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Nonfunding Rules of General Agreement on Tariff & Trade (GATT): Reporting and Disclosure

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Summary: After a year of dealing with reporting and disclosure rules enacted with GATT, it's time to review those requirements. This session examines both the rules and practitioners' experience in implementing them, including:

- *reportable events,*
- *Pension Benefit Guaranty Corporation (PBGC) notification of financial status, and*
- *participant notification for underfunded plans.*

Ms. Jennifer Joy Cummings: I am a retirement consultant with Towers Perrin in Houston. Paul Shultz was with Towers Perrin for a number of years. Paul is an attorney, and he lead our technical resources department as head of all the attorneys.

Mr. Paul T. Shultz III: This is true. I had 20 wonderful years at Towers Perrin, and then I left this year and became a partner at the law firm of Sutherland, Asbill & Brennan, with offices in both New York and Washington. I'm delighted to talk to you about the nonfunding rules of GATT.

There are four topics that we are going to cover. I want to divide these up and let you know where we are as we go through these four different topics.

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First, we'll discuss the background—what happened with respect to these non-funding rules of GATT, why they were passed, and so forth. Second, we'll cover the new events that were added in connection with GATT, and a look at all of the reportable events, looking at the new together with the old. Third, we'll have a discussion of the new reporting requirements that apply to underfunded plans. Finally, we'll go over some requirements for underfunded plans to provide notification to participants; these have really caught the attention of those companies that are subject to that requirement.

The first major topic is the PBGC and the background on the law changes that occurred. During the 1980s and increasingly in the early 1990s the PBGC found itself with a rising level of liability and there was considerable alarm. When the Clinton administration took over in 1993, they looked at it very carefully and felt that they really had to address this issue. They were also concerned about opportunities that companies had to manipulate the PBGC rules for their own benefit, which has been done from time to time. Sometimes the PBGC successfully resisted, but sometimes not.

The administration was also concerned about companies that had suddenly taken a financial downturn, because the PBGC was then caught by surprise when it discovered that it had liabilities that it could have done something about had it been more aggressive earlier.

With these concerns, the PBGC went to work with Congress and also with the Public Trade Association to identify ways of changing the law to avoid these situations, to minimize or control their liability, and to get more information as needed. During 1993–94 the administration developed these changes in the law, frequently running into people from the PBGC who were going to meetings with the Ways and Means Committee to try to develop these changes. They would frequently appear at meetings of trade association groups and talk about what kind of problems they were encountering and what kind of changes they were considering.

One of the things Congress happily discovered as they put together their changes into GATT was that, in the aggregate, the changes that were being proposed by the PBGC actually would raise revenue. This was very convenient because, at that time, the administration was attempting to obtain approval of GATT, the Tariff Act, which was controversial, as you may recall, in late 1994. And the revenue that was going to be raised by the PBGC changes, the changes in Title IV of ERISA would be used to help offset the costs of GATT. So, the PBGC changes, Title IV changes, were linked with the GATT changes and, therefore, the law that was called the Retirement Protection Act (RPA) of 1994, was included with the GATT changes in

1994. They included both changes that affect the funding requirements for pension plans and some nonfunding provisions.

The major purpose of our discussion, of course, is the nonfunding changes. But let me mention the other changes to you briefly to put it in context so you will know what the funding changes were. The funding changes included increases in the premiums and a phase-out of the maximum on the variable premium, changes in the interest rates—really a decrease to the 30-year Treasury rate—used by the PBGC. The mortality table was changed to the 1983 table. The requirement was imposed whereby a plan was required to have at least enough money in its fund to provide for three years of benefit payments, so each plan must have liquidity.

There were changes made in the deficit funding reduction contribution, requirements that had been imposed in 1989, as I recall. I don't recall precisely which Omnibus Budget Reconciliation Act (OBRA) it was, but it came in one of the OBRAs and it was found that it didn't work quite properly. But, my recollection is that it resulted in eliminating funding requirements in a nonintended way. The changes in that law in 1994 corrected poorly designed deficit reduction contributions. It also gave the PBGC the opportunity to sue employers who fail to make their contributions to their plans. So, if you didn't make a required contribution, the PBGC would be able to bring an action against the employer.

