

From: T. Zavist[SMTP:TZAVIST@TX.RR.COM]
Sent: Sunday, December 27, 2009 10:01:40 AM
To: RegComments
Subject: Proposed Amendment to 29 CFR Part 4041
Auto forwarded by a Rule

1416 Esters Rd., Apt. 1040
Irving, TX 75061
December 27, 2009

Constance Markakis, Esq., and Catherine B. Klion, Esq.
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
reg.comments@pbgc.gov

Re: Proposed Amendment to 29 CFR Part 4041

Dear Ms. Markakis and Ms. Klion:

The PBGC is considering restricting the purchase of irrevocable commitments before the initiation of a standard termination of a pension plan.

Pension plan sponsors generally do not try to circumvent the notice requirements in a standard termination when they purchase irrevocable commitments. These notice requirements are not onerous. Many pension plan sponsors are not aware what the notice requirements are in a standard termination, and they rely on their enrolled actuary to help them issue the proper notices.

When pension plan sponsors purchase irrevocable commitments before the initiation of a standard termination, they generally are not contemplating a standard termination at the time the purchase is made. Therefore, should the PBGC prohibit the purchase of irrevocable commitments for a specific period of time before the initiation of a standard termination, the practical effect would be to prohibit the standard termination of a pension plan for a specific period of time after a purchase of irrevocable commitments.

The PBGC requested comments on eight specific issues relating to this matter. Below are comments regarding each of the eight.

(1) Factors in determining whether a purchase of irrevocable commitments is in preparation of the standard termination. Generally, such a purchase is not in preparation of a standard termination and can be presumed to be not in preparation of it.

(2) The specific time period during which a rebuttable presumption should be made that a purchase is in preparation for a standard termination. Generally, such a purchase is not in preparation of a standard termination, so a time period of zero is appropriate.

(3) The specifics of a safe harbor permitting the purchase of irrevocable commitments within a period of time before a standard termination during which such a purchase is otherwise prohibited. There is no point looking to the purpose of the purchase, because a plan sponsor generally would not be contemplating the purchase of irrevocable commitments as a means to circumvent the notice requirements in a standard termination. The margin of sufficiency of plan assets is irrelevant, because the assets must be totally sufficient in order to complete a standard termination. The effect of such

a purchase on a pension plan is no different from the payment of lump sums. Recent legislation restricts both types of distributions in underfunded pension plans. No more reporting is warranted for such a purchase than for lump sum payments.

(4) How the PBGC can better identify plans that purchase irrevocable commitments before a standard termination. The PBGC can request a record of any purchases of irrevocable commitments as part of the standard termination process.

(5) Appropriate enforcement actions. No enforcement action is warranted, because any such purchase generally will be in good faith.

(6) Appropriate penalties for failure to provide required notices and disclosures in a standard termination. Generally, the penalties should be smaller. They should also be proportionate to the size of the pension plan or the number of participants affected by the failure. The notice and disclosure requirements are not onerous. A pension plan sponsor is far more likely to fail to issue proper notice due to an error than due to a deliberate act. The current \$1,100 *per* day fines for late filings are an especial hardship for the sponsors of small pension plans, particularly ones that are not in a position to notice a failure for months or years after such a failure occurs.

(7) Information that a notice to participants and to the PBGC should contain in the case of a purchase of irrevocable commitments during a standard termination. The current practice is to send participants the names of a few insurance companies from which irrevocable commitments might be purchased. Next, the plan sponsor obtains price quotes from a number of insurers each of which is potentially the provider of the safest available annuity. The plan sponsor then chooses one of them, looking to an analysis of the safety of each. Each participant is then given information about the annuity being purchased for the participant, including the insurer and the date and amount of each payment and the specifics of any election the participant must make. Participants have no discretion in this process, other than the choice of annuity options they otherwise would have at retirement (and sometimes also a lump sum in the case of a standard termination). Participants should be notified when a pension plan termination is initiated and should be told their election options. Once an insurer is chosen, participants need to be told the specifics of the new provider of their pension. The current requirement to notify participants of potential insurers before the selection of one of them is unhelpful to participants and could be eliminated. No additional notification to participants is warranted. In a standard termination, assets must be sufficient to satisfy liabilities, so no additional notification to the PBGC is warranted in a standard termination.

(8) Employer experience with locking-in interest rates for the purchase of irrevocable commitments. The interest rate typically is locked in when the purchase is made.

Thank you for the opportunity to submit comments and to answer questions from the Pension Benefit Guaranty Corporation (PBGC). Any comments expressed here are my own professional opinion and not necessarily the opinion of my employer.

Sincerely yours,

Tom

Thomas M. Zavist, FSA, EA

Leonard A. Davis
Senior Associate General Counsel
Law Department

January 20, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Comment on Purchase of Irrevocable Commitments Prior to Standard Plan
Termination – Request for Information

Ladies and Gentlemen:

On behalf of MetLife, I am writing to comment on the Request for Information (“RFI”) that the PBGC published in the Federal Register on November 23, 2009. We appreciate the significant amount of work and effort of the Agency in preparing the RFI and for seeking comments with respect to this important area for Defined Benefit (DB) pension plans, and we appreciate the PBGC’s concerns with regard to participant protections when a plan is no longer intended to be maintained by its plan sponsor on an ongoing basis.

In its RFI, the PBGC appears to be considering issues for which we would suggest the development of a concept of constructive plan termination that would trigger most of the existing plan termination requirements where the sponsor has taken steps to purchase and distribute most but not all plan benefits, under a self-funded defined benefit plan.

Background

As the PBGC states in the Federal Register, “Questions have been raised as to the extent to which a plan administrator may purchase irrevocable commitments for some or all participants during a period of time *before initiating a standard termination*. . . . The PBGC has concerns about whether such purchases could circumvent the statutory and regulatory protections afforded participants and beneficiaries under the standard termination process (FR v.74, No. 224 Nov. 23, 2009, p. 61076).

The protections afforded participants affected by settlement of pension liability are implemented primarily through prescribed notices to affected participants. In plan terminations, the sponsor must issue a Notice of Intent to Terminate (“NOIT”) and a Notice of Plan Benefits (“NOPB”) to all affected parties, including plan participants, and file Form 500 with the PBGC within 180 days after the proposed termination date. Among other things, Form 500 certifies that the plan has sufficient assets to pay liabilities. Once the NOIT has been issued, the plan administrator may

purchase annuities and pay lump sum benefits *only if the PBGC does not issue a notice of noncompliance* during the 60-day review period, which begins when the PBGC receives Form 500. Purchase of annuity contracts incident to plan termination requires a Notice of Annuity Information to all affected participants.

For plan benefits settled and distributed without plan termination, PBGC plan termination rules do not apply and therefore the NOPB and Notice of Annuity Information are not required. The PBGC is seeking to determine whether concern in this regard is warranted, and if so, what appropriate measures it might consider in response, perhaps in the form of expanded notice requirements.

MetLife Comments

MetLife is a leading provider of employee benefits and has been committed to the retirement business for over 85 years, issuing the industry's first group annuity contract in 1921 to fund a defined benefit plan on a fully insured basis. We are also the largest commercial provider of transferred pension obligations in the US. As such we believe we have a useful and important perspective to offer on the PBGC's RFI.

We would observe that for many decades, defined benefit pension plans were commonly fully funded through group annuity contracts. Under such "fully insured" arrangements, the plan sponsor's contributions are made to the annuity carrier, which is in turn responsible for a defined accrued benefit for each plan participant. Such funding arrangements are clearly not done in contemplation of a plan termination. To the contrary, they were designed as a means for a plan sponsor to establish and fund a defined benefit plan on an ongoing basis. Such arrangements, although no longer common, continue to exist today in one form or another.

As the market developed, self funded arrangements replaced this type of arrangement as the norm, especially among large plan sponsors, although as the Agency has accurately indicated in its RFI, group annuity contracts are used in many ways to facilitate the investment and funding of defined benefit programs on an ongoing basis.

DB plans, properly managed, can provide a key element of basic security for plan participants, and for some industries, can serve as an important workforce retention tool in a way that other types of programs cannot match as effectively. The key concern for many current DB sponsors is the volatility of earnings or cash flow associated with maintaining the plan, and how to manage or mitigate such financial effects.

A traditional pension closeout usually involves an annuity contract that transfers all future mortality, expense, early retirement, market and investment risks to an insurance company in return for a single lump sum payment, often in the context of a plan termination. The result of such transactions is to remove the liability for these benefits entirely from the PBGC.

We believe many plan sponsors that are not on a plan termination track will benefit from a new generation of solutions that will help them to better manage their plan's liabilities and related volatility. Most recently, market innovations involving group annuity contracts have been and are being developed to enable plan sponsors to better manage the

longevity and other long term risks associated with ongoing and frozen defined benefit plans. The mechanism for so doing is a partial risk transfer, under which a portion of the plan's liability is transferred to an insurer under an irrevocable arrangement. These transactions are not done in contemplation of a termination, but rather are done to enable the sponsor to reduce the volatility of its plan cash flows and funding, and as such, make it easier for sponsors to continue to maintain plans. They also remove the longevity risk for these participants from the potential liability of the PBGC.

We do not believe that these partial plan settlements are intended, or should, trigger a change in the PBGC's current notice and disclosure practices.

