



Office of Inspector General
Pension Benefit Guaranty Corporation

July 11, 2016

RISK ADVISORY

To: Karen Morris
Acting Chief of Negotiations and Restructuring

From: Robert A. Westbrooks
Inspector General 

Subject: Bundled Administrative Expenses in Financial Assistance Requests

This Risk Advisory is to report our observations related to management's acceptance of a bundled administrative expense agreement with a third-party administrator for a multiemployer (ME) plan receiving financial assistance from PBGC. The suggestions contained in this Risk Advisory do not constitute formal audit recommendations; therefore, no management response is required. If management does take action as a result of this Risk Advisory, we respectfully request a written summary of the action taken. Please be advised we will post this Risk Advisory on our public website in compliance with our responsibility under the Inspector General Act to keep the Board, Congress, and the public fully and currently informed about problems and deficiencies relating to the Corporation's programs and operations.

Summary

As you know, management is responsible for identifying internal and external risks that may prevent the Corporation from meeting its strategic goals and objectives, assessing risks to determine their potential impact, and applying the appropriate risk responses. One source of risk information is the OIG.

We have identified the following risk that warrants management's attention:

PBGC is paying a third-party administrator administrative expenses that may be in excess of expenses that are reasonable, necessary and adequately supported due to the acceptance of a bundled administrative expense agreement.

To mitigate this risk, we suggest you review this agreement and any similar agreement with other third-party administrators to ensure PBGC only pays those administrative fees that are “reasonable, necessary and adequately supported.”

Background

PBGC’s ME pension insurance program protects about 10 million workers and retirees in about 1,400 pension plans. Collective bargaining agreements typically establish ME plans involving more than one unrelated employer, generally in one industry. Most employers and union trustees administer these plans jointly. Some may engage a third party to administer the plan, however, the trustees remain responsible for the plan. PBGC does not directly pay benefits to participants of failed or insolvent ME plans. Instead, under ERISA § 4261, the agency provides the insolvent ME plan “financial assistance in an amount sufficient to enable the plan to pay basic benefits under the plan.” PBGC’s financial assistance includes the amount of benefits owed, as well as an amount to cover administrative expenses to enable the plan to pay retirees and place new retirees into pay status.

The Multiemployer Program Division (MEPD), within the Office of Negotiations and Restructuring, is responsible for processing financial assistance requests. Once a plan files a Notice of Insolvency and a financial assistance request with PBGC, MEPD assigns the plan to a case auditor for processing. Upon receipt of requested documents and information, the MEPD auditor determines the appropriate amount of assistance the plan needs. Financial assistance consists of the amount of actual benefit payments and reasonable administrative expenses. MEPD procedures require field audits to ensure the initial financial assistance awarded goes to an insolvent plan and the plan is properly spending the proceeds of the PBBGC loan.

In FY 2015, PBGC paid \$103 million in financial assistance loans to 57 ME plans (an increase from \$89 million in financial assistance to 44 ME plans in FY 2013). In FY 2015, expenses for the ME program exceeded income for a net loss of \$9.9 billion. This loss increased the deficit in the ME program to \$52 billion – an all-time record high for the program. According to the latest PBGC projections report, it is more likely than not the program will run out of money by 2025. The ME program has been on the GAO’s High-Risk List since 2009, and the fiscal sustainability of the program has been a long-standing concern of our office.

Risk

PBGC is paying a third-party administrator administrative expenses in excess of expenses that are reasonable, necessary and adequately supported due to the acceptance of a bundled administrative expense agreement.

ERISA § 404(a)(1) mandates that a “fiduciary shall discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of paying benefits and defraying reasonable expenses of administering the plan.” ERISA § 408(c) (2) permits a fiduciary to receive “reasonable compensation for services rendered, or for the reimbursement of the expenses properly and actually incurred, in the performance of his duties with the plan [.]”

Our review focused on one plan wherein the plan administrator bundled expenses for administrative services rendered. In his 2012 Fiduciary and Administrative Services Agreement with the plan, the plan administrator states that he has filled the roles of Trustee, Plan Administrator, Plan Sponsor and Independent Fiduciary since 2000.