GATT also added some nonfunding changes. The ones we are going to talk about include four new reportable events; a new requirement that employers provide information if they have severely underfunded plans; and requirements that employers provide notices to their participants and other beneficiaries if they have a plan that is underfunded by more than $50 million. There are a couple of other situations as well, but we'll get into that in greater detail.

Let's go into the second section of this discussion—new and old reportable events. When we talk about these, we're going to talk about who has to report and to whom they have to report, what they have to report, when they have to report, and why they have to report. One of the aspects of the new requirements for reportable events is that penalties can rise to as much as $1,000 per day. The PBGC successfully sought to impose some teeth into their new requirements to get people's attention. Previously there were either no penalties or very minimal penalties, and people ignored the requirements out of ignorance and went mostly unpunished.

The reportable event requirements are set forth in Section 4043 of ERISA. They have been there ever since ERISA was adopted in 1974, and have been dormant in many respects because regulations have tinkered with whether or not those requirements would apply or not apply or be waived throughout the years. They hold both the plan sponsor and the plan administrator responsible. In the case of a single employer plan, that typically would be the employer who is sponsoring the plan. But, of course, if you have a multiple or multiemployer plan, then you have to be more concerned about assuring that the plan administrator has the proper knowledge or information that he or she needs to comply with the reportable event requirements. Notice from either one will satisfy the requirements of the law. Generally speaking, the reportable event requirements had to be met within 30 days after the event occurs. But, as you will notice, that is a rule that has many exceptions.

The RPA or GATT imposed four new reportable events. First, if a member of a control group, in other words, a subsidiary or affiliated organization, leaves a controlled group or group of companies that sponsors the plan, that is a reportable event.

Second, if more than 3% of the liabilities of the defined-benefit plan is transferred through some sort of a transaction to a plan that is not maintained by any member of a control group, 3% of the liabilities move outside of the control group.

Third, when a liquidation of any single member of the control group occurs, my recollection is that is actually liquidation and bankruptcy. I don't think it is just a general liquidation. If there is a liquidation of a member of the control group, that's a reportable event.

Fourth, if any member of the control group declares an extraordinary dividend, in other words, a dividend that is markedly different from their regular dividend policy, and clearly of somewhat of an extraordinary nature, or if it redeems 10% or more of its voting stock, this must be reported. Those are the four new reportable events.

Only the plan sponsor holds responsibility for reporting on one of these reportable events. The reportable event information is due 30 days in advance of the event, not 30 days after.

There are a number of exemptions that have been imposed by a rule-making committee. After RPA was formed, the PBGC recognized that it had somewhat of a jumble of reportable event requirements, and felt that perhaps they should clarify and reissue them, and consider some exemptions in some areas. So they followed a practice that had been applied in some other forms of government in developing a joint rule-making approach with the public. They invited a number of representatives of the public, from trade associations and professional associations, major consulting firms and law firms, to join with them in a committee, I believe, of about

20 or 25 people, to meet periodically to discuss reportable events and how they should be refined in order to achieve the PBGC's purposes, but not overly intrude on the business activities of the public.

The working group met throughout the year, and in April 1996 issued a report. It was a jointly issued report, and I believe, there was consensus on all of the issues on which they made recommendations. As to whether the requirements on new reportable events and old reportable events will be revised in accordance with their recommendations—that is with the PBGC right now. I believe the PBGC is working to develop a proposed set of regulations that they would then issue and have open for public comment. After that they would proceed to adopt the regulations.

This process has also been used by other agencies. I know it was done with the Equal Employment Opportunity Commission (EEOC) on some regulations that they were working on. I believe they found it less satisfactory. I know the PBGC has told me that they were very pleased with the results and that the people who participated in that group were pleased.

The advance notice for these new reportable events is waived in certain circumstances. In fact, it is waived in so many circumstances that, in my view, it has a fairly narrow application. But, if it applies to you, you'll want to take it very seriously. It is waived if the company to which it applies is subject to Section 13 or Section 15D of the Securities Exchange Act of 1934. Section 13 is the section that requires publicly traded organizations to be subject to the Securities Exchange Act of 1934. You can translate this as saying essentially every publicly traded company. Section 15D applies to some rare companies that offer securities for sale in such a manner as it requires them to be subjected to the Securities Law, which is not a common situation. But, effectively, what that provision does is it read out of the advance notice requirement virtually every publicly traded company, which leaves only nonpublicly traded companies and other organizations subject to the requirement. That waiver will apply unless the unfunded vested liability is greater than $50 million or the vested benefits are less than 90% funded. And there are several other criteria that have to be met with respect to each specified event. So it's a fairly narrow group that we are looking at.

