

January 2, 2018

Mr. Paul Kollmer-Dorsey
Actuarial Standards Board
1850 M Street, NW, Suite 300
Washington DC 20036

Subject: Antitrust implications of proposed revisions to ASOP 4

Dear Paul:

I am writing to you regarding the possible antitrust implications of the proposed changes to ASOP 4 based upon the Pension Task Force Report ('PTF Report') suggestions as adopted by the ASB.

Before an exposure draft can be released or a proposed final standard can be adopted, there must be a report from the Actuarial Standards Board ('ASB') General Counsel advising that the proposed exposure draft or standard does not present any significant threat of an antitrust violation¹. I am concerned that the following suggestions of the PTF Report have a substantial anti-competitive effect, and thus pose a significant threat of an antitrust violation:

1. Requiring the inclusion of a solvency value with all funding valuations;²
2. Requiring a partial gain and loss analysis;³ and
3. Requiring additional conditional disclosures such as when the assets will be exhausted, implicit amortization period, and length of time until the contribution requirement exceeds the sum of normal cost and interest on the unfunded actuarial accrued liability.⁴

As I am not an antitrust lawyer, my letter explains my concerns from a lay perspective. I am available to explain my concerns further.

Anticipated Proposed Changes to ASOP 4

Exposure drafts of ASOPs 4, 27 and 35 are being prepared for the purpose of exposing language to incorporate the suggestions of the PTF Report as adopted by the ASB. To consider the PTF suggestions through an antitrust lens, I divided the proposed changes into three categories:

- Group 1 – If an actuary performs a particular service, the actuary must disclose certain information.
- Group 2 - If an actuary performs a particular service, the actuary must perform the service an appropriate way.

¹ The Actuarial Standards Board Procedural Manual (Revised June 2017) Sections IV C and VI B. The report from General Counsel must also conclude that ASB procedures have been followed and that the standard satisfies applicable laws and regulations.

² PTF Report page 18

³ PTF Report page 23

⁴ PTF Report pages 24-25

- Group 3 – If an actuary performs a particular service, the actuary must additionally perform another service.

The required inclusion of the solvency measure, partial gain/loss analysis and additional conditional disclosures (collectively 'Group 3 PTF Suggestions') fall into Group 3. Despite the innocuous title, the additional conditional disclosures require calculations to make the disclosures.

At present, I am most concerned about the antitrust issues associated with the Group 3 PTF Suggestions.

Anti-Competitive Effects

The Group 3 PTF Suggestions have an anti-competitive effect on actuaries who are members ('Actuaries') of the American Academy of Actuaries ('Academy') delivering services to pension plans.⁵ The Group 3 PTF Suggestions require pension plans to purchase additional services if they purchase a funding valuation.⁶ This effectively increases the fees charged for a funding valuation.⁷ Additionally, the Group 3 PTF Suggestions prevent Actuaries from competing on the basis of services offered. Lastly, the Group 3 PTF Suggestions prevent innovation. Instead of Actuaries being free to develop consulting techniques to explain the long-term cost of plans, Actuaries would be required to comply with the Group 3 PTF Suggestions.

As an analogy, the Group 3 PTF Suggestions are the equivalent of a bar association requiring an attorney to prepare a will for every individual they represent in a divorce. Arguably, it is prudent for every adult to have a will. Further, it is arguably prudent to prepare a will or review an existing will when getting divorced. However, a requirement to include a will with every divorce would clearly have an anti-competitive effect. It would increase the legal fees associated with divorces. Additionally, it would prevent individuals from selecting their preferred attorney for preparing their will.

The Group 3 PTF Suggestions are as disjointed to a funding valuation as a will is to a divorce. The Group 3 PTF Suggestions may provide value to certain plan sponsors, but mandating their inclusion with every funding valuation will not uniformly improve the quality of the advice and will have an anti-competitive effect.

At this time, I do not perceive the Group 3 PTF Suggestions to have offsetting pro-competitive benefits.