We know of no specific situation in the large corporate marketplace where a plan sponsor has entered into an irrevocable arrangement that has disadvantaged participants whose benefits were, or were not, included in the arrangement, whether done in connection with a formal plan termination or otherwise. Further, ERISA's fiduciary requirements that are associated with selection of an annuity carrier apply in the case of any irrevocable commitment of an insurer to provide benefits, whether or not a termination is contemplated, which mitigate against such a potential circumstance.

We further note that any irrevocable group annuity purchase requires the issuance and distribution of certificates and related plan participant communication under applicable insurance and tax laws. The certificate confirms the participant's benefit amount under the contract, and participants can and do ask questions if they do not understand their benefit amount or believe it is not correct. Plan sponsors or their administrators provide the data on which the certificates are based.

However, we recognize the PBGC's potential concern regarding the protection of participants whose plan benefits are settled, and while we believe it would be helpful for the PBGC to identify the specific situations of Agency concern, we generally agree that in a case where most of the substantive elements of a termination are present, it may be appropriate for the related notice and participant protections afforded by the standard plan termination process to be triggered. Accordingly, we offer the following thoughts for the PBGC's consideration:

- We feel it is critical that any new rules should be expressed clearly and without uncertainty. This will give incentive to practitioners to act consistently with the purpose of the revisions and avoid discouraging annuity solutions that would otherwise address the PBGC's area of concern.
- The extension of notice rules (Notice of Annuity Information, Notice of Plan Benefits) should be applied only to partial settlements representing substantial or "constructive terminations" based on objective standards, such as some or all of the following:
 - Extent of asset transfer to insurer, such as settlement of plan liability amounting to at least 85% of the plan's Funding Target, or Plan's AFTAP reduced to 60% after the settlement; or

- Plan Type of concern identified by assets or coverage, such as Owner-dominated, e.g., if substantial owners are purchased, or Small plans, e.g., amount of assets left in plan are so low that remaining balance is de minimus.

The Agency may also want to consider whether all participants, not just those whose benefits would be provided under the partial settlement, should be included in the notice. It may be appropriate to provide for a notice requirement to participants whose benefits are settled and distributed in partial settlement transactions meeting defined requirements, when a plan termination is not planned.

- Any quantitative measures above should be based on data produced routinely by ongoing plans, e.g., use liability measures with margins sufficient to avoid need for any “termination liability” or other special purpose calculations, such as some percentage of ongoing plan liability, rather than a measure based on termination liability.
- Further, any such expansion of notice requirements should be focused on plans and situations of particular concern, as suggested below:

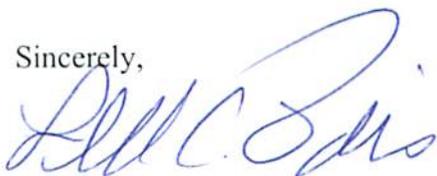
- *Where subsequent termination follows shortly after any settlement* - If the plan administrator settles any plan liability *with* subsequent formal filing of plan termination soon after, we suggest that notice requirements be applied retroactively to settlements which occurred (e.g., up to 12 months prior to plan termination filing); or

- *Where there is substantial settlement of plan liability without subsequent plan termination following soon thereafter* - We suggest triggering PBGC standard plan termination standards of review one year after a substantial settlement, unless superseded by actual plan termination follows within this period.

- Partial settlements of liabilities that are done in the context of ongoing plans should be included in a “safe harbor” in any proposed regulations.

On behalf of MetLife, I wish to thank you for consideration of our comment letter.

Sincerely,



Leonard A. Davis
Senior Associate General Counsel

January 21, 2010

Comments on Irrevocable Commitments
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200K Street NW.,
Washington, DC 20005-4026

This letter is the response of Towers Watson to PBGC's request for public comments on the purchase of irrevocable commitments prior to a standard plan termination as published on November 23, 2009 in the Federal Register. Towers Watson is a leading global professional services company that helps organizations improve performance through effective people, risk and financial management. Established on January 1, 2010, as a combination of the former Watson Wyatt and Towers Perrin, Towers Watson offers solutions in the areas of employee benefits, talent management, rewards, and risk and capital management. Towers Watson employs approximately 14,000 associates on a worldwide basis. Our more than 600 Enrolled Actuaries under ERISA provide actuarial and consulting services to more than 1,500 defined benefit plans in the US. The undersigned have prepared our firm's response with input from others in the firm.

We appreciate the opportunity to provide comments on irrevocable commitments that plan sponsors may purchase to satisfy plan obligations prior to plan termination. We support the effort PBGC is making to clarify or define acceptable practice in this area. It is critical for the overall health of the defined benefit system that plan sponsors have clarity and flexibility regarding options available for settling part or all of a plan's obligation.

Our comments are grouped into the two concerns summarized by the PBGC on page 61076 of the Federal Register. In addition, we offer a suggestion for expanding the solutions we propose to the period after a Notice of Intent to Terminate (NOIT) is filed.

Participant Protection

As PBGC notes, purchasing an irrevocable commitment from an insurer is a fiduciary action. The standard of care for this transaction is high. Plan sponsors provide potential insurers with complete sets of participant data, including significant details regarding the benefits and rights of plan participants. Insurance companies scour the data and plan provisions to completely understand the obligations they assume.

We feel that the accuracy of benefit calculations involved in an annuity purchase is at least as great as provided during ongoing plan operation. While plan participants are not usually notified in advance of an annuity purchase, they are notified upon consummation of the purchase. It is a simple matter for participants in pay status or those participants who have benefit documentation from the plan sponsor to determine if the benefit purchased is correct. We note that the Pension Protection Act of 2006 requires benefit statements to be sent to participants no less than once every three years.

We have two suggestions to address PBGC concerns in this area.

1. PBGC could require a plan sponsor in a standard or distress termination to provide a NOIT and Notice of Plan Benefits (NOPB) to any participant for whom the plan sponsor purchased an

irrevocable commitment in the 12 months immediately preceding the proposed date of plan termination. Such notices would need to be adjusted to fit their retrospective view.

2. If the purchase price of an irrevocable commitment not purchased as part of a plan termination is greater than some threshold percentage of the market value of plan assets at the time of purchase, such a purchase could be added to the events reported to the PBGC under ERISA §4043. Given PBGC's need to know this information in advance of the purchase, we recommend that such a reportable event be subject to the advance reporting rules. However, we recommend that such a reportable event be waived for all larger, well-funded plans consistent with the recommendations we made in our comment letter to the PBGC on proposed changes to the reportable event regulations. For purposes of this event, a well-funded plan would be one that would have a ratio of assets (before subtraction of funding balances) to funding target of at least 80% after adjustment of assets and liabilities for the anticipated annuity purchase. Note that reporting and waivers would necessarily be based on preliminary or estimated information as the precise cost and timing of entering into such an irrevocable commitment is typically not known until the agreement is consummated. Due to the uncertainty of timing, as well as the possibility that a sponsor will ultimately decide not to purchase an irrevocable commitment, we suggest that the reporting be effective for a period of 12 months.

Irrevocable Commitment Purchase Leading to Insufficient Assets

We recognize PBGC's concern that the purchase of an irrevocable commitment may cause a plan's funded status of certain priority categories to deteriorate, expose PBGC to greater risk and put nonguaranteed benefits at greater risk. As suggested above, the purchase of a significant irrevocable commitment could be considered a reportable event. With reasonable waivers in place, this notification would provide PBGC with critical information while not adding too much burden to plan sponsors.

We note that an irrevocable commitment is considered a distribution under IRC §436. Therefore, a plan will need to have a reasonably strong funded status to purchase an irrevocable commitment on unrestricted benefits (which, in practice, will be the plan sponsor's strong desire).

In general, we believe the purchase of an irrevocable commitment is a legitimate and useful business transaction for plan sponsors to have at their disposal. ERISA's fiduciary standard provides protection that these transactions are considered and consummated carefully.

We encourage PBGC to avoid over-regulating this issue and discourage PBGC from trying to establish characteristics of acceptable/unacceptable transactions as suggested in comment issue (1) on page 61077 of the Federal Register. The variations of plan sponsor situations are too vast to be enumerated effectively in regulation.

Finally, it would be troubling if plan sponsors needed to be concerned that good faith, fiduciary compliant transactions made in past years could be resurrected for review or could generate future financial penalties. That said, we recognize that PBGC and plan participants need protection from plan sponsors engaging in transactions that lead to PBGC or plan participant harm shortly thereafter. It seems reasonable that an irrevocable commitment purchase within 12 months of a plan termination filing could be presumed to be part of that termination and subject to related filing requirements.

Irrevocable Commitment Purchase After the NOIT is Filed

The length of time between the NOIT and the final distribution of assets in a termination can be quite substantial. Over that period of time, economic conditions can change and the funded status of the plan can change with it. In our experience, some plan sponsors have found this frustrating and have made changes in their asset allocations to attempt to prevent substantial changes in funded status during this period. The success of these efforts has varied. In some situations, plan sponsors have wanted the opportunity to purchase an irrevocable commitment, seeing this as the best way to prevent a change in funded status, but were prevented from doing so since the NOIT had already been filed. We believe that this opportunity should be available in certain circumstances.