I'm going to discuss five other reportable events. These include: a decrease in the number of participants; where there is a large distribution to a substantial owner and there is an unfunded vested liability; where there is a failure to satisfy the minimum funding requirements; where the employer has been unable to pay plan benefits when they are due; and when there is a change in the plan sponsor. We will go through these five different reportable events and discuss what the rules are and may be to come in each case.

The first reportable event is the case of a decrease in the number of participants in a plan. Notice is required if the number of active employees covered by the plan decreases by 20% during the year, or 25% from the prior year. The regulations give you a good basis for measuring this. I have forgotten exactly whether it's the beginning of this year or the end of the prior year, but the regulations are very straightforward on how you measure it.

In fact, I have a situation that I am dealing with where the client sold off a large part of its operation, which resulted in about an 80% decrease in the coverage level of the defined-benefit pension plan. The PBGC came in and said, you didn't tell us about what's going on here, and also how do you plan on meeting your unfunded vested liability? Well, the plan happened to be in very good financial shape, but the PBGC was concerned. In fact, the PBGC used the reportable event that the employer had provided to the PBGC concerning the decrease in participation as a basis for saying that they had a right, under Section 4062E, to take the position that the employer was now obligated to pay in full the unfunded vested liability to the PBGC, or into the plan, or into escrow, or post a bond for 150% of that liability. So, we've been discussing with the PBGC the lack of merit in their position. I am hopeful that the PBGC will be cooperative in this situation and recognize that this particular client is financially quite viable. I mention this because you may find this position being asserted increasingly.

If you do have a decrease in coverage, you may run into this situation. This requirement for reporting a decrease in participation is waived if there are fewer than 100 participants, or if the percentages are not exceeded for the group, or if the unfunded vested liability is less than $250,000, that is the unfunded vested liability as reported on the Form 5500.

The working group has proposed four changes that I think are worth mentioning. They want to provide an extension of the deadline for filing for this particular reportable event. I believe that it may take a little bit longer for people to recognize they have this kind of decrease. They want to increase the exemption amount from $250,000 to $1 million, recognizing that $250,000 is an amount that may have been appropriate when the regulations were first adopted, but it's pretty low at this point. That unfunded liability would be determined on the same basis as is used to determine variable premiums. They also recommend an exemption if the vested liability determined on a premium basis is 100% funded, or 80% funded if the decrease is not related to the shutdown of a facility. Finally, there's an exemption if there is no variable premium rate. This is likely to be reflected in final regulations once they are adopted.

The second reportable event I want to talk about, among the old reportable events, is a large distribution to a substantial owner in the plan and there is an unfunded vested benefit liability. (A large shareholder/substantial owner is defined in a variety of ways, but basically it is someone who has substantial interest or is a senior officer in the organization.) This would apply if the value of the distribution is $10,000 or more and if there is a reported unfunded vested liability on the Form 5500. This event reporting is waived if the amount paid within one 12-month period is less than $10,000, and if the amount is less than the maximum guaranteed benefit to that individual under the PBGC benefit rules.

The working group recommended a number of changes here. They recommended there be exemptions if the amount paid out in one year is less than 1% of the assets held by the plan. The committee also recommended that there be an exemption if the amount paid out in a plan year is less than the dollar limit under 415 for an age 65 annuity. They also recommended that there be an exemption if there is no unfunded vested benefit liability on a premium basis.

The third reportable event relates to failure to satisfy the minimum funding requirements. The notice would be waived if the unfunded vested benefit liability is less than $250,000, and if a Form 200 is filed. The working group recommends that there be exemption here if the shortfall is corrected within 30 days, and that there be a notice requirement if the employer is applying for a funding waiver. So, if the company is going for a funding waiver, it would have a notice requirement.

