PBGC
Protecting America's Pensions
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

September 26, 2007

Subject: Company "A" [redacted]
Pension Plan

Date of Plan Termination: [redacted]
Date of Trusteeship: [redacted]

Dear

I. INTRODUCTION

By letter dated December 9, 2005, the Pension Benefit Guaranty Corporation ("PBGC") determined that: (1) [redacted] Company "B" [redacted] (the "Fund") had a parent-subsidiary controlled group relationship with Company "C" [redacted] sponsor of the "A" [redacted] (the "Plan"), as of the Plan's termination date of [redacted] ("DOPT"); (2) the Fund owns or has an 80% controlling interest in Company "D" [redacted] Company "E" [redacted], Company "F" [redacted] and [redacted] Company "G" [redacted] (the "Other Companies") as of DOPT; and (3) "C" [redacted] was a member of brother-sister controlled group with the Other Companies. Accordingly, PBGC determined that: (1) the Fund, as well as the Other Companies, were members of a controlled group pursuant to 29 U.S.C. § 1301 (a)(14); (2) those entities are jointly and severally liable to PBGC under 29 U. S. C. § 1362(b)(1) for the unfunded benefit liabilities of the Plan; and (3) the amount of the liability was $3,234,699.00 as of DOPT, plus interest in the amount of $772,987.00 for the period between November 30, 2001 and December 9, 2005.[1]

[1]PBGC's regulation at 29 Code of Federal Regulations ("C.F.R.") § 4062.7, which incorporates by reference section 6601 of the Internal Revenue Code, establishes the applicable interest rate.

On June 7, 2006, you filed a timely appeal of PBGC's determination letter on behalf of your client, Company "H", the Fund's management company.[2] For the reasons stated in this decision, the Appeals Board has denied your appeal with regard to the Fund's liability for the unfunded benefit liabilities of the Plan. Accordingly, the Appeals Board has sustained PBGC's determination that, under ERISA: (1) the Fund was under common control with "C" as of DOPT; (2) the Fund and "C" are jointly and severally liable to the PBGC for the liability imposed by Section 4062 of ERISA, 29 U.S.C. § 1362, with respect to the Plan; and (3) the liability is for the above-stated amount, plus additional interest that has accrued since December 9, 2005. With respect to PBGC's determination that the Other Companies also are jointly and severally liable under Section 4062 of ERISA, the Board granted your appeal.

II. BACKGROUND

A. Facts

"C"

"C", a Delaware corporation, was the Plan's sponsor. Originally established in [redacted], "C" manufactured [redacted] In [redacted] "C" established the Plan to provide retirement benefits for certain of its employees.[3]

Prior to [redacted] "C" stock was publicly traded. On [redacted] Company "I" (which is unrelated to "H" or the Fund) purchased all outstanding shares of "C" stock, pursuant to an acquisition proposal by Company "J", "I", which was 100% owned by Company "L", was merged into "C" upon completion of the sale.

On [redacted] Company "M" consummated the acquisition of "L" "C" [redacted] Form 10-K filing with the Securities and Exchange Commission ("SEC") provides the following information concerning this acquisition:[4]

> Company "M" a corporation formed by "B" (together with its

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[2] The Appeals Board had previously granted you, pursuant to 29 C.F.R. § 4003.4, an extension of time until June 8, 2006 to file your appeal.

[3] The Plan, which initially was called the Pension Plan for Employees of "C" changed its name effective [redacted]

[4] Selected pages of this Form 10-K filing with the SEC are enclosed.

> affiliates, "H", was organized as a holding company to effect the acquisition of all of the outstanding common stock of "L". . . . . The purchase price, including transaction fees and expenses, of approximately $175.2 million was financed with a $25 million capital contribution from "H" (including rollover ownership interests of certain members of management), approximately $15 million in proceeds from "M" issuance of $29.25 million of 13 3/4% Senior Discount Debentures, issuance of $100 million of 10 5/8% Senior Subordinated Notes of "C" and borrowings of $33.6 million under a bank credit facility . . . of "C"

The Fund

The Fund, a limited partnership, was established under Delaware law by its general partner, Company "N" and independent institutional investors. The Fund's establishment is documented by the October 7, 1994 "Agreement of Limited Partnership of "B" ("Partnership Agreement"), which was executed by "N" and the Fund's limited partners through their representatives.

Section 6.1(b) of the Partnership Agreement delegated "full control over the business and affairs of the partnership" to "N" "N" has a 1% capital interest and 20% carried interest in all profits realized by the Fund. In addition to "N" the Fund has 32 limited partners.

