

AMERICAN ACADEMY of ACTUARIES

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January 5, 2018

Ms. Karen Smith
Nova Pension Valuations LLC
10777 Northwest Freeway
Suite 440
Houston, Texas 77092

Re: Proposed Revisions to ASOP No. 4

Dear Karen:

I write in response to your letter of January 2, 2018 concerning potential revisions of Actuarial Standard of Practice No. 4, *Measuring Pension Obligations and Determining Pension Plan Costs or Contributions*.

In the first instance, your comments are premature in light of the status of the work of the Actuarial Standards Board (ASB) and its Pension Committee. As you know, there is no draft of any proposed revision to ASOP No. 4 before the ASB at this time. While the ASB has asked its Pension Committee to draft language that would implement suggestions that the Pension Task Force (PTF) made in its February 2016 report, nothing has been sent to the ASB for consideration or vetted through the usual and comprehensive process that occurs as proposed standards are developed. As you noted, the *Actual Standard Board Procedures Manual* (“*Procedures Manual*”) states that the General Counsel must advise on potential antitrust issues when a “proposed exposure draft” exists. (See § IV.C.¹) Antitrust analysis is fact-intensive and can be done only when a concrete, proposed revised ASOP is ready for exposure. As no proposed exposure draft exists, at this stage, it is not reasonable or prudent for you to suggest that there is any potential antitrust risk in any proposed revision to ASOP No. 4.

Additionally, your letter implies that the role of the Academy’s legal review is to suppress consideration by the ASB and its committees of proposed exposure drafts or discussion of ideas and approaches based on complaints of outside parties. That is emphatically not the case. If there are clear legal issues during any ASB discussions, whether they arise under antitrust law or another area of law, Academy legal advisers will address those with the ASB in privileged communications. There is no reason to preempt the ordinary ASB process now, and I will not do so.

The ASB uses regular and detailed procedures in reviewing proposed revisions to the ASOPs before their release in draft form to the public. Under those procedures, the General Counsel must opine before the ASB’s consideration of any exposure draft or final standard that the draft

¹ Your letter also cites section VI.B of the *Procedures Manual*. That section applies to a “proposed final standard” and has no application, given that no proposed exposure draft exists.

or final standard has been prepared in accordance with ASB procedural requirements, does not pose any significant threat of violating antitrust laws and complies with applicable law and regulations. *Procedures Manual*, §§ IV.C and VI.B. Should the ASB receive a proposed revision to ASOP No. 4, I will review that proposal carefully, before it is given public exposure, for any potential antitrust or other legal concerns and ensure that it is prepared in accordance with the Academy Bylaws and ASB *Procedure Manual*'s requirements.

The aim of your letter appears to be simply to shut down debate of the suggestions set forth in the PTF report before the ASB process even starts. Whether that is because you are speaking for an economically interested group that opposes the suggestions in the PTF report or for some other reason, no warrant exists for any alteration of the regular ASB process for reviewing proposed amendments to the ASOPs. This is not to say that your views or the views of any other member of the profession or the public are not welcome in the context of exposure of a proposed standard. As you know, under the ASB's procedures, a draft ASOP is subject to extensive comments from all interested persons, be they actuaries or members of the public. It would simply be untenable if we were to allow the regular deliberative processes of the ASB or its committees to be impeded or undermined by the irregular outreach of third parties on the basis of their apparent self-interest.

For the reasons stated below, the hypothetical antitrust issues described in your letter are groundless. To begin with, while the PTF report itself clearly was and is a thoughtful and thorough examination of a myriad of issues and will continue to be a valuable source of information and analysis for the ASB, the PTF was not, is not, and will not be delegated any of the ASB's sole discretion and authority to promulgate actuarial standards of practice. Neither the PTF, nor the Pension Committee, nor any other group the ASB establishes to carry out administrative or advisory functions in support of its operations pursuant to its clear authority to do so in the Academy Bylaws (Article XI, Section 5) is delegated authority to promulgate standards. The mere existence of a recommendation or statement in the PTF report poses no antitrust risk whatsoever.