The fourth reportable event is the inability to pay benefits when due. This is really where the plan has encountered a cash-flow shortage and it is unable to meet its benefit payment obligations. If this occurs, it is an event that must be reported to the PBGC. Right now it is waived if the failure is due to certain administrative delays and the payment is actually made within two months. The working group recommends that if a company is subject to the liquidity requirements of 412(m) that there be an exemption. Furthermore, if the company is exempt from 412(m), a notice is required if two times what is paid for a given quarter is greater than the liquid assets.

There are several other events that might be reportable events but have been waived. One of them is the tax disqualification of the defined-benefit pension plan or a determination that the plan is not in compliance with Title I of ERISA. I believe the PBGC feels that there are probably many other problems that the company is dealing with at that point.

Ms. Cummings: I think that they are already receiving notice from the IRS.

Mr. Shultz: Or the Department of Labor. They probably are very well informed. Second, a reportable event occurs if there has been a benefit curtailment, an amendment curtailing benefits. I guess by the same token, the IRS would provide that information to the PBGC. And third, in cases of planned mergers, or asset or liability spin-offs of entire plans, that also is the type of information that is already being filed with the IRS and is being forwarded to the PBGC.

We talked a bit about penalties before. What are the penalties for noncompliance for reportable event requirements? In most situations the penalties are limited to $25 a day for the first 90 days of failure to comply. After 90 days, if you still haven't complied and you find out three years later, you get $25 for the first 90 days and $50 for each day thereafter, but not more than $100 per day times the number of participants. And it is phased down if there are fewer than 100 participants. In a case where there has been a willful noncompliance by the employer or the plan administrator, then the penalties will be increased. Or if there is repeated abuse, a history where the organization is not performing in this area, or if the noncompliance results in substantial harm for the participants, then the penalties will be greater. In any event, the maximum penalty will not exceed $1,000 per day. But this is enough to catch the attention of responsible parties who will not want to incur that kind of a penalty.

We will now move to the third section of our discussion and talk about reporting for underfunded plans. If a plan is seriously underfunded, the new rules adopted by GATT require that the plan sponsor provide information on an ongoing basis to the PBGC until the situation is cured. This information is required to be provided if the aggregate unfunded vested liability for unfunded plans is greater than $50 million, or if there are missed contributions of more than $50 million for any particular member of the control group, (that is, if an employer has failed to contribute over $50 million to a plan), or if there are minimum funding waivers outstanding greater than $1 million and some portion remains outstanding. In those three different situations, the employer is required to provide ongoing levels of financial information to the PBGC. Generally speaking, it is the first one that will bite most often—those plans with over $50 million in unfunded vested liability.

What do these companies then have to provide the PBGC? They need to provide some general information including the name and address of each member of the control group and their legal relationship. This can be very complex for a big company, which is what typically one is talking about with the $50 million unfunded vested liability. I made up one of these charts for one of my clients several years ago, and it just went on and on for pages as we discovered all the different subsidiaries, and subsubsidiaries, and subsidiaries of subsidiaries around the world. It became quite challenging. In fact, I will bet a large number of companies don't even know how many different subsidiaries they have. In any event, that is the first requirement.

The second requirement is actuarial data, including the actuarial report with schedules, a summary of the benefit liabilities of the plan, charts including the age, service and pay levels of various groups of participants; actives, retirees, other beneficiaries, and the market value of assets at the end of the plan year ending in an information year. (An information year is something that is specifically defined. We will talk about that later.)

Financial information is required. This includes financial statements of the company, audited financials if they are available. If they are not available, unaudited financials, otherwise audited tax returns. And if it's a consolidated control group, the revenue, the income, and assets of each contributing sponsor are required. That could be very challenging for many large organizations. There is one out if the financial data are publicly available. This requirement is met by telling the PBGC when it was filed and where the PBGC may obtain it.

When does this information have to be provided? Generally, 105 days after the information year. The information year is the fiscal year, unless some members of the control group have different fiscal years than the calendar year. Generally, 105 days after the information year is usually April 15, that's kind of that three-and-a-half month requirement, but it's using days in this particular case. If some of the information is not included in the initial filing, the alternative deadline, the last possible deadline for the actuarial information, which I suspect will be used often, is 15 days after the deadline for the Form 5500. You must include in the initial filing a timely statement that the unavailable data will be submitted by this later date.

