FEASIBILITY REVIEW

EXECUTIVE SUMMARY

This is a review of the feasibility of combining the Screen Actors Guild – Producers and Health Plans and the AFTRA Health and Retirement Funds. This Feasibility Review consists of a thorough legal analysis by ERISA attorney Deborah Lerner of the Philadelphia law firm Willig, Williams & Davidson as well as correspondence from Julia Penny Clark of the Washington D.C. law firm Bredhoff & Kaiser; Terry Deneen formerly with the Pension Benefit Guaranty Corporation (PBGC); Joyce Mader of the Washington law firm O'Donoghue & O'Donoghue; Frank Moss of the New York law firm Spivak Lipton; Jani Rachelson of the New York law firm Cohen, Weiss and Simon LLP; and Charles Storke, of the San Francisco law firm Trucker Huss. These individuals are among the most experienced ERISA attorneys in the country and together these attorneys and their firms have been involved in thousands of plan mergers. A short summary of their experience and background follows this Executive Summary.

Together, these experts conclude that:

- There is no legal obstacle to merging the pension and health plans.
- Multiemployer plan mergers do not pose any increase in the risk of loss of benefits to plan participants according to the government agency in charge of mergers. Indeed, the law requires that if pension plans are merged, the plans' trustees have a legal obligation to ensure that no participant's accrued benefits will be less after the merger than it was before the merger.
- Mergers are common and beneficial because they strengthen the financial base of the surviving plan, reduce administrative expenses, and permit employees to concentrate their covered work under one benefit structure, among other reasons.
- Even though the merger of the unions would not automatically result in the immediate combination of these plans, the union merger would provide a realistic opportunity for the trustees of the current plans to quickly provide that earnings under both plan could be combined for purposes of establishing eligibility in a plan.
- While the merger of the unions would not automatically result in a combination of the plans, that union merger would facilitate the possibility of doing so if it is in the interests of the participants.
- The merger process for plans is not particularly complicated. It was the express intent of Congress that rules governing plan mergers encourage such mergers because of the Congressional finding that such mergers provide greater stability to the plans and are generally in the best interest of participants.
- Based on their experience with hundreds of plan mergers, these experts conclude that such mergers have, in fact, resulted in plans that are more cost efficient, more stable and have been in the best interests of the plans' participants and beneficiaries.

SUMMARY OF EXPERIENCE OF CONTRIBUTING EXPERTS

Julia Penny Clark. Member, Bredhoff & Kaiser, Washington D.C.; counsel to a number of large multiemployer pension and health and welfare plans; counsel in numerous appellate cases involving ERISA and other plan issues, including cases before the United States Supreme Court; Fellow of the College of Labor and Employment Lawyers; Frequent lecturer and author on ERISA and other plan matters.

Terry Deneen. Employed as an attorney for the Pension Benefit Guaranty Corporation (PBGC) for twenty years; PBGC Chief Insurance Program Officer from 2004 until 2011, where he led PGBC's multiemployer plan insurance program. Received the PBGC's Distinguished Career Service Award in 2007. Charter Fellow of the American College of Employee Benefits Counsel. Frequent speaker at meetings of the American Bar Association and National Coordinating Committee for Multiemployer Plans.

Deborah M. Lerner. Partner, Willig, Williams & Davidson, Philadelphia, PA; Adjunct Faculty, Temple University School of Law and Villanova University School of Law; Fellow, American College of Employee Benefits Counsel; Union Co-Chair, Pension Subcommittee, American Bar Association, Employee Benefits Committee of Labor Section; Frequent speaker and author on plan and ERISA issues; represented plans in over two dozen plan mergers.

Joyce Mader. Partner, O'Donoghue & O'Donoghue, Washington D.C.; Member of Department of Labor ERISA Advisory Council from 1994-1997; Member of Advisory Committee of the Pension Benefit Guaranty Corporation, 2011 to the present; Member of American Bar Association Council of the Section of Labor and Employment Law, and previous Union Co-Chair of the ABA Employee Benefits Committee; Represents the national lobbying group for multiemployer plans, the National Coordinating Committee for Multiemployer Plans and in that capacity works on comments to Congress, the Department of Labor and other agencies regarding benefits matters.

Frank Moss. Partner, Spivak Lipton, New York City; Faculty, New York University Law School and Cornell Law School. Has represented multiemployer plans in the entertainment industry and elsewhere for over twenty years.

Jani K. Rachelson. Partner, Cohen, Weiss and Simon LLP, New York City; Fellow American College of Employee Benefits; Member of American Bar Association Section of Labor and Employment Law, and previous Union Co-Chair of the ABA Employee Benefits Committee; has represented multiemployer plans for over thirty years, including with respect to mergers of pension and health plans; frequent speaker on ERISA issues, including mergers and reciprocity.

Charles A. Storke. Director, Trucker Huss, San Francisco, CA; counsel to many multiemployer plans, including the largest Taft-Hartley trust in the United States, the Western Conference of Teamsters Pension Trust Fund.