The Partnership Agreement describes the Fund's purpose as follows:

> The Partnership is organized for the principal purposes of (i) creating and realizing long-term capital gains primarily from investments in United States industrial businesses, including without limitation, the general buying, selling, holding, and otherwise investing in securities of every kind and nature . . ., (ii) exercising all rights, powers, privileges, and other incidents of ownership or possession with respect to investments held or owned by the Partnership, (iii) entering into, making, and performing all contracts and other undertakings with respect to such investments, (iv) managing and supervising such investments and (v) engaging in such other activities incidental or ancillary thereto as the General Partner deems necessary, advisable or desirable.[5]

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[5] Partnership Agreement, Sec. 1.3.

[redacted] "N" hired "H" [redacted] to manage the Fund's investments. As your appeal stated, "H" is a "private equity investment firm" that is in the business of forming and providing services to investment partnerships, or "funds," to which groups of institutional investors make commitments.[6] As an advisor to those funds, "H" sources investment opportunities, negotiates and consummates the investments, monitors and oversees the investments, and ultimately . . . negotiates the sales of the investments for profit (or losses, as in the case of the Company)."[7]

Bankruptcy Filing and the Plan's Termination

On [redacted] "C" filed for Chapter 11 bankruptcy in Delaware. Subsequently, all assets of "C" were sold in two separate transactions that closed on [redacted][8] [redacted] also was the date when "C" ceased business operations and terminated all of its employees. Although the purchasers of "C" assets hired a substantial number of its former employees, they did not assume the liabilities associated with the Plan.

On [redacted] PBGC issued a Notice of Determination that the Plan should be terminated pursuant to 29 U.S.C. § 1342(a)(1) and (2). Subsequently, PBGC and "C" (as Plan Administrator) entered into an agreement that terminated the Plan, appointed PBGC as trustee, and established [redacted] as the DOPT under 29 U.S.C. § 1348. As a result of this agreement, which took effect on [redacted] PBGC became trustee of the Plan.

B. "H" Appeal

In your June 7, 2006 appeal, you asserted that the following grounds exist for changing PBGC's determination:

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[6] Appeal, p. 6.

[7] *Id.* Additionally, your appeal stated at page 6 that the "profits and losses of each fund are shared by the limited partner investors and a general partner entity affiliated with "H" Your appeal did not explain, however, how "H" and "N" are affiliated.

[8] On [redacted] the Fund deducted [redacted] of capital losses on its [redacted] U.S. Return of Partnership Income (Form 1065), Schedule D, for its investment in "C" Your appeal further states that: (1) the net proceeds from the asset sale were not sufficient to pay the claims of the Company's secured creditors in full; (2) with the sale of the Company's assets, the Fund lost all of its [redacted] and (3) the holders of "C" and "M" unsecured subordinated debt also lost their entire investment.

- The Fund is not conducting a "trade or business" and therefore cannot be in "C" controlled group;
- PBGC incorrectly determined that the Fund and the Other Companies are in "C" Controlled Group;
- PBGC erred in its determination that the Fund and any of the Other Companies are liable for the Termination Payment.

You also argued the following:

> A controlled group determination in the instant case would be directly contrary to long-standing legal precedent. ...the Fund cannot be a member of a parent-subsidiary controlled group of trades or businesses under ERISA because the Fund is not conducting a "trade or business." The Fund is a passive investment vehicle that has no employees, no involvement in the day-to-day operations of its portfolio investments and no income other than passive investment income such as dividends, interest and capital gains. The Fund cannot be a trade or business because, as the Supreme Court has clearly held, "investing is not a trade or business."
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> . . . There is no legal basis on which the PBGC could sustain an argument that it is entitled to deference in broadly interpreting and applying its regulations. ERISA commits interpretive authority here to the Treasury Department, not to the PBGC, and the Treasury Department's actions represent a deliberate decision by that agency to leave in place the Supreme Court's long-standing definition of the phrase "trade or business" - a definition that has been ratified by Congress. If the PBGC determines that it is desirable to expand the controlled group rules to include private equity funds (such as the Fund) and their portfolio investments (such as the Other Companies), it should do so prospectively and openly by seeking a legislative change or (if it believes it has the authority to do so) by issuing new regulations after the required notice and comment period.[9]

III. DISCUSSION

A. Controlled Group Liability

ERISA § 4062(a) [29 U.S.C. § 1362(a)] provides that liability for an underfunded single-employer pension plan upon its termination

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[9] Appeal pp. 2-3.

is incurred by any "person" who is, on the termination date, a contributing sponsor of the pension plan or a member of the sponsor's controlled group. That section further states that the liability of all such persons is "joint and several." A "controlled group" means, with respect to any person, "a group consisting of such person and all other persons under common control with such person."[10] ERISA § 4001(b)(1) [29 U.S.C. § 1301(b)(1)] provides that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer."