The PBGC's proposal questions the significance of the NOIT relative to purchasing irrevocable commitments, essentially asking if a sponsor can not take such an action after an NOIT is filed then why should they be able to take this action without PBGC oversight just before filing? We would turn this question around and ask if there are conditions under which entering into such a transaction is acceptable to PBGC then why should the filing of an NOIT make this unacceptable? We would propose that in a standard termination, a purchase of an irrevocable commitment be permitted after the NOIT is filed if the NOPB is distributed to the participants included and the conditions for a waiver of the irrevocable commitment reportable event proposed above are met.

Thank you for this opportunity to comment on the proposed revisions. If your staff has any questions concerning our comments please contact either of us directly.

Sincerely,



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January 21, 2010

Pension Benefit Guarantee Corporation
Legislative and Regulatory Department
1200 K Street, NW
Washington, DC 2005-4026

Re: Purchase of Irrevocable Commitments Prior to Standard Termination

The Pension Benefit Guarantee Corporation (PBGC) published a request for public comment regarding the purchase of irrevocable commitments by a plan sponsor from an insurer prior to plan termination. The PBGC has several concerns, including the use of such purchases to circumvent the sponsor oversight and participant notices and guarantees provided under the plan termination process. I will not attempt to address all of the PBGC concerns in this comment letter. Instead, I propose a safe harbor for transactions that include only retirees and beneficiaries that have been receiving payments for at least one year. The advantage of this proposed safe harbor is that it would apply regardless of the timing of a future termination of the pension plan.

In general, the purchase of irrevocable commitments by a plan sponsor from an insurer should be encouraged, not discouraged, because the transaction has the potential to benefit all the involved parties. The transaction removes pension liabilities from the plan sponsor's balance sheet, lowering the magnitude of cost volatility. The transaction eliminates potential liabilities from the PBGC's balance sheet through a regulated and approved funding channel. The transaction provides pension plan participants with guaranteed future payments from a regulated insurer. The only caveat is that the on-going pension plan must continue to be well-funded immediately after the transaction is complete.

I suggest that a safe harbor for the purchase of a group annuity contract for retirees and beneficiaries currently receiving payments in an on-going pension plan be established. This proposed safe harbor would apply the existing requirements of the PBGC standard termination process regarding retirees and beneficiaries that have been in payment for at least a year. This would include the following notices, all of which could be incorporated into a single notice:

- A notice of plan benefits that includes amount and form of benefits payable to the retiree, the amount and form of benefits, if any, payable upon death and name of beneficiary and the date and amount of any scheduled increases or decreases in the payment amount.
- A notice of annuity information that includes the name and address of each insurer under consideration.
- A notice that the PBGC's guarantee will end and a statement concerning state guarantee association coverage.

Since current regulations already require that this transaction be reported to the Internal Revenue Service, the Pension Benefit Guarantee Corporation and the Department of Labor on the annual Form 5500, a separate notice to the PBGC regarding this transaction would be redundant and unnecessary.

It seems reasonable to require that the pension plan be well funded both before and after the transaction. This could be accomplished as follows:

- Require that a group annuity purchase in an on-going pension plan be considered a plan amendment under IRC Section 436, and as such a pension plan must have a certified funding level (FTAP) of at least 80% immediately after the transaction is complete.

The advantage to a plan sponsor for adhering to this proposed safe harbor would be that the time between a future plan termination and the purchase transaction would be irrelevant.

Paul Withington, FSA, MAAA, EA



Financial Security. For Life.



AMERICAN BENEFITS
COUNCIL

Filed Electronically

January 22, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Comments Regarding Purchase of Irrevocable Commitments Prior to Standard Termination

Dear Sir or Madam,

This letter, which is submitted by the American Council of Life Insurers (“ACLI”) and the American Benefits Council (the “Council”), provides comments in response to your request for public comment regarding the purchase of irrevocable commitments prior to standard termination, which was published on November 23, 2009 in the Federal Register. The Council is a public policy organization principally representing Fortune500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. The Council offers an important and unique perspective of both the employer sponsors of retirement plans and the service providers that assist them. ACLI is the principal trade association of life insurers, representing over 300 members that account for over ninety (90) percent of the life insurance industry's total assets in the United States. The life insurance industry is one of the largest providers of products and services to employer-sponsored pension plans – both defined contribution and defined benefit plans. Twenty-two percent of the assets in employer-based retirement plans in America are managed by life insurers.

ACLI and the Council appreciate the opportunity to comment and we applaud the Pension Benefit Guaranty Corporation's (PBGC) commitment to safeguarding retirement plan assets and protecting plan participants in the course of plan terminations.

There are compelling reasons that plans may have for purchasing irrevocable commitments prior to the initiation of a standard termination, as pointed out in the request for public comment. When used properly, they can be a valuable tool for the plan sponsor in maintaining the plan and ensuring plan stability.

There are a multitude of different reasons unrelated to plan termination that a plan, and its participants, may benefit from the purchase of irrevocable commitments, such as:

- To take advantage of favorable interest rates, which have a significant effect on both annuity rates and plan funding status. Purchasing annuities prior to a drop in interest rates can have a significant positive impact on the plan (particularly when a plan administrator anticipates benefits going into pay status and foresees an advantage to the plan of purchasing annuities). It is not difficult to imagine a situation in which a pension plan that is currently fully funded may find itself underfunded if it waits and purchases annuities when interest rates are less favorable.
- For risk mitigation. If a plan sponsor does not want to guess at when interest rates will be favorable, he may want to establish an orderly program to purchase annuities gradually over time. This risk mitigation strategy of purchasing annuities may allow a plan sponsor to continue to operate a plan without fear that future interest rate, asset return, or mortality changes will have a disproportionate impact upon its bottom line, and therefore necessitate the termination of the plan. A strategy such as this could entail the purchase of annuities for retirees only, for retirees and deferred vested participants, or even for all participants, depending upon the amount of risk the plan sponsor wants to retain. Another form of risk mitigation involves looking not just at interest rates, but the intersection of interest rates and asset returns and funding status at a certain time.
- To purchase benefits for vested terminated participants.
- To facilitate an organizational goal, such as the sale of a subsidiary or the reduction in plan liabilities.

As discussed below, many annuity purchases are simply made in the normal course of business, unrelated to plan termination. As a result of the myriad of rationales that underlie annuity purchases, the use of a safe harbor period and limitations on purchases of irrevocable commitments beyond those already in the regulations would be counterproductive to the continuation of pension plans. In effect, the current funding rules already place limitations on what poorly funded plans can do, and further restrictions would make ongoing defined benefit plans even less desirable for plan sponsors that utilize, or are contemplating the utilization of annuity purchases in order to better address needs including risk mitigation, divisional sales, or the meeting of specific financial goals.

Given the problems that defined benefit plans have experienced resulting from the difficult economy, such strategic actions to use plan assets wisely should be encouraged, and it should be in the PBGC's best interest for sponsors to stabilize the plan in this manner. Plan administrators need maximum flexibility and should not be precluded from having access to this effective tool.

Notwithstanding the above, however, we understand the PBGC has concerns that there may be a plan sponsor that inadvisably seeks to use these products in a way that circumvents PBGC rules, potentially at the expense of rank and file employees. In those cases, as the request for comment notes, there is a possibility that "plan assets could be insufficient for plan benefits at the time of any distribution upon termination, since plan assets used to purchase irrevocable commitments (and the investment returns on those assets) would no longer be

available to pay other plan benefits.” Although there may be some who circumvent the rules to ensure that executives receive their full benefits from the plan, we urge the PBGC not to impose restrictions that would be to the detriment of the great majority of plan sponsors whose purchases are for legitimate reasons. As we explained above, we believe that it is in both the plan sponsors’ and the plan participants’ best interest to avoid unnecessary restrictions on the purchase of annuities. It is also in the PBGC’s best interest, because stabilizing the plan with this tool generally will lessen the likelihood of distress terminations. With this in mind, we list below suggestions on how we believe the PBGC can strike this balance.

(1) New Approaches Should not Apply to Certain Purchases.

There are numerous situations in which purchases of irrevocable commitments should clearly raise no concern because the transactions are not made with any intent to terminate. If the PBGC does decide to take some action in this area, then certain irrevocable commitment purchases should be carved out and exempted from any reporting or additional requirements. This carveout should include:

- annuity contracts purchased in the normal course of business (e.g., annuity contracts purchased at retirement or termination of employment, whether in a historically based series or in a one-time effort to reduce the size of the plan’s liabilities and overall risk);
- purchases by plans funded entirely with annuity contracts;
- traditional arrangements, such as group deferred, deposit administration, and IPG annuity contracts; and
- purchases by plans that include participant contributions (at least with respect to the amount of the participant contributions).

We would be happy to provide more information about the various types of product arrangements that we feel would fall into these categories.

(2) PBGC’s Authority to Correct Egregious Results.

Regarding PBGC’s concern that plan assets may not be sufficient to cover all benefits at termination if some assets are used to purchase irrevocable commitments prior to the termination, we feel that PBGC has ample remedies and authority under existing law to address this type of situation after the fact. PBGC also noted its concern that participants will not receive the proper notices and will miss the opportunity to correct information used to calculate their benefits. In the event that PBGC determines that a notice should have been provided and the notice process was intentionally circumvented, PBGC can require that the notice be provided and participants’ benefits could still be adjusted if they were to be found incorrect.

