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 Actuaries[1] 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 annuitization[2]. Some Members of Congress have also expressed an interest in policies to encourage annuitization[3]. 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

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[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

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- 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,

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

1850 M Street NW Suite 300 Washington, DC 20036 Telephone 202 223 8196 Facsimile 202 872 1948 www.actuary.org