According to MEPD policy, administrative expenses incurred or charged to a plan should be “properly recorded, reasonable, and necessary” and such expenses be supported by adequate documentation. MEPD is to enforce this policy through field audits and financial assistance reviews designed to ensure plans meet the standards for financial assistance as provided by ERISA and PBGC regulations.¹ For this plan, MEPD reported in its 2007 field audit report that key documents to support plan expenses and cash on hand, such as bank statements and invoices, were missing. The field audit report further depicted the plan’s records as “at best sketchy or not available.”

In 2015, we found PBGC paid the plan administrator \$264,000 (\$22,000 per month) for administering benefits to approximately 2,500 participants. For these payments, PBGC allowed compensation to the plan administrator in the form of a fixed monthly fee for fiduciary and administrative services that were not reasonable or adequately supported. This occurred because the plan administrator bundled variable costs, such as billable staff wages and trustee fees, into his fixed monthly administrative fee. Since 2007, PBGC has paid the plan administrator’s fee under this bundled fee arrangement. The plan administrator renegotiated his fixed fee once, in 2014, reducing it from \$29,000 to \$22,000 a month. After the reduction of the fee, PBGC continued to pay for bundled administrative services without requiring proper supporting evidence. MEPD’s periodic reviews of the plan’s administrative expenses did not go beyond the total monthly bundled amount to assess all costs incurred or charged, direct costs or otherwise.

MEPD requires a plan to submit a written request each time it needs financial assistance. Aside from the request letter, MEPD is required to review other supporting documents, such as bank

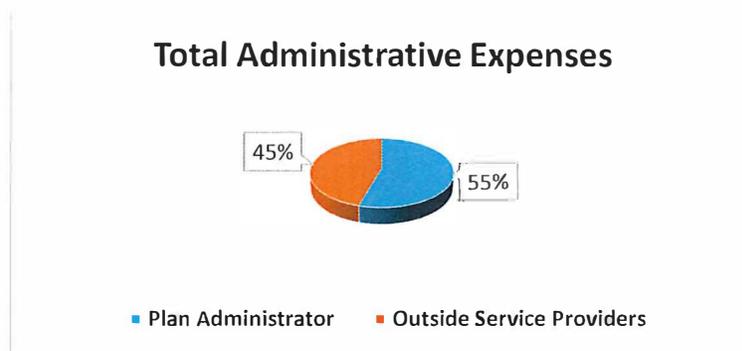
¹ MEPD Multiemployer Plan Procedures FY 2014, dated October 1, 2014, was the current criteria at the start of our review.

statements, invoices, cancelled checks and service agreements, as part of the financial package submission. The service agreement between the plan and the plan administrator in this case specified that compensation would cover his services and related bundled fiduciary, trust office, administrative, legal, and actuarial services. However, the documentation provided by the plan administrator to PBGC in support of the plan’s financial assistance request only supported the plan administrator’s flat fee, \$29,000 or \$22,000 – that is, there was no documentation of the expenses included within the flat fee. As recently as 2014, MEPD requested details for the bundled fee. In response, the plan administrator provided only an itemized list of services without listing the associated costs and MEPD did not request additional information.

The MEPD Program Manager advised the OIG that MEPD did not dispute the bundled administrative expenses, and that, generally, he would question only “high cost” plans. In terms of “high cost” plans, the Program Manager was referring to a comparison of this plan versus the average administrative expenses of the roughly 1,400 ME plans, whether insolvent or solvent. MEPD policy requires auditors to perform analytical reviews to identify possible misstatements and unreasonable, unnecessary and unsupported expenses incurred by the plan; it does not waive this requirement in the event the administrative expenses compare favorably to national averages.

According to information provided by the plan administrator and OIG analysis, the total administrative expenses received in 2015 (\$264,000) can be divided into two categories: (1) payments to outside service providers and (2) payments to the plan administrator. Figure 1 below shows payments to outside service providers accounted for \$120,100 (45 percent) of the administrative expenses, and payments to the plan administrator accounted for \$143,900 (55 percent) of the administrative expenses.

Figure 1: Total Administrative Expenses Paid for Outside Service Providers Versus Plan Administrator, as of December 31, 2015.



The plan administrator provided service agreements for each professional services providers, and we conclude the payments to these providers were reasonable based on the terms of their agreements. In addition, the services provided (such as plan actuary service, benefits processing services and banking services) were necessary to the plan and adequately supported. For example, the plan administrator separately contracts with an individual to perform the duties of the benefits administrator. This benefits administrator averaged 30 hours per week, worked from their home, and received \$54,000 a year. The benefits administrator's duties consisted of the day-to-day administration of the plan and managing a dedicated phone line for a 2,500-participant plan.