(3) Existing Reportable Events can be Used.

Rather than creating a rule (such as a new reportable event) to address the PBGC’s concerns, we suggest that the current reportable events could be used for this purpose. The current participant reduction reportable event, for example, is triggered if the purchase of an irrevocable commitment would cause the number of active participants under a plan to be reduced to less than 80 percent of the number of active participants at the beginning of the plan year (or to less than 75 percent of the number of active participants at the beginning of the

previous plan year). However, if PBGC feels that it needs to establish a new reporting mechanism to address this issue, we could conceive of a new reportable event that would require reporting when a plan purchases an irrevocable commitment(s) (1) when such plan is less than 80% funded (including if the purchase causes the plan to become less than 80% funded), and (2) which purchase results in a 25% or greater decrease in plan assets or plan participants.

(4) Any New Requirement should not add Unnecessary Expense.

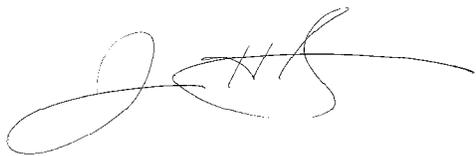
If the PBGC does decide to require additional reporting, it should use data that the plan will already have available. For example, if PBGC requests funding figures, it should be acceptable to use AFTAP calculations, rather than a termination valuation, since the actuary will already have done those calculations and producing a new calculation would add additional expense to the plan.

(5) Purchases Prior to Termination should not be Presumed to be Made with an Intent to Terminate.

In the request for comment, you ask various questions about determining whether a purchase prior to a standard termination should be considered “related to” the termination. This issue really goes to a plan sponsor’s intent when he purchases the contracts, which is very difficult to know, prove or assume. A plan may make a purchase solely to take advantage of favorable rates, and then six months later could face an unexpected and catastrophic event that prompts the sponsor to decide that termination is necessary. Such purchase, although close in time, should not be considered related to the termination. In addition, as noted earlier, there are clearly circumstances in which irrevocable commitments are purchased in the normal course of business. Because we believe that the great majority of purchases are made with the best interest of the plan as a whole and not to evade the standard termination processes, we feel that it would be inappropriate for the PBGC to make assumptions (whether based on factors or a rebuttable presumption or a safe harbor) that any purchases prior to the issuance of a NOIT are related to the standard termination or should be in any way limited.

* * * *

On behalf of the Council and ACLI member companies, thank you for consideration of these comments. As stated above, we welcome the opportunity to discuss these comments and engage in a productive dialogue with the PBGC on these important issues.



James H. Szostek
Director, Taxes & Retirement Security
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January 22, 2010

Submitted to reg.comments@pbgc.gov and by Mail

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Request for Public Comment—Purchase of Irrevocable
Commitments Prior to Standard Termination
Docket ID: PBGC -2009-0009-0001

Ladies and Gentlemen:

These comments are submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in response to the Request for Public Comment issued by the Pension Benefit Guaranty Corporation (PBGC) on the Purchase of Irrevocable Commitments Prior to Standard Termination. 74 Fed. Reg. 61074 (November 23, 2009).

The AFL-CIO, its 57 affiliated unions and its community affiliate, Working America, represent more than 11 million workers. For more than 60 years, the American labor movement has championed the provision of real retirement security to working families across all sectors of our economy. Defined benefit pension plans, the plans that PBGC guarantees, continue to be the soundest and most efficient vehicles for building and safeguarding retirement income security.

Defined benefit plans and the protections they offer are critical to the retirement security of working families. Sixty-six percent (66%) of private sector workers represented by unions participate in a defined benefit pension plan.¹

¹ U.S. Department of Labor, National Compensation Survey: Employee Benefits in the United States, March 2009 (U.S. Bureau of Labor Statistics September 2009) available at <http://www.bls.gov/ncs/ebs/benefits/2009/ebb10044.pdf>.

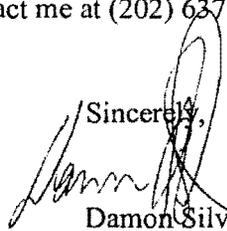
In the event of a plan termination, Title IV of the Employee Retirement Income Security Act of 1974, as amended, (ERISA)² provides critical protections to plan participants and establishes procedures to follow when a standard or distress termination is to occur. *See* ERISA Section 4041(b) and (c).³ For participants, as well as their collective bargaining representatives, the required advance notice of the plan termination and the notice of plan benefits, in the case of a standard termination, are vital. They provide necessary information about the status of the plan, the benefits to which participants are entitled and the party responsible for guaranteeing those benefits when an annuity is purchased.

We share the PBGC's concerns that these important protections could be circumvented through the purchase of irrevocable commitments before the plan administrator or plan sponsor begins the standard termination process. We are, however, unaware of cases where advance purchases have occurred, other than those described in the request for comment, and we would like to see full development of the relevant facts regarding the scope and extent of the perceived problem. Absent that information, it is difficult, if not impossible, to provide meaningful comments to the agency and, importantly, to ascertain whether the regulatory process is the most appropriate forum to address the issues raised by the PBGC.

We are particularly concerned about whether the intended result of protecting participants and the benefits they have earned will be achieved through the guidance PBGC is considering. Providing a safe harbor allowing the advance purchase of annuity contracts could provide incentives for these transactions—an extremely troubling result. If the current economic situation has taught us anything, it is that the funded status of a defined benefit plan can change in an instant.

We hope our comments are helpful to the PBGC in its development of any guidance on the purchase of irrevocable commitments before a standard termination is initiated. Should there be any questions about our comments or if additional information from the AFL-CIO would be helpful, please do not hesitate to contact me at (202) 637-3953.

Sincerely,



Damon Silvers
Director of Policy and Special Counsel

² 29 U.S.C. §1301 et seq.

³ 29 U.S.C. §1341(b) and (c).

Filed electronically via the Federal eRulemaking Portal at www.regulations.gov

January 22, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington DC 20005-4026

Re: Comments on Purchase of Irrevocable Commitments Prior to Standard Termination

Dear Sir/Madam:

Dietrich & Associates, Inc. (Dietrich) appreciates the opportunity to comment on the Pension Benefit Guaranty Corporation's (PBGC's) inquiry on purchasing irrevocable commitments prior to standard termination.

Dietrich (www.dietrichassociates.com) is a leading employee benefits brokerage and consulting firm that specializes in providing defined benefit plan sponsors with terminal funding annuity placement solutions. We primarily focus on mitigating financial volatility through innovative risk management while minimizing administrative burdens.

As a major industry practitioner, we feel uniquely qualified to comment on this topic. Over the past decade, we have executed more than \$2 billion in annuity transactions. Our comments, therefore, are set forth below.

We ascertain that the PBGC has two key concerns as we read through Federal Register Vol. 74, No. 224 / November 23, 2009:

- Participants receive inadequate disclosures
- Assets may be insufficient upon actual termination

From a practitioner's perspective, the market has developed solutions for many questions posed by the PBGC. Current regulations and safeguards also exist that should ameliorate or dampen the concerns for irrevocable annuity purchases ahead of plan termination. We attempt to identify those solutions and safeguards while providing potential ideas for consideration.

We respectfully suggest that further regulation may have deleterious effects on sponsors maintaining defined benefit plans. Dietrich does not encourage plan terminations. We view

the annuity purchase as a useful liability management tool that meets ERISA regulations. Our suggestions attempt to weigh the need for fair practices balanced with sponsors' operational effectiveness.

Dietrich would like to offer the following suggestions for consideration:

- Irrevocable annuities prior to termination should continue unencumbered;
- Consider a PBGC notice requirement only for irrevocable annuities purchased within a specific timeframe;
- Consider notice to participants only for irrevocable annuities within a specific timeframe.

Finally, we ask the PBGC to view our comments and suggestions in a context where the discussion diverges between two prevailing realities. There is a discernable difference between:

- 1) Buying irrevocable annuities as an important, smart risk mitigation strategy and
- 2) Buying irrevocable annuities to hedge the annuity cost prior to undergoing the plan termination process.

These two issues may require different treatments that will be discussed in the following comments.

PBGC Comment Questions

A. What factors should the PBGC consider in determining if an irrevocable commitment is in preparation of a standard termination?

The determination of ironclad factors remains elusive. However, one item to consider is whether the plan is frozen. If a sponsor freezes its plan, then it is unlikely it will be unfrozen, albeit possible. If a plan decides to execute a hard freeze where participants do not receive additional accruals, then it is likely the plan will head toward termination at some point; the question is when. For soft freezes, these plans may lead to eventual termination, too; however, with less certainty as hard frozen plans. Our experience shows that frozen plans are generally more willing to purchase irrevocable annuities ahead of plan termination.

The main factors determining if a plan will make this prudent decision to buy irrevocable annuities prior to the plan termination are: a) whether it is overfunded or close to fully funded, and b) current interest rates. Higher interest rates correlate, all other things being equal, to lower annuity costs and potentially a better funded plan. Also, plans that have sufficient assets to perform a standard termination will be more amenable to

buying annuities ahead of the termination process in order to alleviate the risk of becoming underfunded or making larger contributions.