FEASIBILITY REPORT OF DEBORAH M. LERNER

Law Offices of
Willig, Williams & Davidson

TO: DAVID WHITE, NATIONAL EXECUTIVE DIRECTOR, SCREEN ACTORS GUILD

KIM ROBERTS HEDGPETH, NATIONAL EXECUTIVE DIRECTOR, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

FROM: DEBORAH M. LERNER, ESQUIRE

DATE: JANUARY 25, 2012

RE: FEASIBILITY REPORT

The purpose of this feasibility report is to provide a general overview of the issues and likely legal impact on the pension and health plans of the Screen Actors Guild and the American Federation of Television and Radio Artists in the event that the two unions merge. As you have requested, I have addressed in this report "what, if any, merger plan can be achieved which will satisfy the requirements of the law and the protection of all eligible members against loss of benefits, presently or in the future." This report is based on my experience as a benefits lawyer for approximately 25 years, my review of the applicable law, and my involvement in more than two dozen mergers of pension plans and health plans.

As an initial matter, the merger of the two unions would not, from a legal standpoint, necessitate the merger of either the health and welfare or the pension plans sponsored by either union. The plans could be retained as stand-alone plans (with contributions to each one being based on the type of work performed), or one or both types of plan could be merged, or new plans could be created.[1] Generally, a decision to merge two health and welfare plans or two pension plans is made by either the collective bargaining parties or by the respective plans'

[1]As discussed, infra, this decision must be made by the respective boards of trustees of the plans. Accordingly, even if both SAG and AFTRA jointly desired to merge the plans, they would not, either separately or together, have the legal authority to do so. Both pension plans and both health plans are jointly trusteed with representatives of the contributing employers. A vote to merge would require both the union representatives and the employer representatives to agree to a merger.

boards of trustees. As discussed below, decisions such as plan design and plan amendment historically have devolved upon the respective boards of trustees of both the AFTRA and SAG plans. Because the amount of employer contributions made to a multiemployer pension or health and welfare plan is determined by the collective bargaining parties, the main impact of a merger of the two unions on the existing plans (or on any merged plan) would be an increased ability to negotiate contribution increases to the plan or plans and to unionize non-unionized employers to increase the participant and contribution base.

PENSION PLANS

Recent years have seen the merger of many pension multiemployer plans. The merger of such plans is governed primarily by Section 4231 of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") which was designed to facilitate such mergers. In discussing the enactment of Section 4231, Congress noted in the legislative history accompanying the Multiemployer Pension Plan Amendments Act that:

> The rules regarding mergers and transfers are designed to allow mergers in all cases where the resulting plan will not be expected to be in financial trouble. **This facilitates the committee's purpose of encouraging mergers which expand a plan's contribution base to provide greater stability by looking at the prospects for the resulting plan instead of focusing on the narrow mechanical test provided under current law. The committee believes that a merger which complies with the conditions will generally be in the best interest of plan participants.** House Comm. On Education and Labor, H.R. Rep. No. 869, 96th Cong., 2d Sess. 87 reprinted in (1980) U.S. Code Cong. & Ad. News 2918, 2955.[2] (Emphasis added).

The Pension Benefit Guaranty Corporation ("PBGC") has jurisdiction over multiemployer plan mergers and has issued regulations under Section 4231 of ERISA which apply to mergers of multiemployer plans. On January 19, 2012, the PBGC issued the *PBGC Retrospective*

[2] As cited in DOL Advisory Op. 89-29A.

Review Plan Report in which it states that it is in the process of developing a Notice of Proposed Rulemaking which would modify the current regulations governing multiemployer plan mergers. See page 3, RIN/OMB Control Number 1212-AA69 at www.pbgc.gov/Documents/PBGC-Retrospective-Review-Plan-Report.pdf . The Report summarizes the reason for a change to the current regulations as follows:

> Multiemployer plans must file certain information with PBGC. **Multiemployer plan mergers do not pose any increase in the risk of loss to PBGC or to plan participants.** (Emphasis added). These filing requirements increase administrative costs to PBGC and plans and create an unnecessary burden in completing the merger.

In addition to complying with Title IV of ERISA (Section 4231 is in Title IV) and the regulations issued thereunder, multiemployer plan mergers must comply with Title I of ERISA. The United States Department of Labor has jurisdiction over the enforcement of Title I.

The United States Department of Labor has stated that:[3]

> The provisions of Title I of ERISA do not expressly prohibit or limit mergers of multiemployer plans. In the Department's view, whether a proposed merger of multiemployer pension plans complies with the provisions of sections 403(c)(1) and 404(a)(1) of ERISA can only be determined by the appropriate plan fiduciaries based on all relevant facts and circumstances. Based on the statutory framework and the Congressional intent ...it is the opinion of the Department that, in determining the propriety of a merger of a multiemployer pension plan, the fiduciaries of each multiemployer pension plan must make their determinations under sections 403(c)(1) and 404(a)(1) by reference to the multiemployer plan resulting from the proposed merger. In making such determinations, the fiduciaries must consider the funded status of the resulting merged plan, as well as the long-term financial viability of such plan. In this regard, it is contemplated that the fiduciaries would, among other things, take into account the economic outlook of the industry, demographics of the resultant participant population, current and anticipated contribution rates, and administrative expenses.