Regarding the payments to the plan administrator, we found that these payments were not reasonable or adequately supported. We discussed the invoices and payments with the plan administrator and he provided explanation and documentation. For 2015, the plan administrator did not provide a detailed allocation of expenses. For 2016, he projected \$235,310 in plan expenses, of which \$128,660 were payments to the plan administrator, estimated as follows:

- 15 average hours per month for the plan administrator for an annual payment of \$89,460;
- 12 average hours per month for support staff within the plan administrator's office for an annual payment of \$27,200; and
- \$12,000 estimated annual allocable share of office rent, including share of common space.

The plan administrator estimated he averaged 15 hours per month and yet received a significantly higher salary than the benefits administrator, who is doing the substantive work from her home. In addition, while the benefits administrator explained her time billed to the plan, the plan administrator could only provide a rough estimate. Based on this misalignment of duties, we found the salaries of the plan administrator and support staff to be unreasonable and unnecessary in comparison to the salary and duties of the benefits administrator. We also note that salary amounts were unsupported estimates because no one in the plan administrator's office recorded hours worked in relation to the plan. Likewise, the plan administrator did not have an allocation method for determining overhead expenses such as rent and utility expenses.

We believe PBGC has paid administrative expenses that were not reasonable or adequately supported because their analytical reviews focused solely on the bundled amount, not the individual actual costs incurred by the plan. Moreover, in determining reasonableness of administrative expenses, the MEPD Program Manager relied upon a comparison of total

administrative expenses with national averages, although there is no policy permitting this. The plan administrator was able to operate with little scrutiny by PBGC due to a bundled arrangement; thus, increasing the risk of improper payment of administrative expenses.

Suggestion

To reduce the risk of waste, fraud, and abuse, and to enhance program performance, we offer the following suggestion:

The Chief of Negotiations and Restructuring should review this agreement and any similar agreements with third-party administrators who request financial assistance with bundled administrative expenses to ensure that PBGC pays only those administrative fees that are “reasonable, necessary and adequately supported.”



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

February 3, 2017

To: Robert A. Westbrooks
Inspector General

Through: Karen L. Morris *KLM*
Chief of Negotiations and Restructuring

From: Rossi Marcelin *RM*
Division Manager, Multiemployer Program Division

SUBJECT: Management's Response - Bundled Administrative Expenses in Financial Assistance Requests

A. Background

In November 2015, your office commenced a "follow-on" review in a series of limited-scope audits of the Multiemployer Program Division ("MEPD"). The OIG notified the Office of Negotiations and Restructuring ("ONR") and MEPD that they would be reviewing insolvent multiemployer plan administrative expenses.

On June 30, 2016, we received the OIG's observations to ONR in the form of a "Risk Advisory." Your memo focused on costs incurred by a particular plan receiving financial assistance and suggested that MEPD review plan agreements relating to administrative expenses. The memo does not include formal audit recommendations, and you have advised us that no response from management is required. Given the significance of the issues you have raised, however, we have reviewed the facts in detail and will take action as necessary.

B. OIG Risk Reported

PBGC is paying a third-party administrator administrative expenses that may be in excess of expenses that are reasonable, necessary, and adequately supported due to the acceptance of a bundled administrative agreement.

C. Authority and Responsibility under ERISA

PBGC's obligation to pay financial assistance is set forth in ERISA § 4261(a): "If upon receipt of an application for financial assistance under section 4245(f) or section 4281(d), the corporation verifies that the plan is or will be insolvent and unable to pay basic benefits when due, the corporation shall provide the plan financial assistance in an amount sufficient to enable the plan to pay basic benefits

under the plan.”

The conditions under which PBGC provides financial assistance are detailed under ERISA § 4261(b)(1): “Financial assistance shall be provided under such conditions as the corporation determines are equitable and are appropriate to prevent unreasonable loss to the corporation with respect to the plan.”

PBGC, consistent with these statutory requirements, pays financial assistance directly to an insolvent plan, not to third party administrators or any other professionals employed by a plan or the plan’s independent fiduciary. Under ERISA § 404, a fiduciary has the sole responsibility of defraying reasonable expenses of administering a plan. Upon a multiemployer plan’s insolvency, PBGC must provide financial assistance to an insolvent plan which will enable the plan to pay basic benefits and cover required and reasonable administrative expenses.

