AMERICAN ACADEMY *of* ACTUARIES

December 9, 2009

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VIA FACSIMILE

Re: H.R. 3936, the Preserve Benefits and Jobs Act of 2009

Dear Representatives Pomeroy and Tiberi:

The American Academy of Actuaries[1] Pension Committee respectfully submits comments for your consideration regarding H.R. 3936, the Preserve Benefits and Jobs Act of 2009. Our comments are not intended to advocate for or against any particular provision. Rather, we offer actuarial insights that are meant to help ensure the language in the single-employer defined benefit provisions of the final bill is clear and consistent with the intent.

Section 101 – Extended Amortization of Shortfall Bases

Section 101 provides for extended amortization of losses incurred during 2008 and 2009. If the plan sponsor elects to utilize either extended amortization method, there is an associated requirement to maintain an "active plan." This active plan requirement can be satisfied by either a defined benefit (DB), a defined contribution (DC), or a nonqualified plan option.

Covered employees under maintenance of effort requirement

The maintenance of effort provisions apply to employees "who would, but for any prior amendment ceasing accruals, be eligible for an accrual under the plan." We recommend that a time limit be put on the amendments ceasing accruals in this requirement – such as limiting it to employees for whom accruals ceased in the last five or 10 years – due to administrative difficulties in tracking historical plan freezes in the distant past. Consider a division of a company never covered by the DB plan. Presumably, the active plan requirement is not intended to require coverage be extended to such a division. However, if the division was covered by the plan 30 years ago and participation was frozen at that time, is the division required to be covered again at this time? If the plan was involved in any merger(s), or the employer was involved in

[1] The American Academy of Actuaries is a professional association with over 17,000 members, whose mission is to assist public policymakers 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.

any reorganization(s), which is quite common, it may be administratively impossible to determine which divisions might now need to be covered to satisfy the active plan requirement. Documentation may also not be available going back through the many plans and companies that may have been involved with a plan in the past.

Special delay of maintenance of effort requirement

The maintenance of effort requirement applies to "applicable plan years," which are generally the 2009 and 2010 plan years. Assuming the bill is signed into law some time in 2010, this provision would apply retroactively for 2009 and in many cases for part of 2010. This retroactive application would be particularly problematic for the nonqualified plan option -- by 2010 it would be impossible to undo compensation deferred in 2009. There is a special rule that provides for a delay in the maintenance of effort requirement in limited circumstances. We recommend extending this special rule to any plan year beginning before enactment.

Section 104 – Lookback for Credit Balance Rule

Generally, a plan may not use its credit balance for a plan year if the prior year funded ratio was less than 80 percent. Section 104 proposes, for plan years beginning after October 31, 2009 and before November 1, 2011, to look back to the funded status for the plan year beginning after October 31, 2007 and before November 1, 2008, if better. So, in a simplified illustration, the availability of the credit balance for the 2010 and 2011 plan years, in addition to the 2009 plan year, would be based on the 2008 funded status.

Along these lines, another change is worth considering. Assume a plan accelerates funding such that the funded status for 2011 is above 80 percent, while the funded status for the prior year is less than 80 percent (regardless of whether that is the 2010 funded status, under current law, or the 2008 funded status with the above relief). Such a plan would not be able to utilize its credit balance for 2011, despite the enhanced funded position. Unless there is a policy reason to restrict the use of credit balances based on the prior year's funding level, we recommend consideration of a change to allow reference to the current year’s funding level, if better than that of the prior year.

Section 108 – Social Security Level-income Options

This section would exclude Social Security level-income options from the benefit restrictions applicable to lump sums. Consideration should be given to expanding this provision to exclude other payment options from the restrictions where they do not pose a meaningful risk to plan solvency. This would avoid unnecessary restrictions, which are complex and costly to administer. The following forms of payment could be excluded:

1. Return of employee contributions in a lump sum – Even if a pension plan were to terminate with insufficient assets, under ERISA rules employee contributions have the highest priority claim on plan assets. Thus, it is unlikely that a restriction on employee contributions would divert plan assets that rightfully belong to other plan participants.
2. Cash refund annuity – This payment option is a variation of an annuity with a guaranteed number of annuity payments. Under the cash refund annuity, instead of receiving the remaining payments over a period of time following the death of a participant, the beneficiary receives the remaining payments in a lump sum. Since the lump sum only

applies upon death, this option would have a minimal effect on the assets available to pay benefits to other participants.

> **Note**: It is unclear whether the lump sum restrictions would actually apply to this payment form under recently published final regulations. The regulations define lump sum type payments as of an "annuity starting date." The annuity starting date is defined by reference to the annuity starting date for the qualified joint and survivor annuity payable at the same time, but there is no annuity option upon the participant's death, so the cash refund feature may not be restricted. (We also intend to follow up with the IRS and Treasury about the intent of the regulations. If the favorable interpretation of the regulations is correct, there would be no need to clarify this in legislation.)

3. Retroactive annuity starting date (RASD) – Of course, the restrictions cannot be avoided by applying a RASD and saying that the annuity starting date was before the applicability of the restrictions. However, RASDs are a common tool used by plan administrators since it often takes time for them to determine and pay benefits following a retirement or termination of employment. Using them should not transform a straight life annuity into an option subject to the restrictions because of a payment of a modest amount of back payments in a lump sum. A reasonable limit on retroactive amounts paid as a lump sum might be six to 12 months of monthly annuity payments, but no earlier than the termination of employment. Another special rule may be appropriate for plans with disability payments that are subject to a determination that the participant is eligible for Social Security disability benefits. The Social Security Administration can take up to two years to determine eligibility, so the allowable retroactivity should be extended in this case. If these exceptions are adopted, plans that currently provide for earlier RASDs should be permitted to be amended to restrict RASDs to those that comply with these limitations. This would allow the plan to avoid triggering the restrictions on accelerated distributions on account of a RASD provision. Such a change may require anticutback relief under IRC Section 411(d)(6).

Section 111 – Limitations on Ad-hoc Amendments

In short, this section would introduce a limit on "window" benefits that include a lump sum feature. For such an amendment to take effect, the plan would need to be 120 percent funded after the amendment (or alternatively, the cost of the amendment could be contributed).

As the proposed bill reads, it appears that if a plan is less than 120 percent funded, the company could allow the amendment to take place by funding the full cost of the additional benefits. However, if the plan is funded at or just above 120 percent, the company needs to contribute more than the full cost of the additional benefits. For example, suppose the liability is $100, and the assets are $120, with a funding level of exactly 120 percent. The cost of the amendment is $5. Under the bill, the company would need to contribute enough to reach 120 percent of $105, or $6. Meanwhile, a plan with a funding level less than 120 percent would only need to contribute $5.

We recommend a simple fix that would place a cap on the amount the company contributes equal to the full cost of the additional benefit. This could be accomplished by clarifying that the cost is the lesser of the items in Subsections I and II.

We thank you for this opportunity to share our thoughts on your proposed funding relief. We would be happy to meet with you to answer any questions. We are also available if there is any particular provision of possible funding relief that you would like to discuss. If so, please contact Jessica Thomas, the American Academy of Actuaries' pension policy analyst, at 202-785-7868 or Thomas@actuary.org. Thank you for your consideration of this matter.

Sincerely,

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