Plan mergers are often a method of securing the financial health of the combined entity on a going forward basis. Changes enacted by Congress in the Pension Protection Act of

[3] Ibid.

2006,[4] designed to improve the funding of pension plans, combined with the major market downturn in 2008 and the impact of the increased volatility of the securities markets have forced fiduciaries of multiemployer pension plans to study methods to increase employer contributions and reduce costs.

The only sources of a pension plan's income are employer contributions and investment gain. Investment gain or loss is primarily a function of the returns of the securities markets. However, the negotiating parties will have the ability to obtain higher plan contributions. The success of the union in negotiating higher contributions will depend in large part on the strength of the union, assuming financially viable contributing employers.

The merger of pension plans may result in significant savings of administrative costs. As a general matter, the larger the plan, the more negotiating power the plan has to obtain lower costs and more favorable terms from service providers, such as investment managers.

In addition, the merger of pension plans may eliminate duplicative costs and fees. For example, on an annual basis, each plan's actuary must prepare an annual valuation of the plan, conduct studies to prepare an annual certification of the funding status of the plan, prepare an annual funding notice, in addition to the actuary's other functions. Similarly, each plan's auditor annually must audit the plan, prepare financial statements and complete an annual report (Form 5500) for filing with the governmental agencies. Consolidation of plans means that only one audit, one valuation and one filing of each required form is necessary. To the extent that there are duplicative general administrative duties in the day-to-day operations of the plans, a consolidation can eliminate them.

Certain fees may be based on a sliding scale, which are reduced based upon volume. Similarly, investment management fees (typically one of the most significant costs for a pension plan) are often based on a percentage of assets under management which percentage is

[4] Pub.L. No. 109-280, (Aug.17, 2006).

reduced as the amount of assets increase. Accordingly, a merger of pension plans may result in significant savings in both of these types of expenses.

DECISION TO MERGE PENSION PLANS

Only the bargaining parties or the respective board of trustees of each of the plans can make the decision to merge two multiemployer pension plans. It is our understanding that historically the trustees of both plans have been responsible for plan design and similar decisions and that such past practice is very unlikely to be changed. The trustees are appointed by representatives of contributing employers and of the sponsoring unions. Each side has fifty percent of the voting power in each plan such that both the union representatives and the employer representatives of both plans must agree to merge the plans.[5]

Acting as plan fiduciaries, [6] the majority of the trustees of each plan would have to conclude separately that a merger would be in the best interests of their plan participants. This would require each board to study the economic impact of merging the plans in comparison to the impact of letting each plan continue on a stand-alone basis. Such an analysis requires a detailed study, by each fund's actuary, in consultation with the other professional advisors and the fund staff, to determine the likely financial impact of each alternative.[7] Because there is no

[5] It is possible that, depending on the governing documents and the applicable law in the jurisdiction, if the employer representatives or the union representatives were dissatisfied that a vote for a merger was rejected, the losing side could file an arbitration action to seek to reverse the result. See Section 302(c)(5)(B) of the Taft Hartley Act which requires that if the employer group and the employee group deadlock on an issue involving the administration of the fund, the dispute is subject to arbitration.
[6] Section 404 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") sets forth the basic fiduciary duties of trustees. Where a plan's governing documents provide that the trustees' actions are taken in a fiduciary capacity, the United States Department of Labor has clarified that their actions to establish, amend, design, merge or terminate a plan are also taken in their capacity as fiduciaries of the plan. See, DOL Field Assistance Bulletin 2002-2. We do not know if the governing documents of any of the plans involved here so provide, although they could be amended to so provide.
[7] In order to effect a merger of two multiemployer pension plans, the plans must file certain notification forms with the PBGC as well as notify plan participants, beneficiaries, the sponsoring unions, and contributing employers.

legal requirement that multiemployer plans be merged merely because the sponsoring union of such plan has merged with another union, each plan's board of trustees is free to accept or reject *any merger proposal.*

It should be emphasized that it is not possible to guarantee that any pension plan's benefits would never be reduced if the plans were to continue as stand-alone plans, or if they would be merged, or if they would be frozen and a new plan created. For any pension plan, including the SAG and AFTRA plans, the continued financial health of contributing employers, the strength of the economy, the plans' investment returns, the enactment of laws that would change the legal framework under which multiemployer pension plans operate, and the strength of the sponsoring union are all factors in determining the continued strength of the pension plans regardless of whether they are merged.

PROTECTION OF PARTICIPANTS' BENEFITS

Generally, whether or not a particular benefit, or future benefit, or plan feature in a multiemployer pension plan is legally "protected" from reduction is independent of whether or not that plan is merged into another plan.

Section 411(d)(6) of the Internal Revenue Code and Section 204(g) of ERISA provide that a pension plan participant's accrued benefit (as well as certain subsidized benefits such as early retirement benefits) cannot be reduced except in certain rare situations which may occur regardless of whether or not a plan is merged.[8] For example, the government may require an insolvent pension plan, subject to Title IV of ERISA, to reduce benefits to a certain level.[9] In this case, however, neither the AFTRA nor the SAG pension plan is insolvent, such that the

[8] Section 204(g) of ERISA and Section 411(d)(6) of the Internal Revenue Code of 1986, as amended (the "Code").

