Qualified Annuity Services, Inc.

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January 22, 2010

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,

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[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 Index[6] 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

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

[5] "ERISA Prodcedural 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."

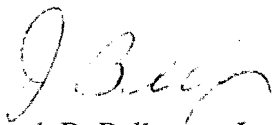
Over the past two and one half years, the QAS' Annuity Settlement Index has illustrated significant price volatility as compared to select PPA funding rates. The difficulty for many businesses is the struggle with the burden of risks while balancing their desire to meet promises to participants. Many 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.

Chris Horsburgh, President