⁵ For simplicity, I am limiting the discussion to actuaries who are members of the Academy. The antitrust issues are further complicated because the ASB sets standards for all five of the US-based actuarial organizations. All five of the US-based actuarial organizations have adopted the same code of conduct and thus the same ASOPs. Thus, an actuary does not have the luxury of selecting from different codes and standards when choosing which actuarial organizations to join. Similarly, a plan sponsor does not have the luxury of selecting an actuary who belongs to the actuarial organization that has the most appropriate code and standards of practice for their plan.

⁶ I am concerned that Section 3 of the Clayton Act is implicated.

⁷The PTF Report acknowledges that the calculation and disclosure of a solvency value will require additional work by actuaries. See PTF Report page 19.

Deviation Language Insufficient

The antitrust issue is not solved by deviation language.⁸ If the Group 3 PTF Suggestions were required⁹, then any Actuary who deviated from ASOP 4¹⁰ would be required to explain the requirement, why the actuary did not follow the requirement and the effect of not following the requirement.¹¹ The very act of preparing these disclosures and discussing the disclosures with the pension plan increases the cost of the assignment¹². And, deviating from an ASOP exposes the actuary to greater legal risk.¹³

Additionally, it is not in the interest of the profession to promulgate standards that contemplate wide use of deviation language. Actuaries regularly including deviation language would render the ASOPs meaningless.

Lack of Ability to Practice

Antitrust concerns are magnified here because an Actuary may not be able to practice unless the Actuary maintains his membership in the Academy and thus be subject to the ASOPs. To issue certain types of opinions an actuary must be a member of the Academy.¹⁴ Thus, Academy membership is not always optional.

Lack of Representation

With respect to Actuaries whose practice is primarily private, single-employer pension plans, there is a due process concern. These individuals have no representation on the ASB¹⁵, had no representation on the PTF¹⁶ and were not provided meaningful advance notice that the PTF was going to make recommendations regarding private employer plans.

8 ASOP 41 – Section 4.4 DEVIATION FROM THE GUIDANCE OF AN ASOP - If, in the actuary’s professional judgment, the actuary has deviated materially from the guidance set forth in an applicable ASOP, other than as covered under sections 4.2 or 4.3 of this standard, the actuary can still comply with that ASOP by providing an appropriate statement in the actuarial communication with respect to the nature, rationale, and effect of such deviation.

⁹ I.e. the ASOP said the actuary “must” include or “should”

¹⁰ See ASOP 1, Section 2.1

¹¹ ASOP 41, Section 4.4

¹² In the example of the lawyer being required to provide the will with the divorce, deviation language would not solve the lawyer’s problem. The lawyer would have to explain the requirement, why he was not providing the will and the effect of not providing a will. Arguably, these disclosures are helpful. But, all of this takes time and may confuse the client. This increases the fees for the divorce and decreases competition.

¹³ I understand that it is not the intention of the ASOPs to create legal liability or to be used that way. But, it is inevitable.

¹⁴ As an example, consider the Retiree Drug Subsidy attestation requiring the attesting actuary to both be qualified and be a member of the Academy.

¹⁵ Neither Ms. Kathy Riley’s nor Mr. Mita Drazilov’s focus is on private, single-employer plans.

¹⁶ There were four members of the PTF: Mr. Bob Meilander who is not a pension actuary; Mr. Mita Drazilov who works on public sectors plans, Mr. Alan Milligan who is the Chief Actuary for the California Public Employees’ Retirement System and Mr. Frank Todisco who is Chief Actuary for the US Government Accountability Office. None of the four included private, single-employer experience as part of their curriculum vitae in the PTF Report.

But, further, private, single-employer plans are currently under-represented on the ASB and ASB Pension Committee and certain employers are over-represented.¹⁷ And, the current membership on the ASB Pension Committee does not conform to the ASB's own requirements.¹⁸

To be clear, the PTF membership, the ASB Pension Committee members and the ASB Pension members are an impressive group of actuaries. I do not doubt of the qualifications, experience or intelligence of any of these individuals. However, without additional input, they do not represent all actuaries to be affected by the proposed standards.