[9] Section 4245 of ERISA. This section is in Title IV of ERISA. All private sector multiemployer pension plans are subject to Title IV of ERISA which Title created the Pension Benefit Guaranty Corporation which insures pension plan participants benefits up to a certain level and which has jurisdiction over certain actions taken by such plans, including mergers of such plans.

exception does not apply. In addition, a multiemployer defined benefit plan may not pay benefits that exceed the maximum annual dollar benefit permitted under the Code.[10]

With respect to a participant's or beneficiary's already accrued pension benefit, Section 4231(b)(2) of ERISA specifically provides that a plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans or engage in the transfer of assets and liabilities to or from another multiemployer plan unless "no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date."[11] Under Section 3(16)(B)(iii) of ERISA, the plan sponsor, in the case of a multiemployer pension plan is "the association, committee, joint board of trustees, or similar group of representatives of the parties who establish or maintain the plan..." The plan sponsor of each of the SAG and AFTRA plans is its board of trustees. **Thus, it would be each board's obligation, in the event that the trustees would decide to merge the SAG and AFTRA plans, to ensure that no participant's accrued benefit will be less immediately after any merger than it was immediately before the merger.**[12]

Although it is rare that a participant's vested accrued benefit at normal retirement age would be reduced, a board of trustees of a multiemployer pension plan that has been certified by the plan's actuary to be in critical funded status may be required to reduce or eliminate some or all of its so-called "adjustable benefits."[13] Neither the AFTRA nor the SAG pension plan is certified to be in critical status, nor is either projected to become critical by the respective plan actuaries. **On the contrary, both plans are certified to be in what is often referred to as**

[10] In those situations in which a participant's benefit would exceed the maximum annual dollar limit permitted under Code Section 415 ($195,000 per year commencing at normal retirement age which amount is indexed for inflation), the bargaining parties or the Board of Trustees may be able to alleviate, at least in part, the impact of the reduction, by adopting alternative benefit structures.
[11] See also PBGC Reg. Sec. 4231.4
[12] However, the combined benefit is still subject to Code Section 415.
[13] Adjustable benefits include early retirement benefits or retirement-type subsidies; benefit improvements not in effect for at least 5 years; disability benefits; and most forms of benefit other than a level annuity for the life of the participant or the joint lives of the participant and the participant's spouse. See Section 432 of the Code and Section 305 of ERISA.

the "green"' zone- meaning that no special rules apply to them and they are not required to reduce or eliminate any benefits. [14]

Based on a plan's financial health and its projected funding, the trustees of a multiemployer pension plan may determine that it is necessary to reduce future benefit accruals, which are not legally protected benefits. Except for a 15-day advance notice requirement, there are no general legal impediments to a board of trustees' determination that it is necessary to reduce future benefit accruals. It is not possible to predict whether or not any plan's benefits (whether or not such a plan is merged into another plan) will be improved or reduced in the future. However, a strong union with strong negotiating power and a desire and ability to unionize non-union employers is critical to the proper funding of a pension (as well as a health and welfare) plan and more likely will be able to protect participants' benefits and seek benefit improvements.

MERGER OF HEALTH PLANS

As is the case with pension plans, any decision to merge plans is made by the bargaining parties or the respective boards of trustees. In this case, such a decision likely would devolve upon the respective boards of trustees of the two plans. Although the sources of a health plan's funding may include employer contributions, employee premiums, and investment returns, the investment returns often are a less significant factor in determining benefits than they are for a pension plan. This is because the amount of reserves for future benefits is substantially less than that required for a pension plan and there are fewer assets which can be invested. In addition, health plans usually are invested more conservatively, such

[14] A funding improvement plan must be adopted by a plan that has been certified to be in endangered or seriously endangered status and a rehabilitation plan must be adopted by a plan that has been certified to be in critical status. See Section 432 of the Code and Section 305 of ERISA.

that the investment returns are less volatile and less likely to reflect major market upswings (or downswings).

Unlike the case with pension plans, there are no specific rules governing the merger of health plans. There are no specified procedural rules. There are no specific governmental filing or notice requirements, although notice would be required to plan participants and beneficiaries as a legal matter and notices would be necessary to affected parties (contributing employers, vendors, professional advisors etc.) as a practical matter.[15] In addition, unlike a pension plan which generally must protect a participant's accrued benefit and certain other related benefits, a health plan generally may reduce participants' benefits or increase employee premiums for coverage subject only to certain advance notice requirements. A merger of health plans may be effected for the purpose of preventing future benefit cuts and strengthening the contribution base of the combined plan. In addition, a plan merger would eliminate the problems of many individuals who work under the jurisdiction of both unions but have insufficient covered earnings under either health plan to qualify for benefits. The basic fiduciary analysis used to determine whether or not two health plans should be merged is similar although not identical to that used for pension plans.