Our experience implies that sponsors purchase irrevocable annuities at opportune times when it most prudent to do so. Furthermore, sponsors only contemplate such transactions to ensure they can execute a standard termination. The obvious advantage is that the plan anticipates it will have sufficient assets to terminate the liability. Such a scenario benefits plan participants and the PBGC.

The purchase of irrevocable annuities does not necessarily foreshadow eventual plan termination. Historically, sponsors have used irrevocable annuities to defease their plan obligations. This strategy, considered prudent risk management, has been accomplished in mass or on a seriatim basis.

It may be impossible to develop specific factors for determining whether a sponsor who buys irrevocable annuities will terminate its liability. However, in aggregate, there are factors that may influence that decision.

B. Should there be a specific time period prior to a standard termination where a purchase is made and is determined to be related to a standard plan termination?

We stated initially that there is a difference between buying annuities for risk mitigation purposes and for hedging purposes. Our initial thought is a timeframe is not necessary; however, the answer to this question depends on the scenario.

Risk Mitigation Strategies - As a practical matter, regulatory bodies should encourage plans to defease their liabilities through irrevocable annuity purchases. Overwhelmingly the advantages benefit the participants, the plan sponsor and the PBGC. The participants obtain a benefit guaranteed by a "Safest Available Annuity" insurance company. The sponsor removes liability and volatility from its plan. And finally, the PBGC lowers the aggregate liability that it is accountable to insure.

These irrevocable annuities should be acceptable to the PBGC as long as the sponsor follows all regulatory due diligence and maintains its fiduciary responsibilities; i.e., DOL IB 95-1, non-discrimination rules, etc. With the prevalence of liability driven investing and the re-emergence of asset liability management, sponsors have once again contemplated bulk, irrevocable annuity purchases; they consider "carving out" or "laying off" a portion of their liability as a means of managing their risks.

Dietrich suggests that additional disclosures or reporting requirements are not necessary to execute these risk mitigation strategies. Coincidentally, they may strengthen defined benefit plan management.

Hedging prior to Termination – Assessing our data over the past two years shows the likelihood of buying irrevocable annuities is limited prior to plan termination. It occurred in only 10% of our actual executed placements. In those few cases, our experience tells us that plan sponsors will: a) primarily annuitize retirees only, b) consider a combination of retirees and terminated vesteds, and c) very rarely buy annuities for active liability (only occurred once in our analyzed data). With active liability annuity purchases prior to termination, a revocability provision is required, and this is further described on page 6. In practice, our data shows the vast majority of our annuity placements occur after the start of the termination process (90%).

If a sponsor wants to terminate its plan, then it needs to economically prepare for the event. Our experience tells us that all sponsors who contemplate irrevocable annuity purchases want to perform a standard termination, and as a part of that standard termination, they guarantee that funds will be sufficient. Hedging the liability by buying irrevocable annuities can help a sponsor manage its risks and determine the value of the guarantee they have made. It is almost certain that the annuity purchase will not transpire if the economics do not work.

When a sponsor prepares for termination, it will not execute an advanced annuity purchase if it creates underfunding issues. The current rules under the Pension Protection Act (PPA) cause adverse consequences if a sponsor has a funding level less than 80%. As noted by the PBGC in the preamble to its recently proposed “reportable events” regulations, the benefit restriction rules under Internal Revenue Code (IRC) Section 436 “prohibit or limit...annuitizations by significantly underfunded plans”. This provision already creates a significant deterrent that precludes the need for additional regulation if a plan sponsor wants to purchase irrevocable annuities ahead of termination. It is also the reason why in practice the funding issues should not be a concern, because sponsors are very sensitive to maintaining sufficient assets in these situations.

Notification – Understandably, a key PBGC concern is plan asset disposition right before termination. As stated above, if a plan follows all regulatory and fiduciary rules, then a plan should be able to purchase irrevocable annuities to hedge its liabilities. We would suggest that a timeframe not be imposed on sponsors as to how long prior to termination it can purchase irrevocable annuities.

An innocuous suggestion, if deemed necessary, is that sponsors alert the PBGC of such transactions when occurring prior to the termination process. However, to limit scope and avoid burdensome compliance, we suggest reporting should be confined only to significant annuity purchases (greater than 20% of liabilities) and occur only within a year prior to establishing a proposed termination date.

While the annuity purchase would have already been executed, the sponsor can still notify the PBGC that the transaction has occurred. We will discuss this in greater detail on page 7.

C. What information should be provided to participants for permissible purchases as part of a plan termination?

Disclosure is an important consideration for participants when the sponsor purchases irrevocable annuities prior to termination. A sponsor may annuitize benefits for retirees and perhaps for terminated vesteds also, but with less frequency. Based on current regulations, it is easier to use irrevocable annuities for retirees and terminated vesteds because there is a distributable event for these participants. In both scenarios either the participant has retired (retiree) or no longer works for the employer (terminated vested).

Retired & Terminated Vested Liability – As a result of the distributable event, retirees and terminated vesteds received information about their calculated pension benefits. Sponsors provide the benefit information, usually with assistance from their actuary, to the participant. Accordingly, the participant has an opportunity to assess the benefit and determine if there are any data errors used in the calculation.

The disclosure is no different than when in the course of individuals retiring or leaving the plan, the plan sponsor is responsible for providing applicable benefit information; e.g., in accordance with IRC mandated benefit disclosure requirements. Again historically and currently, in some cases, sponsors will purchase annuities for individuals and transfer the liability to an insurer immediately. In other cases where plans offer a lump sum option, a participant might receive a cash distribution in lieu of future monthly benefits. In both scenarios the liability leaves the plan and proper disclosure is provided to the participant. When the sponsor makes an irrevocable annuity purchase, then he/she has just purchased annuities in bulk instead of on a seriatim basis. Again, however, disclosures were previously provided.

An additional advantage of buying irrevocable annuities ahead of termination is the fact that the insurance company provides the participant with an annuity certificate, commensurate with state law, which identifies the amount the insurer is obligated to pay the participant. As part of the certificate process there is a second opportunity for participants to determine if they have the correct benefit (additional disclosure).

We suggest that current disclosure practices should suffice for irrevocable purchases for retirees and terminated vested liabilities.

Active Liability – For active liabilities, there is no distributable event when annuities are purchased prior to the plan termination. Therefore, in such situations, Dietrich requests a revocability clause as part of the annuity quotation and purchase process.

The PBGC may ask what information is provided to the active participants. Our current practice suggests that plan sponsors do not circumvent the PBGC process and provide Notice of Plan Benefit (NOPB) information to participants if they: a) recently purchased irrevocable annuities prior to beginning the termination process, and b) contemplated initiating the termination process in the near future (within a year). This provides disclosure information, as the sponsor undergoes the termination process, to the active participants whose benefits were purchased prior to termination.

Consider the following:

- Participants with distributable events obtain disclosures from sponsors;
- Active annuity purchases prior to termination utilize revocability arrangements;
- We advise sponsors on NOPB notification for imminent termination filings.

As an aside, when using risk mitigation strategies, plan sponsors may also purchase the accrued benefit of active participants. The plan may have no intention of terminating, but again utilizes the annuity strategy only as a risk management tool. In these cases, we suggest there should be no additional disclosure or reporting requirements.

D. How can employers “lock in” purchase rates including the costs and period of lock-in?

The frequency of lock-ins is a recent phenomenon. The lock-in rationale is solely a hedge against interest rate volatility. A terminal funding contract moves like a bond and varies with interest rates, so using a rule of thumb, a 20 basis point movement in rates may cost a plan sponsor about 2% in annuity price depending upon plan duration. The lock-in process mitigates this risk.

It is clear that many plan sponsors feel that buying annuities for retirees or terminated vesteds without a lock-in period is permissible because there is a distributable event, as stated above. Again, our experience demonstrates that sponsors use a lock-in when there are active liabilities being purchased.

Bidding – The revocability wording starts with the annuity quotation process. Inherent in this process, within the proposal and the commitment letter, each insurer must provide wording similar to the following excerpt:

“In the event the plan termination does not receive the regulatory approval by the PBGC and/or IRS, then the [Insurer] will rescind the Contract and return premium, less retirement payments with interest, and a market value adjustment.”

Each insurer uses slightly different revocation wording and market value adjustment formulas. However, in all cases, the wording allows the sponsor to extricate itself from the contract if the appropriate approvals are not received. Generally, plan sponsors pay no upfront costs for entering into such an annuity contract. The market value adjustment works, in principle, like redeeming a bond prior to maturity.

E. Should a safe harbor be provided including any specific considerations and disclosure requirements?

On the presumption that plan sponsors will continue to buy irrevocable annuities prior to the termination process, the PBGC should provide a safe harbor if the sponsor does the following:

- Utilizes the safest available annuity guidelines;
- Provides NOPB disclosure to participants for irrevocable annuities purchased within a year of the proposed termination date.

Considering that participant safety is of utmost importance to the PBGC, then it is critical that sponsors follow DOL Interpretative Bulletin 95-1 (29 CFR 2509.95-1) in the purchase of annuities. These guidelines ensure that sponsors perform due diligence and meet their fiduciary responsibilities in purchasing irrevocable annuities.

At minimum, current rules promulgate that plan sponsors follow regulatory guidelines and fiduciary responsibilities if purchasing irrevocable annuities. Additionally, it may be a smart practice to provide NOPB type information primarily to active participants if irrevocable annuities are purchased within a year of the proposed termination date. It should not create an onerous burden for plan sponsors.