While due process and representation issues are not dispositive, I am concerned they would potentially weigh against the ASB and Academy in an antitrust matter.

Comment Letters

A quick review of recent comment letters to the ASB indicate that others are concerned about antitrust issues even though they are not currently using antitrust nomenclature. As an example, WillisTowersWatson¹⁹ have articulated and referenced in their comment letters their North American Retirement Principles.

Only one of the four is an enrolled actuary which is the legal, necessary credential for actuaries who practice in the private, single-employer practice area.

¹⁷ Ms. Margaret Berger is with Mercer and her practice is primarily with private plans. Ms. Tammy Dixon is a multi-employer actuary with Segal. Mr. Howard Freiden is an actuary with Deloitte and his experience includes both private and public sector experience. Mr. David Kausch is a public sector actuary with GRS. Mr. Steven McElhaney is a public sector actuary with Cherion. I am uncertain of the chair's Mr. Christopher Noble's practice, but he lists his specializations in the actuarial directory as academic/education, employee health benefits and research. He is with WillisTowersWatson.

Ms. Kathy Riley is with Segal and Mr. Drazilov is with GRS. Thus, both Segal and GRS have employees serving on both the ASB Pension Committee and the ASB as pension representatives.

Neither the ASB nor the ASB Pension Committee have representation from pension plan actuaries who work at small firms or who work on small pension plans based upon the membership currently listed on the ASB website.

¹⁸ "The makeup of committees should include a full breadth of views from those who will be affected by proposed standards. Recognition of diversity of opinion by specialty area, employment and geography is important." The Actuarial Standards Board Procedural Manual (Revised June 2017), Section II F.

¹⁹ Formerly, TowersWatson. The principles are available at <https://www.towerswatson.com/en/north-american-retirement-principles> and have been referenced since the merger between Willis and Towers Watson.

The third principle is as follows (emphasis added):

While we support the efforts of the actuarial profession to encourage the use of best practices, we do not believe that the ASOPs are the appropriate means to achieve that objective. ***The ASOPs should not impinge upon the terms of the engagement between an actuary and his or her Principal.*** Actuarial services subject to the standards are already highly regulated by governmental and other authoritative bodies. ***The terms of engagement are based upon a mutual understanding of those requirements by the actuary and the Principal. The ASOPs should not require the actuary to perform additional work that is outside the scope of the engagement, is not requested by the Principal and for which the actuary is unlikely to be compensated.*** Doing so can also lead to the unintended consequence of Principals using non-actuaries, not subject to ASOPs, for activities that should be the province of actuaries.

I am concerned that some dismiss comments such as this by stating that the engagement must be for appropriate services and fees should not be a factor. I agree that actuaries should not accept engagements where the terms are inappropriately narrow. But, looking at WillisTowersWatson's third principle from an antitrust perspective, they are asserting that standards of practice should not interfere with contractual terms negotiated in an open, transparent and competitive marketplace.

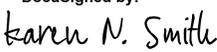
It is not in the best interest of the Academy and ASB to be insensitive to these issues until comment letters and other parties begin to view these issues from an antitrust perspective.

Conclusion

Given the limited volunteer resources and the importance of timely implementing the PTF Report suggestions, any antitrust issues should be considered sooner rather than later. To do so later would delay important revisions to the pension ASOPs. The key concerns of the PTF Report may be better addressed by drafting the Group 3 PTF Suggestions as the actuary "should consider" including these items, particularly when the public interest in a given plan is high.

This letter is sent on my person behalf and does not represent the views of any actuarial group to which I belong. I appreciate your consideration of my comments. I hope that 2018 is productive for both the ASB and the Academy.

Sincerely,

DocuSigned by:

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Karen Smith

Copy: Beth Fitzgerald, ASB Chairperson

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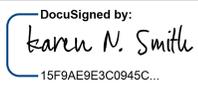
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