March 6, 2002

Mr. Robert J. Doyle, Director
Office of Regulations and Interpretations
Room N5660
Pension and Welfare Benefits Administration
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Request for Advisory Opinion regarding Limitation of Liability and Indemnification Proposals from Actuarial Firms

Dear Mr. Doyle:

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), a national, nonpartisan, non-profit organization of multiemployer pension, health and welfare plans and their labor-management sponsors, joins with the Central Pension Fund of the International Union of Operating Engineers and Participating Employers ("CPF") in its request for guidance from the Department of Labor regarding the issue of limitation of liability and indemnification sought by several actuarial firms performing valuations of multiemployer defined benefit pension plans as required by ERISA § 103. As you have undoubted discerned from your review of the facts in the CPF submission, the subject of this request has significant ramifications, both legal and practical, beyond the presenting case. Because we represent the interests of the multiemployer plan community at large, we believe that the both the Department and the NCCMP have a common objective in seeing that fund trustees and other fiduciaries are provided with appropriate guidance in this matter and we would welcome the opportunity to meet with you to discuss this matter in depth.

Background

Many of the largest actuarial firms in the country have recently reported that they are requiring, or considering requiring, the type of limitation of liability and indemnification clauses which precipitated CPF's submission in this matter. In a January 21, 2002 article appearing in Pensions & Investments magazine (included as Exhibit 2 with the CPF submission), Watson Wyatt Worldwide, Towers Perrin and William M. Mercer, Inc. were all reported to be requiring these clauses, while Milliman USA and The Segal Company were reported to be studying the situation. Each of these firms is a large national organization that has traditionally provided actuarial services to multiemployer pension and welfare plans throughout the United States. It is fair to say that, as a group, they are leaders in the industry.

Irrespective of the business considerations behind the motivation for these demands (which are briefly discussed below), they present a clear dilemma for multiemployer plans and their trustees and participants. Specifically, trustees may violate ERISA by

agreeing to such demands and, if agreed to, participants will be left without protection from errors caused by actuarial malpractice.

Discussion

For the reasons discussed in the submission of the CPF, we concur with their conclusion that a reviewing court might well conclude that trustees violate Sections 404(a)(1)(A), 404(a)(1)(B) and 406 (a)(1)(D) of ERISA by agreeing to the limitation of liability and indemnification clauses such as those proposed.

Because this is an issue of first impression, and one with enormous potential consequences for ERISA plans, guidance from the Department is necessary to assist trustees in addressing this issue in a manner consistent with their statutory obligations.

As suggested in the Pensions & Investments article, and discussed in greater detail in the CPF submission, the new demands for these clauses may have been precipitated by recent judgments and claims in actuarial malpractice cases, which have created an insurance dilemma for the firms involved, and possibly for the industry as a whole. If such a dilemma exists, however, it cannot excuse the trustees from their duty to act solely in the interests of plan participants and beneficiaries.

If actuarial firms are faced with a business challenge because of their past malpractice, they must make their own business judgments to address that challenge. If insurance markets have properly identified certain firms as unacceptable risks, then those firms may be required to refocus their business plan on that portion of the market for actuarial services that can legally indemnify them and limit their malpractice liability. ERISA plans are only one part of their potential market.

A wide variety of businesses other than ERISA plans utilize actuarial services, most notably life, health and casualty insurance companies. Such commercial clients are governed by the relatively liberal "business judgment" rule in deciding whether to accept financial liability for actuarial malpractice. They place corporate assets in jeopardy by accepting such liability. ERISA trustees, on the other hand, are governed by the more exacting "prudent man" rule, and place plan assets in jeopardy by accepting such liability.

As reflected in the comments of Watson Wyatt spokesman, Eric Lofgren, in the Pensions & Investments article, actuarial firms may regularly require such liability-shifting clauses from their non-pension fund clients. However, in attempting to extend those clauses to pension fund clients, we believe that actuarial firms are seeking to cross an uncrossable divide established by Congress.

Actuarial firms that are unable to secure malpractice insurance, and unwilling to expose their business assets to malpractice liability, may make a business judgment to withdraw from the ERISA market. While this may leave plan trustees with fewer firms to choose from, we believe that outcome to be far better for plan participants than accepting the enormous financial risks presented by these clauses.[1]

[1]The insurance consequences of such liability-shifting clauses are perverse. If the clauses are accepted, the actuarial firms are relieved of liability. As evidenced in the letter of the Chubb Insurance Group included as Exhibit 3 of the CPF submission, the CPF trustees have been advised that damages resulting from actuarial malpractice would not be covered by fiduciary insurance, and Chubb would not write an endorsement for the trustees covering such liability. Indeed, it would be puzzling if Chubb or any insurance company would insure any plan for actuarial malpractice. A fundamental of insurance underwriting is the ability to measure

Given the economic incentive to secure these clauses, and the apparent momentum of the leading national actuarial firms to pursue them, we are extremely concerned that if the Department, through action or inaction, signals that these clauses are acceptable, they will quickly become an industry standard. We are also concerned that, by extension, this policy would be a standard soon emulated by the other professionals relied upon by ERISA plans, namely, auditors and attorneys.[2]

Among the lessons of the current Enron debacle is that greater accountability must be required of the professionals whose opinions corporate shareholders and employees rely upon. Certainly there should be no lesser expectation of the professionals relied upon by plan participants for their heath and retirement security. Enron has resulted in a call for new legislation to require such accountability. We believe ERISA already requires such accountability, and we request that the Department reaffirm this fact and provide clear guidance to this effect in response to the CPF submission. This is especially true with respect to the actuarial profession because of the unique statutory position of the Department in the establishment of the Joint Board for the Enrollment of Actuaries.

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risk. There is no ability to measure the risk of actuarial malpractice if the applicant for such insurance is a board of trustees, not the actuary who actually performs the calculations and who has control over the quality of its work product. It's ironic that to measure the risk of such insurance, the underwriters would rely on professional actuaries.

[2] The limitation of liability and indemnification of these plan professionals is readily distinguishable from that routinely contained in the commercial contracts of other service providers retained by plans, such as data system consultants, internet service providers and bulk printers where trustees can objectively measure potential damages and agree to limit liability accordingly. With actuaries, auditors and attorneys the financial viability of the plans they serve is, virtually, always at stake.

The NCCMP would welcome an opportunity to discuss these issues and the related practical implications for plans and their trustees with the Department in order to obtain guidance as to how ERISA fiduciaries can respond to this situation. Please contact me at your earliest convenience to schedule such a discussion, or if you have any questions regarding this submission. Thank you for your consideration of this request.

Very truly yours,

Randy G. DeFrehn
Executive Director