MEPD’s standard for approving financial assistance to a plan is first and foremost that, consistent with the statute, such expenses do not produce a risk of unreasonable loss to the corporation with respect to the plan. Second, as a matter of policy and MEPD’s internal procedures, we look to ensure that expenses submitted for financial assistance are reasonable, necessary, and adequately supported.

The U.S Department of Labor (“DOL”) has the statutory authority to define reasonable expenses under Title I of ERISA. The application of fiduciary principles is based on the individual facts and circumstances of each situation and plan. Reasonableness is therefore based on what a fiduciary would prudently expend in like circumstances for the sole and exclusive interest of participants and beneficiaries with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims.” *See* ERISA § 404(a)(1)(A)(ii) and 404(a)(1)(B).

To determine what is reasonable, MEPD applies a number of criteria, including:

- a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of a multiemployer pension plan;
- b. Market prices for comparable goods and services;
- c. The restraints or requirements imposed by such factors as: sound business practices, geographic location, specific challenges faced by the plan;
- d. Significant deviations from the established practice of the plan itself or from other multiemployer plans in a like situation.

Although administrative expenses make up less than 7 percent of total financial assistance requested, MEPD maintains a number of controls in our process to ensure only reasonable and necessary expenses are funded. These include:

- A standardized program of audit procedures over administrative expenses which are performed on multiemployer plans upon insolvency;
- The requirement that we receive invoices for all expenses submitted for assistance;
- Three levels of review performed over all requests for financial assistance including

- expenses;
- Periodic analysis of total administrative expenses incurred by each plan receiving financial assistance.

Under ERISA, PBGC is not a party to the agreements that plan trustees enter into, and the plan trustees have a fiduciary obligation to act in the best interest of the plan. PBGC closely coordinates with plan trustees and plan administrators to help ensure appropriate administration of insolvent plans however, PBGC lacks the statutory authority to formally establish procurement processes to be followed by plans.

D. Necessary

The first step MEPD takes in determining whether an expense should be approved is whether the expense is ordinary and necessary for the operation of a multiemployer pension plan. Under the terms of the Fiduciary and Administrative Services Agreement of the plan in question, effective as of April 30, 2014, the bundled fee of \$22,000 per month would cover the following services:

1. Service as Trustee, Plan Administrator, Plan Sponsor, and Independent Fiduciary
2. Processing of benefit appeals
3. Tracking of contributions due and paid to the plan
4. Maintaining an ERISA Bond for the plan
5. Maintaining plan files and records including data bases (electronic, microfiche, and approximately 100 boxes of files and records) going back to the plan's creation in the 1960s
6. Maintaining individual participant files
7. Benefit processing through dedicated staff, Trust letterhead, and phone lines
8. Benefit Payments (Including ACH) through a U.S. Bank which maintains an 800 toll-free participant line and Spanish speaking capability
9. A computer team, dedicated service, staff for periodic reporting to the PBGC and monthly data transmission to the plan's bank
10. Monitoring participant mortality; including use of a Positive Pay check system
11. Handling all aspects of participant communication, including mailings to participants, and tracking of missing participants
12. Compliance reporting, including 1099Rs, and Form 5500s
13. Reporting to the PBGC, submission of requests for financial assistance (including bank statements and cash flow reports)
14. Maintaining a current Plan Document, obtaining IRS determination letters as necessary
15. Providing actuarial reports as necessary

These enumerated services are all ordinary and necessary in the operation of a multiemployer pension plan, and are consistent with the services provided to the other 60+ plans to which PBGC currently provides financial assistance.

The OIG noted that part of the identified risk is “due to the acceptance of a bundled administrative agreement.” A bundled services agreement is one of many types of service agreements used by

plans. In May 2004, the DOL's Employee Benefits Security Administration issued a fact sheet entitled "Tips for Selecting and Monitoring Service Providers for your Employee Benefit Plan." One of the tips provided is as follows:

"You may also wish to consider service providers or alliances of providers who provide multiple services (e.g., custodial trustee, investment management, education, or advice, and recordkeeping) for a single fee. These arrangements are often called "bundled services."

MEPD carefully evaluates contractual arrangements used by plans, including bundled services, and will raise any issues which appear to be out of the ordinary.