To impose termination liability on an organization other than the one originally obligated, two conditions must be met: (1) the organization must be under "common control" with the obligated organization and (2) the organization must be a "trade or business."[11]

You contend that PBGC lacks the authority to interpret 29 U.S.C § 1301(a)(14)(B) relating to controlled group determinations because "Congress . . . granted interpretive authority over . . . [29 U.S.C. § 1301(a)(14)(B)] to the Treasury Department." We disagree. ERISA § 4001(a)(14)(B) [29 U.S.C. § 1301(a)(14)(B)] states that "the determination of whether two or more persons are under 'common control' shall be made under regulations of [PBGC] which are consistent and coextensive with regulations prescribed by the Secretary of the Treasury under subsections (b) and (c) of . . . [IRC] 414". Thus, the only restriction ERISA imposes on PBGC's authority to interpret 29 U.S.C. § 1301(a)(14)(B) is that its regulations must be consistent and coextensive with the applicable regulations issued under Internal Revenue Code ("IRC") section 414.[12] Accordingly, PBGC does have interpretive authority with respect to 29 U.S.C. § 1301(a)(14)(B). *See* 29 U.S.C. § 1302(b), which establishes the powers of PBGC to administer Title IV of ERISA, and, in particular, 29 U.S.C. § 1302(b)(3), which authorizes PBGC to issue regulations to carry out the purposes of Title IV.

You also assert that PBGC "lacks authority to adjudicate this case under ERISA in any fashion contrary to the judicial definition of" trade or business in the federal income tax context. You state that this definition excludes investment activities.

Again, we disagree. As several courts have noted, interpretations under the IRC are not determinative of whether an entity is a trade or

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[10] *See* 29 U.S.C. § 1301(a)(14)(A); 29 C.F.R. § 4001.2 (definition of "controlled group").

[11] 29 U.S.C. § 1301(a)(14)(B); Treas. Reg. § 1.414(c)-2(a).

[12] *See* 29 C.F.R. § 4001.3(a)(1).

business under ERISA.[13] Moreover, in this case, PBGC's determination does not involve an interpretation of "trade or business" that differs from the "judicial definition" in the tax context. As detailed below, PBGC's determination is consistent with the "trade or business" test articulated in *Commissioner v. Groetzinger*,[14] a tax court case, as well as with judicial decisions that have applied the *Groetzinger* test in determining liability under ERISA.[15]

B. Common Control

ERISA § 4001(a)(14)(A),(B) [29 U.S.C. § 1301(a)(14)(A),(B)] provides that a "controlled group" consists of two or more "persons" under common control.[16] ERISA § 4001(b)(1) [29 U.S.C. § 1301(b)(1)] states that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." The above-cited ERISA provisions also state that the determination of whether two or more "persons" are under common control shall be "consistent and coextensive" with regulations under sections 414(b) and 414 (c) of the Internal Revenue Code.[17]

The applicable regulation for determining "common control" is Treasury Reg. § 1.414(c)-2. Treas. Reg. § 1.414(c)-2 defines "common control" as one or more chains of organizations: (1) "connected through ownership of a controlling interest[18] with a common parent organization . . . where the common parent organization owns a controlling interest in each of the organizations" (i.e., a parent-subsidiary relationship) or (2) where "the same five or fewer persons who are individuals, estates, or trusts own a controlling interest in each organization . . . [and] such

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[13] *PBGC v. Center City Motors*, 609 F. Supp. 409, 411 (S.D. Cal. 1984) (citing *United Steelworkers of America, etc. Local 4805 v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1299 (3rd Cir. 1983)).

[14] 480 U.S. 23 (1987).

[15] *See, e.g., Central States, Southeast & Southwest Pension Fund v. Personnel, Inc., 974 F.2d 789, 794 (7th Cir. 1992)* ("*Personnel*") (stating that "[a]lthough the Groetzinger court considered a provision of the tax code, we find its definition helpful in . . . [determining whether an activity is a] trade or business").

[16] *See also* 29 C.F.R. § 4001.3 (PBGC regulation defining "trade or business under common control" and "controlled group").

[17] IRC § 414(b) defines "Employees of Controlled Group of Corporations" and IRC § 414(c) "Employees of Partnerships, Proprietorships, etc., Which Are Under Common Control." *See also* 29 C.F.R. § 4001.3 (PBGC regulation).