We move to the fourth of our major sections. We will talk about the notices that participants must receive if the plan is severely underfunded. I understand from talking to people at the PBGC that quite a few companies discovered that they were subject to this requirement of providing notice to their employees and found that probably the least acceptable alternative, and made sure that they received enough contributions into their plan early enough so that they could escape this requirement. This is one thing people don't like to do, to tell their employees that their pension plan is not fully funded, or is not as well funded as the government thinks it ought to be.

What does it mean to be underfunded for purposes of this requirement? There are several different ways in which the requirement can be triggered. First, if the plan is underfunded and it has a variable premium obligation, this is one way in which it can be triggered. It is exempt from the variable premium requirement if it contributes the full funding limit for the prior plan year. That's one of the things that companies have done to try to avoid this requirement, or avoid getting caught in that particular trigger. Second, if the plan is underfunded and it is not even at the 90% funded level or the deemed 90% funded level. If you have looked at this particular requirement, you will recall that there are several different ways in which you can be deemed 90% funded. And there are some interesting transitional rules, very tricky transitional rules that I won't attempt to try to restate here. But if you have this problem it's worthy of looking closely at those to see whether you can actually satisfy the 90% rule. Finally, if you have a smaller plan there are some much-simplified, applicable rules.

Mr. David P. Rigby: The second requirement you just mentioned, is that "or", or "and?"

Mr. Shultz: That's "or." If you're in either one of those situations, you must provide these notices to participants. You are underfunded if you are in either one of those situations I just mentioned.

Who do you have to provide these notices to? Participants, beneficiaries, alternate payees of qualified domestic relation orders (QDROs), and unions that represent the participants.

What must be included in this notice to employees? Funding percentage on a current-liability basis, the date as of which that funding percentage is applicable, and a statement to your employees that benefits may be at risk if the employer faces severe financial crisis or bankruptcy (not the kind of thing to warm an employee's heart or make him feel comfortable). You must also include, with respect to any plan year, the identification of any plan year within the last five years where there is a funding waiver that remains open as of the end of the prior year, and an indication that a quarterly or other contribution was 60 or more days late. This is the kind of notice that you're required to give your employees, not exactly what people want. You also must include information on the maximum guarantee benefit amounts for at least one early retirement age. Finally, other information about the PBGC and guaranteed benefits.

When does this have to be distributed and how? It is subject to the same distribution requirements as the summary annual report. If you recall, that is typically done within two months after the Form 5500, which occurs in the middle of November. It must, however, not be part of the summary annual report (SAR). It has to be a separate document; a stand-alone document.

Any information that is not specifically required to be included in the notice must be set forth in a separate document. It cannot be included in this document. The PBGC, in fact, provides a sample notice. As I indicated, the deadline is the same as the SAR—two months after the filing of the Form 5500. Again, penalties for failure to provide these participant notices can be up to a maximum of $1,000 a day.

Mr. Daniel P. Nichols: On the penalties, I wonder if you have had any discussions with the PBGC, on the first year. If the company missed the deadline for giving the notice, how stringent a penalty up to $1,000 was going to be applied?

Mr. Shultz: I haven't had any specific conversations with the PBGC, but I think that you will find they are pretty accommodating, and they really are working very hard for people to try to comply on a voluntary basis. I suspect if you can show circumstances that they will be pretty lenient. That's my guess, based on my conversations with them. There are a number of other things that the PBGC has been doing. The situation that I described earlier where they were approaching the client concerning the decrease in participation resulted from a unit that was set up back in 1990 or 1991, which vigorously follows emerging financial situations around the country.

By reading the newspaper, the stock market report, financials, and annual reports, the PBGC tries to identify places where there are changes or deals being done, and what the impact is on a pension plan. That group actively participates in talking with companies that have that kind of problem, and they try to be very friendly. They try to encourage people to move in their direction. One must always remember that they are seen as the 500-pound gorilla—they can pretty much do what they want, but they are trying to be a friendly gorilla.

From the Floor: I have a question about the definition of who has to give notice to a participant. Which PBGC variable premium are we talking about, and which quarterly contributions are we talking about that might have been missed? For example, for calendar plan year, what if I missed my April 15 quarterly, in fact, I missed all of my quarterlies, but at the end of the year I put in a current contribution that's well above what I needed to put in, plus interest. Which variable premium are we talking about? Which 5500 are we talking about?

Mr. Shultz: My recollection is, if you miss any one of them during the year, that triggers the requirement.