E. Reasonableness

Price

The next step MEPD takes in determining whether an expense should be approved is whether or not the expense is reasonable. As PBGC is charged by statute with the prevention of unreasonable losses with respect to the plan, our focus here is primarily to ensure that expenses are consistent with fair market rates for the services in question.

One of the best methods we have for arriving at a reasonable price for a given service is to compare it to what other plans have paid for a similar service. This is called the fair market value or market price, which can best be defined as the price that a person reasonably interested in buying a given good or service would pay to a person reasonably interested in selling it. The fair market value is widely used across many areas of commerce, financial accounting, and insurance. Furthermore the use of a market price in determining the reasonableness of a given good or service is directly in line with the "prudent man standard" discussed above and found in ERISA § 404. This is because the prudent man standard dictates that what is reasonable is based on what a fiduciary would spend in like circumstances, i.e., the market price is a price based on a comparable service.

In 2015 MEPD conducted a study of the administrative expenses incurred by all multiemployer plans to arrive at an objective measure of what it generally costs to administer a multiemployer plan. We found that the greatest predictor of administrative expenses was the size of the plan; simply put, administrative expenses move in line with the number of participants and beneficiaries in the plan. A plan with 20,000 participants will require more resources to administer than one with 2,000 participants. There will be a commensurate increase in phone calls, benefit determinations, and mailings for larger plans. We also found, however, that the larger the plan the lower the expenses can be expected to be on a per participant basis. Larger plans cost less to administer on a per participant basis due to economies of scale. As a result, we divided plans into 5 tranches by the number of participants, i.e., 0-499, 500-999, 1,000-4,999, 5,000-9,999, and 10,000 or more.

We also noted that the only expense that is common in solvent multiemployer plans but not found in insolvent multiemployer plans is a plan's investment/asset management and consulting fees. Accordingly we removed all of these fees from our analysis. The OIG noted the following:

“The MEPD Program Manager advised the OIG that MEPD did not dispute the bundled administrative expenses, and that, generally he would question only “high cost” plans. In terms of “high cost” plans, the Program Manager was referring to a comparison of this plan versus the average administrative expenses of the roughly 1,400 ME plans, whether insolvent or solvent.” MEPD policy requires auditors to perform analytical reviews to identify possible misstatements and unreasonable, unnecessary and unsupported expenses incurred by the plan; it does not waive this requirement in the event the administrative expenses compare favorably to national averages.”

“...in determining reasonableness of administrative expenses, the MEPD Program Manager relied on a comparison of total administrative expenses with national averages, although there is no policy permitting this.”

While the OIG’s memo states that MEPD compared the plan to roughly 1,400 multiemployer plans, the plan was compared to the roughly 520 plans of a similar size (between 1,000 and 4,999 participants). The OIG’s memo noted that our analysis included plans “whether insolvent or solvent.” However, we would like to note that MEPD adjusted its data to omit expenses that are not borne by insolvent plans. Applying it in this case, MEPD concluded that the expenses charged by the plan in question were reasonable. While the OIG states that there is no policy permitting the use of our study, MEPD conducted the study to aid in our analysis of the reasonableness of plan expenses, as required by the standards of reasonableness found in ERISA.

The plan reviewed by the OIG has approximately 2,500 participants. For plans of like size, we find that the average administrative expense per participant is \$227. The total administrative expenses of the plan in question, for the year 2015, were \$112 per participant, significantly less than what similar plan fiduciaries are paying to administer multiemployer plans of a similar size. Using this objective measure, we find that based on price alone, MEPD cannot find that these costs pose an unreasonable risk of loss to the corporation with respect to the plan as per ERISA § 4261(b)(1). Neither can we find that these costs are unreasonable based on the prudent man standard of care, as similarly situated fiduciaries are paying nearly twice the rate to administer multiemployer plans of a similar size. MEPD simply has no basis on which to consider the expenses of this plan unreasonable.

Market Analysis vs. Cost Analysis

The OIG noted the following:

“The plan administrator estimated he averaged 15 hours per month and yet received a significantly higher salary than the benefit administrator, who is doing the substantive work from her home. In addition, while the benefits administrator explained her time billed to the plan, the plan administrator could only provide a rough estimate. Based on this misalignment of duties, we found the salaries of the plan administrator and support staff to be unreasonable and unnecessary in comparison to the salary and duties of the benefits administrator.”