F. How could the PBGC identify plans that purchase irrevocable commitments prior to a termination?

We suggest if a sponsor utilizes annuities as a risk management tool, there should be no additional reporting requirement for the plan sponsor beyond the current standard Form 5500. As part of the Form 5500, Schedule H and Schedule I information provided to, among others, the PBGC, plan sponsors are required to report expenses associated

with payments to insurance carriers to provide benefit payments, e.g., paid-up annuities.

The PBGC might also consider, again if necessary, modifying the rules under the advance notice of reportable events. ERISA §4043(c)(12) requires reporting to the PBGC when, in any 12-month period, 3% or more of a plan's benefit liabilities are transferred to a person outside the transferor plan's controlled group or to a plan or plans maintained by a person or persons outside the transferor plan's controlled group. If a block of annuities is purchased, then perhaps it can be construed as an indicator that a sponsor may be contemplating plan termination.

However and more importantly, this consideration (and the rationale behind it) should align with the proposed waiver for benefit transfers resulting from annuitization or lump sums contained in the recently proposed reportable event regulations. It is possible that the PBGC may view that these types of transfers are an unnecessary reportable event.

As discussed earlier, it is important to differentiate between buying irrevocable annuities as a risk mitigation strategy versus for hedging purposes relating to plan termination. It is important to acknowledge that irrevocable annuity purchases do not necessarily connote a sponsor will terminate its plan. For these reasons, we suggest if the PBGC contemplates a change, that it incorporates a one year window because it possibly presages intent. Finally, in order to ensure orderly compliance, we suggest that guidance only apply when irrevocable annuity purchases are greater than 20% of liability. Some waiver or exemption may need to be contemplated for smaller plans.

Dietrich proposes these minimal, but impactful changes because they should not burden sponsors. If a plan sponsor commences the termination process and has purchased irrevocable annuities within a year of the proposed termination date, then the plan sponsor would need to alert the PBGC.

Insufficient Assets - Our experience shows that plan sponsors who buy irrevocable annuities right before plan terminations are doing so to ensure they have sufficient assets to facilitate a standard termination.

The question becomes, what is the likelihood that after the sponsor judiciously plans to hedge its risks, for perhaps a portion of its liability (retirees and maybe terminated vesteds), that it will have insufficient assets to cover its remaining liability? We think the possibility is fairly remote. Again, a prudent sponsor will not execute a transaction if the overall economics do not work.

A situation in which a sponsor has insufficient assets resulting in a distress termination as a **direct** result of any advanced irrevocable annuity purchase should be an extremely

rare event. However, any negligent sponsor can circumvent any rule, so the question becomes, does potential, additional regulation warrant action or deterrence? Current PPA requirements and prudent fiduciary and regulatory guidance are serious enough deterrents to prevent egregious or even minor abuses. The issue, therefore, is not the purchase of irrevocable annuity purchases ahead of termination. The issue is how to prevent potential abuses from sponsors that circumvent the spirit of good pension management.

Any significant changes to irrevocable annuity purchase rules may have very minimal effect on poor fiduciary decisions/behavior. However such changes could have a significantly negative impact on good, prudent risk pension management and might have a worse long-term impact on the PBGC.

G. Suggested penalties and guidelines for penalties

If the PBGC requires reporting, then the same penalties that are in effect for failure to do advance reporting might suffice.

We hope these comments are helpful and would appreciate the opportunity to expound on ideas and thoughts outlined with the PBGC.

Sincerely,

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US Chamber of Commerce

January 22, 2010

Pension Benefit Guaranty Corporation
1200 K St NW
Washington, DC 20005-4026

RE: Request for Comment on Purchase of Irrevocable Commitments Prior to Standard Termination

To Whom It May Concern:

On behalf of the US Chamber of Commerce, we submit this letter in response to a request for information from Pension Benefit Guaranty Corporation (the "PBGC") on the purchase of irrevocable commitments prior to a standard termination under section 4041(b) of ERISA.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Chamber members believe that the purchase of irrevocable commitments should depend on the facts and circumstances surrounding the purchase. However, we realize that there may not be resources to utilize such a process for all purchases. Therefore, we believe that there should be a safe harbor for certain purchases.

A safe harbor will allow certain plan sponsors to purchase irrevocable commitments without fear of being found in violation of the regulations. The safe harbor should require that the irrevocable commitments be purchased for a specific purpose; that the plan assets were at least equal to plan benefits at the time of purchase; and that the standard termination notice be given to beneficiaries covered by the irrevocable commitment. We believe that a safe harbor with these requirements will address the concerns of the PBGC during a standard termination.

The request for comments indicates two primary concerns with irrevocable commitments. The first concern is that the purchase of irrevocable commitments circumvents the statutory and regulatory protections afforded under the standard termination process. In particular, that plan participants do not receive adequate notice and that the PBGC does not receive adequate information to determine whether participants receive correct benefits. To address this concern, we recommend that the safe harbor require the standard termination notice to be given to beneficiaries covered under the irrevocable commitment, including the 60-day review period. Currently, beneficiaries covered by an irrevocable commitment do not receive notice of the standard termination. By requiring that they receive notice, these participants will have adequate notice to make any changes.

Moreover, the irrevocable commitment should include a representation that it is subject to later review and audit by the PBGC. Thus, if the PBGC has an issue with the irrevocable commitment they will still have the opportunity to nullify it. Through this requirement, the PBGC can determine during the standard termination process whether the purchase of the irrevocable commitment provides sufficient benefit coverage.

The second concern of the PBGC listed in the request for comments is that plan assets are sufficient for plan benefits at the time of the distribution resulting from the termination. To address this concern the safe harbor should require that, at a minimum, plan assets – including the irrevocable commitment – be equal to benefits at the time of purchase. The safe harbor can also require an actuarial certification that, taking into account the plan sponsor’s commitment to fund the plan, there will sufficient assets. The financial requirement addresses the PBGC’s concern about insufficient assets while using a determination date will provide certainty for plan sponsors.

Finally, we suggest that safe harbor require that irrevocable commitments be purchased for the purpose of locking in rates with an insurer to ensure plan sufficiency. This requirement will be based upon the statement of the plan sponsor.

We do not believe that there should be a time period associated with the safe harbor. The two concerns of the PBGC associated with the purchase of irrevocable commitments are adequate notice to participants and ensuring that there are sufficient assets. Neither of these concerns is addressed by the timing of the purchase of the irrevocable comments. Rather, creating a safe harbor that requires a specific purpose for the purchase, notice to beneficiaries covered by the irrevocable commitment, and certain financial requirements as described above addresses the PBGC’s concerns.

Nonetheless, a safe harbor should be only that – a way to ease oversight burdens for the agency and to provide certainty for plan sponsors. A purchase of irrevocable commitments that does not meet the safe harbor should be subject to a facts and circumstances review by the PBGC. This review should be the ultimate determination of compliance by a plan sponsor.

Thank you for your consideration of these comments. As you continue to review this issue, we are happy to offer additional suggestions and comments.

Sincerely,



Randel K. Johnson
Vice President
Labor, Immigration & Employee
Benefits
U.S. Chamber of Commerce



Aliya Wong
Executive Director, Retirement Policy
Labor, Immigration, & Employee
Benefits
U.S. Chamber of Commerce



AMERICAN ACADEMY *of* ACTUARIES

VIA EMAIL: reg.comments@pbgc.gov

January 25, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW.
Washington, DC 20005-4026.

RE: Request for Comment on Purchase of Irrevocable Commitments Prior to Standard Termination

To Whom It May Concern:

I am writing to you on behalf of the Pension Committee of the American Academy of Actuaries¹ in regard to the Pension Benefit Guaranty Corporation (PBGC)'s request for comments concerning the purchase of irrevocable commitments prior to initiating a standard plan termination under ERISA Section 4041. The Pension Committee appreciates the opportunity to provide comment on this matter.

While there are legitimate concerns about such purchases, the Department of Labor (DOL) has taken a position of encouraging annuitization². Some Members of Congress have also expressed an interest in policies to encourage annuitization³. We believe adopting policies that encourage annuitization by plan sponsors would be consistent with the PBGC's mission to protect workers' retirement income by providing timely and uninterrupted payment of pension benefits.

We understand the PBGC's concern over the use of irrevocable commitment purchases prior to the initiation of a standard termination possibly being used to circumvent participant rights and protections afforded by the PBGC's standard termination regulations. However, we believe that plan sponsors generally make use of irrevocable commitments as a means of legitimately managing the risk and financial health of their defined benefit plans and the PBGC's concerns are likely the result of focus on bad actions on the part of a few employers, rather than a broad intention to evade the PBGC regulations and endanger the benefit security of plan participants. We therefore encourage the PBGC to weigh the potential benefits to plan participants and sponsors in determining its future stance on annuity purchases outside the standard termination process.

Our comments generally fall into three categories:

- Benefits to plan sponsors and participants in allowing the continued use of irrevocable commitments prior to standard termination;
- Issues related to establishing a rebuttable presumption that irrevocable commitments prior to initiating a standard termination are related to the standard termination; and

¹ The American Academy of Actuaries is a 16,000-member professional association whose mission is to serve the public on behalf of the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

² Rule 10/07/2009 74 FR 51664. EBSA also will explore steps it can take by regulation, or otherwise, to encourage the offering of lifetime annuities or similar lifetime benefits distribution options for participants and beneficiaries of defined contribution plans.