MERGER PROCESS

Even after a decision is made to merge two pension plans or health plans, there are a number of terms that must be negotiated by the respective boards of trustees.[16]

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[15] Final Forms 5500 and 990 would have to be filed for the health plan that is terminating through merging with another plan.

[16] In negotiating the terms of a merger agreement, after a decision is made to proceed, the respective boards of trustees must determine the initial benefit structure or structures (or whether both current structures will be retained on a going forward basis), who will be the initial trustees and the process for selecting and removing trustees, who will administer the plan, the location of the fund office or offices and whether a lease must be terminated or negotiated or whether property owned by a fund should be sold or leased or whether it will no longer be usable, which professionals, investment managers, insurance companies, and other vendors will be retained, what IT programs will be used for record retention

However, addressing the various issues involved in a merger does not mean that the process cannot be accomplished nor does it mean that the process cannot be accomplished expeditiously. The fact is that mergers of employee benefit plans are common, because as Congress recognized, they are good for participants. In addition, there are a number of steps that can be taken by plans prior to completion of a merger to assist participants.

In that regard, you have provided to me a document that you have indicated was part of an initial review of the steps that might be taken by these plans to address concerns of participants. I have attached a copy of that document to this report. That document lists a number of steps to facilitate the merger of the plans. It also refers to reciprocity agreements that can be implemented very quickly and can make it much easier for participants to qualify for benefits.

While the steps reflected in the document provided to me are certainly not the only ways to address some of the issues surrounding the combination of the plans, the document does provide a very reasonable roadmap of the kinds of steps that could be taken to do so.

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purposes, benefit processing purposes and other related plan functions, which administrative policies and procedures (ranging from collection and delinquency procedures, to claims appeal procedures, benefit processing procedures, personnel policies, and various other policies and procedures) will govern the operation of the combined plan, how and when will participants and beneficiaries, contributing employers, vendors, and other affected parties be notified, and a myriad of other details, all of which have to be negotiated between the respective boards of trustees.

POSSIBLE STEPS TO ENHANCE PENSION AND HEALTH BENEFITS FOLLOWING MERGER OF SAG AND AFTRA

<u>Reciprocity Agreements</u>

A common problem facing a number of AFTRA and SAG members is that they perform some work under the SAG contracts and some under the AFTRA contracts. However, although they have earnings under both contracts they fall short of the requirements for health plan eligibility under either plan. Yet, if their earnings were combined they may be able to qualify for coverage under one of the plans. Also in some cases, members do not receive a pension; because although they have some years under AFTRA and some under SAG, they fall short of the vested requirements for either plan's pension. Once again, if the pension years were combined, for vesting purposes, they could qualify for pension benefits.

As part of the first step of bringing together the two unions' respective plans, following a merger of the unions, the trustees of the SAG and AFTRA plans could establish a system of reciprocity between Plans. What this means is that members would be able in many cases to combine earnings from AFTRA contracts and SAG contracts to establish eligibility for health coverage in one of the Plans. Additionally, the Trustees could combine SAG and AFTRA pension vesting years to help members achieve a vested pension.

Once the unions are merged, there are further steps that could enhance the safety of pensions and to address the problem of members without health coverage. Trustees of both plans could reduce their respective administrative costs. This may involve a combination of the plans and administrative offices of the AFTRA and SAG funds to reduce duplicate expenses.

However, this will only occur after performing extensive studies and analysis to determine if this is in the best interest of both sets of plans' participants. The guiding principle would always be to enhance the safety and security of the benefits programs for the combined, and future, membership.

<u>Benefit Consolidation Phases</u>

The following phases could be utilized in order to combine the SAG and AFTRA Pension and Health Plans:

> <u>Step One</u>: Establish a system of reciprocity between the AFTRA Health and Retirement and SAG Pension and Health Plans.
>
> <u>Step Two</u>: The SAG plan Trustees and the AFTRA plan Trustees can jointly rebid all major provider contracts in the Health Plans (hospital, medical, and dental and prescription drugs). This would permit members from both unions to have the same health provider network delivery systems. It could also provide the benefit of administrative savings.

Step Three: Move to one information technology platform to process hospital and medical claims. The trustees should use a "best practices" approach and adopt one claims system, which would now be made much easier by having all members in the same networks.

Step Four: The AFTRA plan Trustees and the SAG plan Trustees can jointly rebid outside consultants (auditors, actuaries, and investment managers). Again this could provide immediate savings while moving the administrative offices closer together. (Note: common investment managers will be important in achieving administrative savings in the pension plans because over 50% of administrative costs are associated with this expense category).

Step Five: Combine administrative offices of the SAG Pension and Health and AFTRA Health and Retirement Plans. This step would probably be done after the development of common health networks, professional advisors and information technology delivery systems. Because the previous steps would have built a foundation of cooperation, it would be easier to combine the administrative offices.

Step Six: Combine the AFTRA and SAG Health Plans into one benefit plan. Once again this process will have been simplified by the previous phases above.

Step Seven: Design a pension plan structure(s) that would maximize future pension benefits, consistent with the legal obligation to protect and preserve already accrued benefits.