The plan administrator’s relationship to the benefit administrator in this situation is similar to that of employer and employee as the benefits administrator is an independent contractor. The plan

administrator in question is an ERISA attorney with over 30 years of experience, and has served thousands of plans and has overseen well over \$1 billion in plan benefit payments/direct rollovers. A professional with a similar background is routinely compensated at a higher rate than the benefit administrator. The PBGC is not in a position to ensure pay equity in organizations who provide services to insolvent multiemployer plans, this is a private business function, and PBGC is not party to the contractual arrangements.

It is also important to note that we do not evaluate the reasonableness of the expenses charged to plans by utilizing a cost buildup approach (or cost plus pricing). The cost buildup approach is a system in which a business develops their prices, fees, or rates by adding up direct and indirect costs and then adding a profit. We evaluate the reasonableness of expenses based on market (or value) based pricing. We do not use a cost based pricing approach because the majority of trustees who make the decisions on which service providers to hire do not utilize cost based pricing and the vast majority of service providers in the industry do not develop their pricing based on costs but instead rely on market conditions to determine their pricing. In addition, many service providers may lack formal cost accounting systems needed to properly develop cost estimates.

It would be unreasonably burdensome and likely cost and resource prohibitive for MEPD to require a cost buildup analysis of all expenses approved for payment. MEPD management has determined that we are willing to accept the risk that the price we accept from a market based analysis may be greater than what a cost based analysis would produce. It should be noted that cost analysis of proposals received in response to federal government solicitations is only used in exceptional circumstances and reliance on market analysis is the preferred approach.

Other factors

Per an Information letter issued by the DOL on December 1, 1997:

“Because a number of factors will necessarily be considered by a fiduciary when selecting a service provider, a fiduciary need not necessarily select the lowest bidder when soliciting bids, although the compensation paid to the service provider by the plan must be reasonable in light of the services provided. The fiduciary should not consider one factor, such as the lowest fee bid for services, to the exclusion of any other factor, such as the quality of the work product. Rather, the decision regarding which service provider to select should be based on an assessment of all the relevant factors, including both the quality and cost of the services.”

Therefore, when determining whether an expense is reasonable, MEPD must look at both cost and quality. An assessment must be made of all the relevant factors and not simply the cost. The quality of the work performed is integral to the determination of whether or not the expense is reasonable. MEPD has not found the plan administrator’s service to the plan in this case to have been lacking in any way. Documentation requests were complied with in a timely manner, fund staff was responsive, and we encountered no problems with the day to day administration of the plan.

F. Adequately supported

The OIG noted the following:

“We also note that salary amounts were unsupported estimates because no one in the plan administrator’s office recorded hours worked in relation to the plan. Likewise, the plan administrator did not have an allocation method for determining overhead expenses such as rent and utility expenses.”

As we have previously stated, and in line with DOL-issued guidance, ERISA does not prohibit a bundled services arrangement. However, a business such as the plan administrator’s in question which works for a flat fee under these bundled service agreements would have no reason to track hours, as they are not paid on an hourly basis. The terms of service call for a flat rate of \$22,000 a month and the price as discussed above was found to be reasonable by MEPD.

In making a determination that an expense is adequately supported, MEPD looks at whether an expense is included accurately in cash flow reports, that all expenses are consistent with corresponding bank statement activity, and that they are in line with any contractual agreements for services that may be in place. For the plan the OIG reviewed, the \$22,000 monthly expense was listed in the services agreement contract with the plan, it was listed accurately in cash flow reports and reconciliations, and the amount was consistent with corresponding bank statements.

G. Conclusion

On September 16, 2016, the trustee of the plan who initially agreed to the bundled services agreement resigned and was replaced by a new trustee. Upon reviewing the bundled services agreement, the new trustee found that the agreement was reasonable and signed a new bundled services agreement with the same service provider after a minor modification.

We believe that the expenses of the plan reviewed by the OIG were reasonable, necessary, and adequately supported. We have no reason to believe that these expenses present an unreasonable risk of loss to the corporation with respect to the plan, as is the condition for financial assistance as defined in ERISA.

While we do not find that there have been any unreasonable expenses related to this plan, we are committed to continuing to monitor agreements for administrative expenses closely and to work with the OIG to prevent or address any instances of waste or fraud. We appreciate OIG’s work in this area and would welcome further discussions on how best to deal with these challenges.