[18] In the case of a partnership, "controlling interest" is ownership of at least 80 percent of the voting shares of and 80 percent of the profits, interest, or capital interest of a partnership. Treas. Reg. § 1.414(c)-2(b)(2).

ownership is identical with respect to each such organization, such persons are in effective control[19] of each organization" (i.e., a brother-sister relationship).

Your appeal does not dispute PBGC's determination that a parent-subsidiary relationship exists between the Fund and "C" based on the Fund's 96.3% stock interest in "M" (parent to "C"), but you contend that the Fund cannot be a member of "C" controlled group because it is not a trade or business. You also contend, based upon factual and legal grounds, that no brother-sister controlled group exists between the Fund and the Other Companies.

Without analyzing the legal arguments you made, the Appeals Board determined the records in PBGC's possession are insufficient to establish that a brother-sister controlled group relationship existed between "C" and any of the Other Companies. Thus, we granted your appeal with respect to the liability of the Other Companies. However, as detailed below, the Appeals Board found that the Fund is a member of "C" controlled group.

C. Trade or Business

Under ERISA § 4001(b)(1) [(29 U.S.C. § 1301(b)(1)], "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." Congress's intent for enacting 29 U.S.C. § 1301(b)(1) was to prevent employers from avoiding liability "by fractionalizing their business operations."[20]

While you acknowledge that a parent-subsidiary relationship exists between the Fund and "C" you assert that the Fund is not an employer under ERISA § 4001(b)(1) [29 U.S.C. § 1301(b)(1)] because the Fund is not conducting a trade or business. You also assert that the "Fund is a passive investment vehicle that has no employees, no involvement in the day-to-day operations of its investments and no income other than passive investment income such as dividends, interest and capital gains." We address these assertions below.

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[19] "Effective control" is demonstrated by ownership of at least 50 percent of the combined voting power of all the voting stock of a corporation and by ownership of at least 50 percent of the profits, interest, or capital interest of a partnership. Treas. Reg. § 1.414(c)-2(c)(2).

[20] *PBGC v. Don's Trucking Co.*, 309 F.Supp. 2d 827, 831 n.7 (E.D. Va. 2004), *aff'd, PBGC v. Beverly*, 404 F.3d 243 (4th Cir. 2005). *See also Personnel*, 974 F.2d at 794; *PBGC v. Ctr. City Motors, Inc.*, 609 F.Supp. 409, 411 (S.D. Cal. 1984).

The Fund's Relationship with "N"

In analyzing whether or not the Fund is a "trade or business," the Appeals Board concluded that it is appropriate to consider the duties and responsibilities delegated to and assumed by "N" who is the designated "General Partner" under the Partnership Agreement. We further took into account that, as a matter of law, an agency relationship exists between the Fund and "N" Under the Delaware Revised Uniform Partnership Act ("DRUP Act"), "each partner is an agent of the partnership for the purpose of its business, purposes or activities."[21] DRUP Act § 17-403 provides that a general partner has the rights and powers to manage and control the business and affairs of the limited partnership" subject to the DRUP Act and the partnership agreement.[22]

As discussed above on page 3, the Partnership Agreement delegates "full control over the business and affairs of the partnership" to "N" [23] Thus, pursuant to the DRUP Act and the Partnership agreement, an agency relationship exists between the Fund and "N" [24]

In your appeal, you contend that "H" (i.e., the Fund's management company), not "N" (the general partner), was responsible for the day-to-day management of the Fund. However, according to the terms of the Partnership Agreement: "The appointment of a Management Agent shall not in any way relieve the General Partner of its responsibilities and authority vested pursuant to Section 6.1 or relieve the General Partner of any of its fiduciary duties to the Partnership and its Partners."[25] In addition, "N" in its Management Agreement with "H" reserved the right to make "all decisions, consents, and other determinations (including, without limitation, decisions, consents and other determinations relating to the acquisition and disposition of Fund investments, distributions by the Fund of cash and other securities and

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[21] 6 Del. C. § 15-301 (2007).

[22] 6 Del. C. § 17-403 (2007).

[23] *See* Partnership Agreement, Sec. 6.1.

[24] *See e.g.*, 6 Del. C. § 15-301 (2007); *Am. Title Ins. Co. v. E. W. Fin. Corp.*, 16 F.3d 449, 456 (1st Cir. 1994); *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990); RESTATEMENT (SECOND) OF AGENCY § 1, 212 (2006).