Against that background, from your citation of section 3 of the Clayton Act, 15 U.S.C. § 15, it appears that you are concerned that some of the suggestions in the PTF report would raise potential tying issues. Section 3 of the Clayton Act applies only to sales of commodities. Actuarial services are not commodities. Therefore, section 3 of the Clayton Act has no application to ASOP No. 4 or any other ASOP.

Tying arrangements could be challenged under section 1 of the Sherman Act, 15 U.S.C § 1, which does apply to services, but nothing in your letter offers facts suggesting that a potential plaintiff could establish any of the elements of unlawful tying. There is no basis or reason to believe that a potential plaintiff could establish that there are two separate products improperly tied together, that there is any market power in the tying product, or that any suggestion in the PTF report—if ultimately adopted by the ASB—is likely to harm competition in the market for the tying product, even assuming such a market actually exists.²

² We disagree that the comment letter you cited demonstrates concerns about the competitive effects of a hypothetical standard. The TowersWatson “principles” you endorse are unrelated to antitrust law; they address contract issues between an actuary and a principal. Nothing in the

Finally, your suggestion that certain legal requirements make Academy membership a necessity in some instances does not state an antitrust concern. The ASOPs are applicable to every U.S.-based organization that has adopted the Code of Professional Conduct. There is nothing different about the Academy in that respect. In addition, the Academy does not impose any such legal requirements. Legal requirements are established either by the federal government, the states, or some local jurisdiction. Legal mandates adopted by federal, state, or local jurisdictions are matters over which the Academy has no control and could not possibly affect any antitrust analysis.

Your letter also mentions a “due process concern” because actuaries whose practice is primarily private single-employer pension plans “have no representation on the ASB.” As you know, the ASB is not, and has never, been a “representative” body as you are suggesting. Members are not chosen because they represent certain interests or serve a certain segment of the public or work for certain employers. ASB members must and do check their employment affiliations and economic interests at the meeting room door when they serve. They must look at issues objectively from all perspectives and do what is in the public’s interest, by focusing on what are appropriate standards. The ASB is not driven by the economic interests of any member of the profession, employers, or one relatively small segment of the profession.

To the extent that members of some segment of the actuarial profession that primarily serves private, single-employer pension plans have particular concerns about any ASOP, they are similarly situated to all other actuaries. Long-standing ASB procedures provide ample and extensive opportunities for input into the standard-setting process. The exposure-and-comment process allows all interested persons the same opportunity to raise publicly any concern about a draft ASOP.

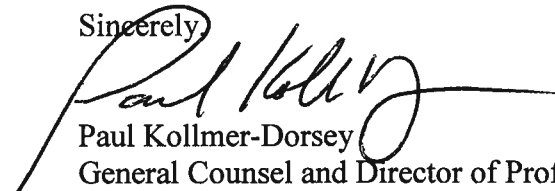
If any exposure draft that proposes to revise ASOP No. 4 is issued, you and other ACOPA and ASPPA members will be free to submit comments and provide information or make any arguments about why any proposed revisions are or are not appropriate in a given context. The ASB considers every comment carefully and takes them into account in its deliberation on whether to promulgate a revised ASOP and the terms of any revised standard. You can clearly see the product of this deliberation by examining Appendix 2 of any ASOP which contains a detailed summary of comments to the ASB and responses thereto. That process will not change if an exposure draft of ASOP No. 4 is prepared and released.

I understand that ASOP No. 4 may be of peculiar interest to pension actuaries, and particularly those performing services for private, single-employer pension plans. I can assure you that all legitimate concerns expressed by members of the profession and the public are taken into account by the ASB through an objective, orderly and transparent process that has been in place since the ASB’s establishment in 1988. No subset of the actuarial profession is entitled to any greater voice in the process than other interested parties. The ASB provides significant opportunities for any and all commenters to be heard. If and when a proposed revised ASOP No.

ASOPs or in the PTF report interferes with an engagement or precludes principals and actuaries from establishing a scope of work most suited to the principal’s needs, taking into account the costs and benefits of certain actions in any given situation.

4 is released for exposure by the ASB, the public notice and comment process is the appropriate forum in which to raise any concerns that you may have, whether professional, economic, or legal.

Sincerely,



Paul Kollmer-Dorsey
General Counsel and Director of Professionalism