³ H.R. 2748

- Recommendations to address the PBGC's concerns regarding circumvention of the statutory and regulatory protections afforded plan participants in a standard termination and the potential for the purchase of an irrevocable commitment to lead to a distress termination.

Benefits to Plan Sponsors and Participants

Plan sponsors may use the purchase of irrevocable commitments as a tool for managing the risks associated with sponsoring a defined benefit plan or for other legitimate business purposes. Plan sponsors take substantial risks when plan assets are not aligned with plan liabilities. One way to match assets and liabilities is through the purchase of irrevocable annuities. This is especially critical where plan assets and liabilities represent a substantial portion of the total corporate financial picture. There can also be other legitimate business purposes for purchasing irrevocable commitments, some examples of which include:

- **Purchasing annuities following a rise in interest rates to settle a portion of the plan's obligations at a reduced cost.** This purchase can increase the security of benefits for the remaining participants in the plan by settling a portion of the obligation at lower cost than available at a future date, leaving more plan assets available to cover the cost of remaining benefits at that future date.
- **Purchasing annuities gradually over time to allow for orderly settlement of the obligation and reduction of the impact of the plan termination on the employer's financial statements.** Rather than incur a large one-time charge at plan termination, employers may want to recognize settlement charges in smaller increments over a period of several fiscal years. Some employers may also consider using cash contributions made to the plan each year to purchase annuities and methodically retire their benefit obligation rather than investing the cash in other securities.
- **Purchasing annuities for deferred vested participants allows plan sponsors to minimize the risk and burden related to tracking these participants.** Retirees and active participants are relatively easy to track, but maintaining records and paying PBGC premiums on former employees following termination can be burdensome and costly. By transferring that obligation to an insurance company the plan sponsor may reduce the administrative expense related to operating the plan and thus improve plan funding (if those expenses would have been paid from plan assets).
- **Purchasing annuities to facilitate, or in conjunction with, a corporate transaction such as the sale of division or subsidiary.** If participants affected by the transaction will no longer be employed by the plan sponsor, settling the obligation at the time of the transaction allows for purchase of an irrevocable commitment at a time when sufficient data is available to do so (and when a potential buyer in such a transaction would be willing to cover the cost of the purchase). Delaying purchase of an irrevocable commitment can increase the cost to obtain data of the necessary accuracy to complete the settlement. (See discussion above regarding annuity purchase for terminated vested participants.)

Issues Related to Establishing Rebuttable Presumption Periods

The PBGC has asked for guidance on:

- What factors should be taken into account in determining whether the purchase of irrevocable commitments prior to the first day a Notice of Intent to Terminate (NOIT) is issued in a standard termination is in preparation for that termination; and

- Whether there should be a rebuttable presumption that a purchase of irrevocable commitments made within a specified period (e.g., one year) before the first day a NOIT is issued in a standard termination (and if so, what time period) is in preparation for that termination.

While some plan sponsors may attempt to use the advance purchase of annuities to circumvent the PBGC's notification and reporting requirements related to a standard termination, we believe the uses of annuity purchases discussed above make it clear that there are some important reasons for allowing these purchases by plan sponsors.

Our primary concern regarding the implementation of a prolonged presumption period is that doing so may deter a plan sponsor employing one of these legitimate strategies from subsequently initiating a standard termination at a time when the cost to settle the obligation is decreased (e.g., due to favorable pricing conditions) and the plan is sufficiently funded. In light of this concern, if a rebuttable presumption period is instituted, we would recommend a relatively short period, such as 60 or 90 days. As noted previously, we believe the focus should be on factors such as the purpose for the purchase of the irrevocable commitment more so than on the specific timing of the purchase.

Recommendations to Address PBGC Concerns

We believe there are three primary means to address the concerns expressed by the PBGC in the request for comment. Any or all of these would benefit plan participants and provide the PBGC with the information necessary to distinguish those irrevocable commitment purchases that are meant to circumvent the participant protections afforded by the statute and regulations from those that are made for legitimate business reasons.

- Require plan administrators to notify the PBGC when a portion (or all) of the benefits under a plan are to be secured by the purchase of annuities, provided:
 - i. The portion settled exceeds 5 percent of the total benefit obligation (as smaller purchases should not put the plan at significant risk).
 - ii. The plan's funded level after the annuity purchase, as measured by the target liability funded ratio using IRC Section 430 funding target assumptions and market value of assets, but without offset by the carryover and prefunding balances, is under 80 percent.
 - iii. The report is required to be rendered within 60 days after the event.
 - iv. Plans settling only the highest ERISA §4044 priority categories of plan benefits are exempted.⁴
 - v. Plan sponsors subject to reporting are required to report only information already available (e.g., plan assets, funding target liability for the plan and the group being settled, and the amount of the settlement) rather than having to incur additional cost to produce information not already determined in the course of plan operations.
- Plan administrators are to also provide a Notice of Annuity Information and Notice of State Guaranty Association Coverage of Annuities to all affected plan participants and the PBGC in advance of the irrevocable commitment purchase. In the context of a standard plan termination, such notices are required 45 days in advance of the annuity purchase. However, for reasons outlined above, this same timing requirement may present a significant challenge to a plan

⁴ ERISA Sections 4044.11, .12 and .13.

sponsor attempting to capture a favorable pricing scenario for a segment of their participant population. We recommend a shorter advance notification period if the annuity purchase is prior to the standard termination (e.g., 15 days in advance of final payment on the contract). Providing these notices to participants and the PBGC could constitute the type of safe harbor that the PBGC has contemplated in its request for comments.

- Require that when a plan sponsor purchases an irrevocable commitment it also demonstrate that the purchase complies with the DOL Interpretive Bulletin 95-1 standard (i.e., that the plan sponsor purchased the safest available annuity).

In closing, we believe the ability to purchase irrevocable commitments prior to initiation of a standard termination is consistent with published public policy of the Department of Labor. It is a valuable tool for plan sponsors in managing the risks associated with their plans and, when used appropriately, can increase benefit security for plan participants. Implementing certain reporting and notification requirements can deter those few plan sponsors not acting in good faith when entering into such transactions and allow the PBGC to more easily identify those transactions that could lead to future plan underfunding and insufficiency.

We would be happy to discuss any of these items with you at your convenience. Please contact Jessica M. Thomas, the Academy's pension policy analyst (202-785-7868, thomas@actuary.org) if you have any questions or would like to discuss these items further.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. H. Moore', with a long horizontal flourish extending to the right.

John H. Moore, FSA, MAAA, EA, FCA
Chairperson, Pension Committee
American Academy of Actuaries



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January 22, 2010

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Ms. Constance Markakis, Esq. and Ms. Catherine B. Klion, Esq.
Pension Benefit Guaranty Corporation
Legislative and Regulatory Department
1200 K Street NW, Suite 12300
Washington, DC 20005-4026

Re: Proposed Amendment to 29 CFR Part 4041

Dear Ms. Markakis and Ms. Klion

We do not believe that the purchase of an irrevocable commitment before a standard termination should be restricted or be subjected to further scrutiny, notice requirements, penalties or other regulatory actions. It is our belief that there is sufficient understanding of the responsibilities for fiduciaries in determining the best course of action to assure that the interests of participants are satisfied as a first priority. This view applies to either an anticipated standard termination, a frozen plan or an ongoing plan.

We are compelled to recall that when investing plan assets, and ERISA fiduciaries must act solely in the interest of plan beneficiaries and "with the care, skill, prudence, and diligence [of] a prudent man acting in a like capacity and familiar with such matters."¹ It is also clear that fiduciaries must not engage in transactions which would be viewed as self-dealing.² Furthermore, there is already a responsibility under ERISA in the event of a possible breach since fiduciaries "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary."³

We are further motivated by that fact that those responsibilities are articulated in plan documents in part with language consistent with that purpose:

"By diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it would be deemed prudent to not do so;
and,

¹ 29 USC 1104 (a)(1)(B)

² 29 USC 1106

³ 29 USC 1109 (a)

In accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provision of ERISA.”

In regard to your request, we provide views reflecting that position for each point:

1) Factors PBGC should take into account in determining whether a purchase of irrevocable commitments before the initiation of a standard termination is related to the standard termination.

There is no time limit or contingent point of time in making a decision to terminate a plan. Plan administrators are at all times responsible for the disposition of plan benefits for all participants. Fiduciaries are compelled to take adequate actions to assure any and all benefit commitments, whether for a frozen plan, a soft-frozen plan or an ongoing plan. In a challenging and changing world of macro economic circumstances affecting over funding, under funding, and risk, the purchase of irrevocable commitments is the critical element which can either prevail or defer an ultimate standard termination.

Any attempt to limit or curtail the process of de-risking so that participants can be assured of benefits promised is contradictory to the responsibility of plan fiduciaries in performing their ERISA responsibilities. Furthermore, the purchase of irrevocable commitments does not relieve the plan fiduciary of their responsibility to participants until the plan termination is complete, including the performance of the PBGC audit process.