CORRESPONDENCE FROM JULIA PENNY CLARK, BREDHOFF & KAISER

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January 26, 2012

Via Electronic and First Class Mail

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David P. White
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5757 Wilshire Blvd.
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Dear Ms. Hedgpeth and Mr. White:

I have been asked to provide this letter regarding the potential for mergers of multiemployer pension plans.

First, it should be noted that mergers of unions do not automatically nor always result in merger of the multiemployer pension plans that the unions negotiate for their members. The merger of the unions and the merger of their plans are separate issues, and a merged union might well decide that it is best to continue more than one plan for members working under different collective bargaining agreements.

Second, the merger of multiemployer pension plans is specifically authorized by the Employee Retirement Income Security Act (ERISA). A government agency, the Pension Benefit Guaranty Corporation (PBGC) has the authority to review proposed mergers and disapprove them if it believes they will be harmful to the rights of participants or to the PBGC's multiemployer plan insurance program. Representatives of the PBGC have appeared at meetings and stated that they generally favor mergers, as they tend to create larger, better funded, and more stable plans.

Third, my law firm has had extensive experience with mergers of multiemployer pension plans, from the early years of ERISA through very recent years. I conservatively estimate that the firm has been involved in more than a dozen such mergers. In our experience such mergers generally result in stronger, more efficient and more stable plans that are in the best interest of all of the plans' participants.

Please let me know if we can answer any additional questions for you.

Sincerely,

Julia Penny Clark

Julia Penny Clark

cc: Robert Bush, Esq.

CORRESPONDENCE FROM TERRENCE M. DENEEN

Kim Roberts Hedgpeth
National Executive Director
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David P. White
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Dear Directors:

I am writing you at the request of attorney Robert Bush, who asked me to provide you with some comments and observations about multiemployer pension plan mergers based upon my thirty-plus years of experience as a pension regulator and former legal counsel to many union pension funds. Mr. Bush contacted me earlier this week and explained that the Boards of the Screen Actors Guild and the American Federation of Television and Radio Artists are considering a merger of the two unions; he further explained that the Boards were aware that many questions and concerns had been expressed about the effect a merger would might have upon the SAG and AFTRA Retirement Plans, and he asked whether I would share with you some of the information about plan mergers that I used to deliver when I spoke on behalf of the Pension Benefit Guaranty Corporation at annual meetings of the National Coordinating Committee for Multiemployer Pension Plans and the international Foundation for Benefit Plans. This is not a burdensome or unwelcome task, and I am happy to accommodate his request.

I should perhaps state at the outset that I represent no party involved in the proposed merger, or any employers who contribute to the Plans. As I told Mr. Bush, I am not interested in seeking remuneration from any party for expressing views and information that I have delivered to the multiemployer community for the past two or three decades. I have been working with multiemployer plans since the late 1970's, when I was a junior member of the PBGC drafting team that developed the 1980 Multiemployer Act: I went on to serve as counsel for the venerable UMWA Health and Retirement Funds, as an associate and the partner at the Groom and Nordberg Law Firm, and then returned to PBGC in 1992, where I eventually became the senior career official in charge of the multiemployer program. After so much personal investment in this area, I am, naturally enough, a strong advocate for well-designed, financially viable multiemployer plans, and that is what impels my letter to you.

As you are no doubt aware, union mergers have no immediate effect upon the preexisting employee pension plans the unions had previously established to cover active workers and retirees. This is because the benefit plans are independent legal entities, and are governed (under the Taft-Hartley Act, ERISA, and the Internal Revenue Code) by trustees who administer the plans solely in the interest of participants. All plan assets are, of course, held in trust and may be used only for providing benefits to plan participants. And all plan benefits are established by the governing plan and trust document that are particular to each plan. Thus, the merger of two unions does nothing to upset the structure of the union sponsored benefit plans.

To be sure, both ERISA and the Internal Revenue Code permit—but do not require—two or more multiemployer pension plans to merge. In order to effect a merger, several statutory and regulatory requirements must be satisfied, as set forth in section

4231 of ERISA and 29 CFR Part 4231. Among other things, advance notice must be filed with the PBGC; *the plans must be amended to specify that no participants' accrued benefit can be reduced due to the merger*; actuarial studies must be performed for each plan; and those studies must demonstrate that the plan is not reasonably expected to become insolvent. *As a result of these safeguards, neither PBGC or plan participants experienced any meaningful losses from multiemployer plan mergers.*

Indeed, as I frequently noted in my NCCMP and IFEBP presentations, over the last 25 years several hundred multiemployer pensions have merged and combined to form larger entities. The filings the plans lodged with PBGC in connection with the merger typically reported that the merger was intended to (a) reduce total administrative costs by reducing duplicative administrative costs; (b) allow for more efficient investment of a larger pool of plan assets; (c) trimming the number of professional service vendors; and (d) allowing better service to plan participants. These are common sense points: two plans that once each had to pay for surety bonds will now pay for only one; there will be one, and not two, actuarial valuation reports, and a larger asset pool frequently allows the combined plans a greater range of options at a lower cost.