From the Floor: The variable premium for the following year?

Ms. Cummings: I don't know what you are talking about with the variable premium. This pertains if you miss a quarterly by more than a certain number of days.

From the Floor: Sixty, right?

Ms. Cummings: I thought it was shorter than that for a quarterly but I was wrong.

Mr. Shultz: Sixty days, yes. If you miss any quarterly by 60, even if you made it up.

From the Floor: Yes, but you still don't have to notify them until several months later when you do your SAR.

That's a different year though, isn't it? That would be a different year, I believe. Let's say 1996 you miss a quarterly.

From the Floor: Let's talk about the 1995 plan year. I miss all of my quarterlies, but I make a contribution on December 31 that is well above my minimum contribution, plus any interest penalties. So, I'm not in any danger of having a funding deficiency of any kind. Sometime in October I do my SAR.

Mr. Shultz: Let's say November 15.

From the Floor: I do my SAR. That's when I have to notify participants that I missed my quarterlies more than a year ago?

Mr. Shultz: Right. November 15, 1996 you tell your participants that in January, June, March, or whenever, that you missed quarterly contributions during 1995. You don't like doing that, right? Most companies don't.

From the Floor: There's no teeth in that.

Mr. Shultz: Why?

From the Floor: The delay is so enormous.

Mr. Shultz: Well, there's teeth in this respect: if you know that is what you have to do, you surely don't want to miss any quarterly contributions.

From the Floor: You don't like to do the notice, right?

Mr. Shultz: Yes. In my experience, at least in talking to people anecdotally, people have a tremendous aversion to providing that kind of information to participants.

From the Floor: Let's take this example one step further. Which variable premium am I talking about if that's a problem? The 1996 variable premium?

Mr. Shultz: I'm sure it's the 1995. It's what happened in the prior year that triggers the notice.

From the Floor: Well, the 1996 variable premium is based on December 31, 1995 data.

Mr. Shultz: I believe the notice requirement is triggered by failure to pay the variable premium in 1995.

From the Floor: Failure to pay or the existence of a variable premium?

Mr. Shultz: Excuse me, you're right, the existence of the variable premium in 1995.

From the Floor: So, I may have to make a notice in November 1996 based upon December 31, 1994 PBGC data.

Mr. Shultz: Right.

Mr. Mark R. Ferrin: On the previous discussion, if you miss a quarterly, we're not subject to the participant notice for underfunded plans, correct? That was a prior question.

Mr. Shultz: If you miss a quarterly, that triggers the participant notice.

Mr. Ferrin: But not this kind of notice. Not these notice requirements. These are notices for underfunded plans, correct?

Mr. Shultz: Right.

Mr. Ferrin: We were discussing the participant notice requirements for underfunded plans. In order for the notice requirement to apply the plan must be underfunded as well.

Mr. Shultz: Yes, I was assuming that, yes.

Mr. Ferrin: I mean, you could have a well-funded plan and miss quarterlies and have to notify participants, but not in this fashion.

Mr. Shultz: You must have an underfunded situation to be worried about these kinds of problems.

Mr. Ferrin: Well, no, you do have to notify participants, but not like this. That's the only point. My question now is, could you elaborate on what it means to be deemed 90% funded?

Mr. Mark S. Swotinski: It's 90%, it's more than 80% funded in this year and at least 90% funded in two out of the last three years. That's the Gateway test. Basically the funding notice is waived if there's no deficit reduction contribution required for the year. Then you don't need to notify participants on the underfunded status of the plan.

Mr. Jay B. Hanselmann: Other than information that is already published, such as the Schedule B and other areas where the enrolled actuary provides information, are there any other enrolled actuary responsibilities attached to these notice requirements that you are aware of?

Mr. Shultz: I think the answer is no. I don't believe that there is any specific requirement that falls on enrolled actuaries.

Mr. Swotinski: Just one minor war story regarding the $50 million unfunded. You have to be careful because it does involve the entire control group. I have a plan that was part of a much larger control group. My plan is underfunded, but only by maybe $5 or $10 million using the PBGC basis, and about three days before they were ready to report I received a call from the control group's actuary who was doing the work for the entire control group saying, we have a plan that is $100 million underfunded and we need all your benefit liabilities by tomorrow. Those kinds of things can happen.