and necessary in running an apprenticeship fund. Specifically, any expense must be related to the training purposes of the fund. In answering frustrated trustees at both her convention speech and the break-out session, she repeated twice that “you can’t have a graduation ceremony that looks like a wedding or a Bar Mitzvah.” She said it was a “fact and circumstances test” in which “modest” ceremonies and gifts are “OK.” Borzi indicated that the DOL would be issuing further guidance for apprenticeship funds.

3. Reproposal of the Definition of Fiduciary: The DOL intends to issue a “reproposal” to update the definition of fiduciary in the beginning of 2013. The DOL’s goal with the new definition of fiduciary is to “protect workers from biased advice.” Phyllis Borzi explained that third-party payments and revenue sharing “seem like a conflict of interest.” The new definition of fiduciary, therefore, will seek to bring “transparency and accountability” to these arrangements, but provide prohibited transaction amendments as well.

The DOL had proposed a new definition of fiduciary under ERISA on October 10, 2010, but withdrew its initial proposal after significant comments from the investment community. The DOL remains concerned that problems exist with the current definition of fiduciary under the 1975 regulation. In particular, the DOL is concerned that many investment advisors that provide fiduciary advice on a one-time basis escape fiduciary responsibility because they do not offer advice on a “regular basis” as the regulation requires. Similarly, the DOL thinks it is problematic that some fund advice would not qualify under the current definition of fiduciary if the client relied in part, but not primarily, on advice from a potential fiduciary. Phyllis Borzi stated that the DOL is conducting more transparent economic analysis to respond to the objections to the initial proposal.

Louis Campagna, Chief, Division of Fiduciary Interpretations Office of Regulations and Interpretations of the DOL, further explained that the re-proposal would set a “clear-line test” distinguishing between investment advice and investment education. He also clarified that any new definition would also add exemptions to the prohibited transactions rules if the fee practices were beneficial to the fund.

4. Affordable Care Act (“ACA”): The multiemployer community has rallied behind the leadership of NCCMP under the common goal to preserve the high quality of affordable care provided by multiemployer plans. Since existing Taft-Hartley trusts are not currently eligible for ACA subsidies, NCCMP advisors have proposed establishing after-tax supplemental trusts to become eligible for subsidies. Alternatively, a union multi-state plan could be established under the multi-state option of the ACA statute. Although the possibilities are complex, plans evaluating their options must have a better understanding of household income of their participants in order to value ACA subsidies. Not every subsidy-eligible person will be in the supplemental trust, because the subsidies are diminished for higher income employees.

Borzi described the Affordable Care Act as “unforgiving and not well drafted.” She stated that the statute was “not drafted in a clear and straightforward fashion,” which is “extremely frustrating to EBSA.” The DOL has been sued in 170 cases alleging that the Department exceeded its authority, and this in turn limits the Department’s discretion in enacting regulations. She said EBSA cannot be perceived as doing a “special deal” for labor plans, because they need a strong statutory basis for anything they do. But EBSA “will do everything in our power to make it serviceable.”

5. 401k Fee Disclosure: The DOL wants to bring greater transparency and accountability to defined contributions plans. To do this, the DOL has published a final rule adopting disclosure requirements for retirement plan service providers under Section 408(b)(2) of ERISA. The final rule requires “covered service providers” to disclose certain information to plan fiduciaries in order for a contract or arrangement with the provider to the plan to be “reasonable” within the meaning of ERISA section 408(b)(2) and, therefore, satisfy the statutory exemption from ERISA’s prohibited transaction rules. Responsible plan fiduciaries of “covered plans” must ensure all “covered service provider” contracts and arrangements comply with the disclosure requirements of the Final Rule by the July 1, 2012 effective date.

Louis Campagna highlighted two aspects of the new rules. First, fiduciaries need to send a disclosure failure notices when appropriate to avoid the expense becoming a prohibited transaction. Second, Campagna questioned whether reimbursement of trustee expenses must be disclosed under Rule 408(b)(2). Surprisingly, he did not have a DOL position on the question, although one plan lawyer noted that trustees do not need to disclose expense reimbursements because trustees do not contract with the plan like a service provider.

6. Vendor Expenses: Phyllis Borzi reported that the DOL is focusing on the reasonableness of expenses paid to vendors, including investment managers and consultants. She said that they are seeing with “increasing regularity” that investment managers and consultants are attempting to disclaim liability for fiduciary responsibility. She opined that it may be a breach of fiduciary duty for trustees to allow this type of disclaimer.

7. PBGC: The PBGC gave a summary of its MAP-21 changes. It reported that the annual premium for multiemployer plans has been raised from \$9 per participant to \$12 in 2013. \$1.7B is available for multiemployer plans, which is well below projected funding needs. The PBGC noted the significant drop in active population for multiemployer plans, as less than one-half of all multiemployer participants are active employees. In the PBGC’s opinion, the funds cannot recover based solely on contributions. In 2011, 49 plans are receiving PBGC financial assistance out of 1460 insured plans (with 168 plans with 10,000 or more participants). They expect plan insolvencies to increase from 46 plans to 90 plans within the next five years. Two plans became insolvent in 2011; five plans closed out with annuities in 2012.

If you would like to discuss any of the issues discussed at the NCCMP conference, or any fiduciary liability issue, please call Daniel Aronowitz at 571-730-4811 or Douglas Dvorak at 571-730-4812.

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