I would not presume to express any view whether it would be wise for the SAG and AFTRA pension plans to merge. That decision is reserved to the Trustees of the respective plans, who would do so only after obtaining appropriate financial, legal and actuarial advice from qualified advisors. But I can report that over many years I reviewed many dozens of these merger applications, that the transactions, once approved, were successfully implemented, and that compliance with the statutory rules actually aided the plans in achieving the goals previously mentioned. The purpose of this communication is simply to share my experience in an area that relatively few people know anything about.

Very truly yours,

Terrence M Deneen

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January 25, 2012

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RE: Benefit Plan Mergers

Gentlemen:

My colleague Bob Bush has advised me that a merger of the health and pension plans affiliated with your respective organizations is being considered and that you are requesting information from a variety of sources concerning past experience with mergers. I am happy to provide my perspective, which based on discussion with my law partners, also represents the perspective of my law firm.

It is my view that mergers of multiemployer result in stronger, more cost efficient plans and therefore, absent unusual circumstances, are in the best interests of the participants and beneficiaries of the merged plans. As a result mergers of multiemployer plans are very common. The merger process itself is not difficult. The process for a merger of multiemployer defined benefit pension plans has a few more requirements than for a merger of welfare plans or defined contribution plans but the merger process even for defined benefit plans is not particularly complicated.

The legal requirements governing the merger of multiemployer defined benefit pension plans are found in Title IV of ERISA and the related regulations. These rules are found in ERISA §4231. The Legislative History of the Multiemployer Pension Plan Amendments Act (MPPAA) states that it was the intent of Congress by adopting §4231 to encourage mergers of multiemployer defined benefit pension plans.[1]

The multiemployer plan clients of my firm regularly engage in mergers and these transactions represent a significant part of our work. My firm is counsel to approximately 120 plans. All but a few of these are multiemployer plans. Several of the multiemployer plans (defined benefit and defined contribution pension as well as health) are national or large regional plans that have been created and/or have grown as a result of mergers. I have been practicing law since 1976 and have been preparing merger agreements for our clients almost from the beginning of my law practice.

My best estimate is that my firm has prepared approximately 60 mergers for our clients since 1999 when the records on our computer network begin. Prior to that date I am aware of at least another 60 mergers and this number is almost certainly lower than the actual number. This includes mergers of defined benefit and defined contribution pension plans, health plans, vacation plans, apprentice and other training plans and other types of welfare benefit plans. Some of the mergers have involved the merger of a single employer plan into a multiemployer plan but all have involved at least one multiemployer plan. There are several mergers currently in progress that have not been included in these numbers.

In addition to the mergers in which we have participated as counsel to one of the funds, we are often involved in mergers as counsel to International Unions. One of the Unions in particular merges Local Unions from time to time and we serve as consultant to the assigned International Representative to facilitate the consolidated Local Union's merger of the benefit funds of the former Local Unions. I personally have been involved in five such situations since 2000 in Upstate New York, New York City, Michigan, Florida and California. Two of these situations involved merging five former funds of each kind into one (e.g. five pension funds into one consolidated pension fund). Other attorneys in my firm have been assigned to similar roles in other Local Union mergers. We provide our experience to assist counsel to the local funds as needed.

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[1] In the Legislative History of the Multiemployer Pension Plan Amendments Act, Congress explained that the merger provisions of MPPAA were intended to encourage mergers of multiemployer plans:

> The rules regarding mergers and transfers are designed to allow mergers in all cases where the resulting plan will not be expected to be in financial trouble. This facilitates the committee's purpose of encouraging mergers which expand a plan's contribution base to provide greater stability by looking at the prospects for the resulting plan instead of focusing on the narrow mechanical test provided under current law. The committee believes that a merger which complies with the conditions will generally be in the best interest of plan participants.

House Comm. on Education and Labor, H.R. Rep. No. 869, 96th Cong., 2d Sess. 87 reprinted in [1980] U.S. Code Cong. & Ad. News 2918, 2855.

The same policy considerations apply to mergers of welfare plans even though the MPPAA rules only apply to pension mergers.

Because mergers of multiemployer plans are so common, this subject is frequently offered at education conferences for Trustees and Plan professionals presented by such organizations as the International Foundation of Employee Benefit Plans (IFEBP), the AFL-CIO and the National Coordinating Committee for Multiemployer Plans (NCCMP). I have given presentations on mergers at the AFL-CIO Attorneys Regional Meeting in 1999, the Building and Construction Trades Department Attorneys Conference in 2000 and the NCCMP Annual Conference in 2007. Other attorneys from this firm have also given such presentations. The IFEBP offers a program on mergers at one or more conferences per year to meet the demand for such information.

The NCCMP and other organizations have made efforts to obtain additional legal tools for use in mergers of financially challenged plans and assistance from the PBGC for such plans. PBGC has on a number of occasions provided assets as part of an arrangement for a larger plan to takeover a smaller financially challenged plan. The view of the PBGC is apparently that the assets transferred as part of the assisted-merger are less than PBGC would spend if the smaller plan became insolvent and the assisted-merger will likely prevent the insolvency of the smaller plan.