2) Whether there should be a rebuttal presumption that the purchase of irrevocable commitments made within a specific timetable period before the first day a NOIT is issued in a standard termination is related to a standard termination and if so, whether time period.

We do not believe that a timetable for a rebuttal presumption is appropriate. There are no such timetables associated with any aspect of the purchase, sale or disposition of any other plan assets in any other form. The use of a timetable introduces elements of increased financial risk and raises the possibility that such a purchase could be subjected to an arbitrary point only to become potentially unworkable in the future. In a practical sense, this places the cumbersome task of attempting to be predictive of all future outcomes. This serves only to place unnecessary burdens upon plan sponsors. Such timetables may have severely impacted such purchases based upon recent events impacting the financial markets.

3) Whether there should be a safe harbor period for a purchase of irrevocable commitments under specific circumstances before the first day of a NOIT is issued in a standard termination. If so, what time period should apply? Whether a safe harbor should be conditioned on the purpose of the purchase. Whether a safe harbor should be limited to plans in which plan assets exceed plan benefits by a certain margin. If so, by what margin and as of what date? What reporting and disclosure requirements should be required with a safe harbor?



We do not believe that a safe harbor period is workable based upon experience. Such a safe harbor is unnecessary due to the already present duty of fiduciaries when preparing to settle the plan obligations. Such a safe harbor should not be conditioned upon a level of excess plan assets. Many plan sponsors may fund their plans adequately only to find that they are then saddled with confiscation of such excess with excise tax burdens. The process of a plan termination may take more than two years. During this time many details may be found about the participant data, correction to precise actuarial equivalency factors, discovery of unreported deaths, and determination of appropriate lump sum distribution calculations. These actuarial errors can wind up as completely unnecessary costs. Those excise costs only serve to create a dim view of defined benefit plans in the minds of some plan sponsors.

4) How PBGC can better identify plans that purchase irrevocable commitments for some or all participants shortly before the initiating a standard termination.

A written communication should suffice, although such a notice serves little practical purposes. Arranging for an annuity as a possible risk mitigation technique need not lead to a standard termination decision for some time period, based upon other circumstances. Part of the process of preparing for a plan termination may include the delays associated with relevant plan amendments and updates yet to be completed and finally submitted to the IRS for a final determination letter to assure that the plan is in good order. Once in process, a final determination letter may be comparatively far into the future.

5) Appropriate enforcement actions in the case of a purchase of irrevocable commitments before the initiation of a standard termination.

We do not believe that there is a need for any enforcement actions because fiduciaries are held to their duties in performing their settlor function.

6) Appropriate information penalties for failures to provide notices and disclosures required as part of the termination process, including guideline information penalty amounts and aggravating and mitigate factors.

The imposition of penalties, if any, for failures to notify should be consistent with similar actions.

7) In the case of a permissible purchase of irrevocable commitments in accordance with 4041.22(b) made after a NOIT is issued, what information should the plan be required to provide to participants? To PBGC?

We believe that it is sufficient to submit the NOIT regarding the possible providers and information regarding state association guaranty provisions. The selection of an annuity provider is a function of the plan fiduciary, or the named fiduciary to which that responsibility is designated. In its Interpretive Bulletin 95-1, the Department of Labor provided guidance about the purchase of annuities, as a response to concerns about insurance company insolvencies at the



time of its issuance.⁴ Fiduciaries are compelled to adhere to the requirements for ERISA “procedural prudence” as that term is defined in Bussian v. RJR Nabisco, Inc., 223 F. 3d 286 (5th Cir. 2000) [“Bussian”] in which a fifth circuit court found the Bulletin merely “instructive” and reinterpreted its guidance in light of the fundamental fiduciary duty requirements of ERISA.

Messrs. Joseph B. Bellersen, Jr. and Alfred A. Turco, Esq. have written a definitive analysis of the requirements for ERISA Procedural Prudence for selection of an annuity provider in light of Bussian.⁵

8) What are employers’ experiences with “locking in” rates for purchases of irrevocable commitments? What are the costs of locking in rates and how long do locking rates remain in effect? In the case of annuity contracts that are purchased as an investment vehicle, can plans lock in rates for the conversion of these contracts to irrevocable commitments at a future date and if so, at what costs and for how long?

The cost of locking in rates for annuities is determined in a spot annuity pricing market. The annuity market is dynamic, and volatile at times. QAS has developed a proprietary QAS’ Annuity Settlement Index⁶ model to track these rates over time. At times, discounts to may vary widely from various PPA funding rate levels. Depending upon what type of strategy is needed, cost to a plan sponsor cost can be extremely high or very low when compared to the liability.

Clients have successfully adopted strategies which have had significant impact on the outcome of eventual plan termination.⁷ Contracts allow for provision of guaranteed settlement rates and the establishment of an allocated participant contract with discretion. There are many contract forms available to the market. Some contracts are more specific as to how they replicate the annuity benefit payments due while others merely provide for a cash flow and do not necessarily mirror the plan provisions. It is important to distinguish between contracts which provide embedded conversion guarantees and contracts which provide exact replication of plan benefits in all forms.

The State of New York defines Closeout Contracts and Terminal Funding Contracts in which it distinguishes between a contract sold to satisfy all plan benefits (Closeout) and a contract which provides for purchase of benefits for retired or terminated vested participants (Terminal Funding). These provisions relate to the separate activities and to the potential operation of a

⁴ Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA When Selecting an Annuity Provider, 29 CFA 2508.95-1 © (1995)

⁵ “ERISA Procedural Prudence: The Appropriate Standard for Selecting an Annuity Provider”, *Journal of Pension Benefits* Volume 10, Number 2 Winter 2003©

⁶ QAS’ Annuity Settlement Index is an unpublished proprietary index maintained by QAS for monitoring various aspects of pension cost over time.

⁷ See attached memo to Mr. Joseph B. Bellersen, Jr., from Mr. Christopher Horsburgh, President, The Horsburgh & Scott Co. (with permission)



plan over time.

QAS has had very favorable client experience with regard to strategies for arranging irrevocable commitments. In fact, Mr. Scott's personal response to this issue reiterates the importance of obtaining desired results: "Only the participants benefit."

Over the past two and one half years, the QAS' Annuity Settlement Index has illustrated significant price volatility as compared to select PPA funding rates. The difficulty for many businesses is the struggle with the burden of risks while balancing their desire to meet promises to participants. Many businesses suffer somewhat equally when markets decline, such as at the present. Some businesses may thrive allowing them to better sustain funding and thus consider de-risking with annuities which may, or may not, be viable for others.

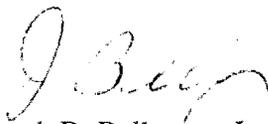
To curtail or limit flexibility to an open market would impact negatively and potentially adversely upon many plan administrators. We believe that plan administrators who are seeking to terminate their plans should seek competent expertise in the matters and should do so with the view that such transactions are subject to the procedural prudence requirements of ERISA.

We have witnessed extraordinary times in which few plans considered the advantages of annuities to de-risk their plans and to provide further benefit security for participants. Such risks may have been prompted due in part to concerns about the financial health of the life insurance company provider universe as a whole. This too, is a matter that can be effectively mitigated by the insurance provider market at this time. And as noted any such actions are already subject to the requirements for ERISA standards for prudence as articulated in *Bussian*.

Thank you for the considering QAS' comments in this regard. QAS would be pleased to discuss the matter further.

Sincerely,

QUALIFIED ANNUITY SERVICES, INC.



Joseph B. Bellersen, Jr.
President





August 21, 2009

Mr. Joseph B. Bellersen, Jr.
President
Qualified Annuity Services, Inc.
260 Northland Blvd., Suite 212
Cincinnati, OH 45246-3651

Dear Joe,

I just wanted to take a moment as I reflect on the assistance you provided in arranging for our annuity for our pension plan. Even though we are still waiting for our IRS determination letter, we find great comfort in knowing that we completely avoided market risks which we might have otherwise have been disastrous.

When we first discussed arranging an annuity, we could not have anticipated the changes in economic circumstances that would unfold. You asked us to consider the importance of providing secure retirement income for all our participants. We value our employees and we decided that we wanted to continue a secure retirement income for them.

You provided significant guidance when your suggestion to arrange an annuity in advance of plan termination was challenged by our actuary. The fact that you had experience with our counsel in that very same issue was invaluable to our moving forward. You arranged for the selection of the annuity provider in a named fiduciary capacity, which provided us with a great deal of assurance. Your recommendation was supported with information that clearly demonstrated your approach to the selection was within a disciplined process. All of these factors created a great deal confidence in your services.

We had no idea that we would face one of the most serious economic downturns in the past few decades. As those dramatic financial events unfolded, we were very fortunate to have arranged the annuity in advance of termination and to know that we had missed all of the equity and interest rates risks which may have been devastating to our plan.

We are certain that we fulfilled our duties under ERISA by engaging QAS to select the annuity provider as an ERISA named fiduciary. We believe that our participants have been well served. It would be my pleasure to speak with any plan sponsors about your services and to strongly encourage them to retain your services.

Sincerely,

THE HORSBURGH & SCOTT CO.

A handwritten signature in black ink, appearing to read "Chris Horsburgh". The signature is fluid and cursive, with a large initial "C" and "H".

Chris Horsburgh, President