In summary, although a merger may appear daunting if it is an unfamiliar experience it really is not a difficult process. Multiemployer mergers have been encouraged by the government even to the point of financially assisting mergers. As a result the law presents few hurdles to mergers even for defined benefit pension plans which are the only mergers specifically regulated. Mergers of multiemployer plans are common and have resulted in stronger, more cost efficient plans with a broader contribution base that also allow their participants more employment opportunities with participating employers.

If you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

Joyce A. Mader

Joyce A. Mader

CC: Robert A. Bush

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Re: SAG and AFTRA Pension and Health Mergers

Dear Ms. Hedgpeth and Mr. White:

I have been asked to review the memo prepared by Deborah Lerner concerning the potential merger of the SAG and AFTRA Pension and Health plans, and to advise as to whether I agree with her conclusion that merger is legally feasible.

I have broad experience in plan mergers in the entertainment industry – indeed, I am confident that I have handled more plan mergers than any other attorney in the entertainment industry. I have been the principal attorney for one of the parties in six defined benefit pension plan mergers and fourteen health plan mergers in this industry.

Each merger, of course, imposes its unique challenges and details to be worked out by the plan professionals and Trustees. Generally, however, mergers are beneficial to the participants of both plans. They typically generate numerous economies of scale, including reduced per capita administrative expenses, greater bargaining leverage with providers, and lower investment costs as a percentage of assets. They can also serve to avoid splits in benefit contributions that could result in a denial of any benefits to individuals whose contributions, if sent to a merged plan, would entitle them to essential benefits.

Based upon my experience and review of the Lerner memo and attachment, and of the respective Pension and Health Plans, I am of the opinion that merger is legally feasible and could be advantageous to the participants and beneficiaries of both sets of plans.

Very truly yours,

Franklin K. Moss

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Re: Benefit Plan Mergers

Dear Kim and David:

I have reviewed the feasibility report prepared by Deborah Lerner concerning the impact on the pension and health plans sponsored by AFTRA and SAG of a merger of the Unions. I agree with her conclusion that while a merger of the unions would not, in and of itself, compel a merger of the pension or health plans, such mergers would be entirely feasible from a legal standpoint. As you know, my firm is co-counsel to the AFTRA Health and Retirement Funds, and I am the senior partner responsible for our representation of the Funds. I am the head of our ERISA group and have represented many Taft-Hartley pension and welfare funds in different industries for over 30 years. I have also advised many trustees in connection with mergers of pension and health plans.

As Ms. Lerner states, mergers are very common in all industries across the country, and occur for a variety of reasons, but, in general, they are in the interest of plan participants because they may allow participants to concentrate their covered work under one benefit structure where it might otherwise be split, expand the contribution base and strengthen the plans' funding, and reduce administrative expenses not only by eliminating one set of audit and valuations and required governmental filings, but because the merged plan typically has better bargaining power to negotiate lower fees and better arrangements with service providers. In addition, where unions merge, trustees of the related Taft-Hartley plans often consider merger in order to avoid confusion over the direction of the employer contributions under the merged union's collective bargaining agreements.

Thus, while mergers of the plans are not required if SAG and AFTRA merge, there are no legal impediments to a merger, and there may be a number of benefits worth consideration by the respective trustees with all of their professional advisors.

Sincerely yours,

Jani K. Rachelson

Jani K. Rachelson

JKR:dea

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Re: ***Feasibility and Benefits of Plan Mergers***

Dear Ms. Hedgpeth and Mr. White:

I am writing to share my experiences as legal counsel assisting boards of trustees in evaluating and implementing almost a dozen mergers of pension plans and health and welfare plans. The plans involved ranged in size from a few million dollars covering a few hundred workers and retirees in a single metropolitan area to hundreds of millions of dollars covering thousands of workers and retirees (and in one case, billions of dollars with hundreds of thousands of participants) throughout the 13 western states. The reasons behind these mergers varied with the particular circumstances of the plans, unions and industries involved but in every single case there were two elements that were the primary, if not exclusive, drivers:

- opportunities to achieve significant savings in investment fees and costs of administration by combining the merging plans' operations and investments, in some cases, the savings realized were the equivalent of a substantial portion of the plans' income from employer contributions.

- diversification and/or broadening of the two plans' covered population in terms of geographic area, industries and size of employers, thereby strengthening and helping to stabilize the employer contribution base that serves as the life's blood of these plans.

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In each instance, the merged plans emerged stronger and more resilient than had they remained separate.

To be certain, for any merger to be successful, the unique characteristics of each plan must be carefully analyzed to determine how best to blend together their respective benefit structures without disadvantaging the participant groups from either plan. In this regard, federal law provides significant protections to all participants involved in pension plan mergers to make sure the benefits each has earned before the merger are preserved under the merged plans. In my experience, with careful planning and the cooperation of all stakeholders in both plans, once a definitive agreement for merger is reached, implementation can be achieved with minimal inconvenience for the covered participants; indeed in most cases, retirees may not even realize that a merger has occurred.

Very truly yours,

Charles A. Storke

CAS:jh