[25] Partnership Agreement, Sec. 5.1. We note that Section 6.1 of the Partnership Agreement vested the General Partner with a wide range of powers, including "the power on behalf and in the name of the Partnership to carry out any and all of the objectives and purposes of the Partnership and to perform all acts and enter into and perform all contracts and other undertakings which the General Partner deems necessary or advisable or incidental thereto, including the power to acquire and dispose of any security (including marketable securities)."

amendments to the Fund Agreement)."[26]

Based on the terms of the Management Agreement and the Partnership Agreement, "N" hired "H" to assist in managing the Fund's investments but did not relinquish all management responsibilities. While these documents establish that "N" hired "H" to assist in providing investment and management services, it does not establish that such activities were only conducted by "H" Thus, the Appeals Board concluded that "N" participated in the Fund's investment activities, and also received compensation (i.e., 20% of all net profits realized) in exchange for its services. Because "N" is the Fund's agent, all of "N" acts within the scope of such agency are attributable to the Fund.[27]

Application of "Trade or Business Test" to the Fund

Although the term "trade or business" is not defined in ERISA, the IRC, or regulations issued by the Treasury Department, courts generally construe the term in accordance with the statute's purpose and use the test articulated in *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), for purposes of distinguishing trades or businesses from purely personal activities or investments.[28]

The *Groetzinger* test has two prongs: (1) whether a taxpayer is engaged in an activity with "the primary purpose of income or profit" and (2) whether the act is conducted with "continuity and regularity".[29]

The first factor of the *Groetzinger* test is a subjective test that looks at the taxpayer's intent (i.e., whether the taxpayer entered into the activity with a profit motive). For purposes of determining the taxpayer's intent, courts evaluate a myriad of factors including the tax benefits obtained by the taxpayer and the circumstances surrounding the inception of the activity.[30]

The second factor is an objective test that looks at how much time the taxpayer typically engages in the activity. Although there is no bright-line test for the amount of time that a taxpayer must spend engaging in the activity, such activity must be conducted with regularity.[31]

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[26] Management Agreement, Pg. 1.

[27] *See Id.*

[28] *See Personnel*, 974 F.2d at 794.

[29] *Groetzinger*, 480 U.S. at 35.

[30] *Id.* at 33-35.

[31] *Groetzinger*, 480 U.S. at 33-35.

You state in your appeal that "N" the general partner of the Fund, and various independent institutional investors created the Fund for "the principal purposes of . . . creating and realizing long-term capital gains from investments . . . including . . . the general buying, selling, holding, and otherwise investing in securities of every kind and nature."[32]

In addition, on the Fund's 1998 through 2002 U.S. Partnership Return of Income (Form 1065) that you provided with your appeal, the Fund reported that its principal business activity is "investment advisory" and its principal service is "investment services."[33] Furthermore, the Partnership Agreement provided that "N" could receive compensation in exchange for investment advisory and management services, including consulting fees, management fees, and carried interest (i.e., 20% of the net profits realized by the Fund).[34] Based on the Fund's tax returns and language in the Partnership Agreement, the Appeals Board concluded that the Fund meets the profit motive requirement described in *Groetzinger*.

Although the Fund engaged in investment activities, such activities must be conducted with regularity in order to meet the second prong of the *Groetzinger* test. While PBGC's records do not contain any documentation detailing how much time "N" devoted to managing the Fund's portfolio, based on the size of the Fund's portfolio (e.g., in [redacted] the Fund reported $469,549,711 in investments in other companies), the profits generated as a result of such investments (e.g., $207,203 in total investment income reported in [redacted], as well as the fees paid to "H" (e.g., $7,043,500 in management fees reported in [redacted], the Appeals Board concluded that "N" management of the Fund's investments was conducted with regularity and thus the Fund, through activities of its agent "N" meets the second prong of the *Groetzinger* test.[35]

You also assert in your appeal that the Fund is not engaged in a trade or business because "investment activities do not constitute a trade or business." Essentially, you argue that the Fund is a passive investor. You state that "[i]n the income tax context, it is universally accepted that passive investment activities do not constitute a trade or business," and you cite several cases, most

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[32] *See* Partnership Agreement, Sec. 1.3; Appeal pg. 6.

[33] We note that one of the IRS's "Principal Business or Professional Activity Codes" for Partnerships is Code 523900, "Other Financial Investment Activities (including portfolio management & investment advice)." *See* 2006 Instructions for Schedule 1065, "U.S. Return of Partnership Income." The Fund's tax returns list "523900" as the "Business code number."

[34] *See* Partnership Agreement, Sec. 3.2(c)(iii).

[35] *See* [redacted] U.S. Return of Partnership Income (Form 1065).

notably *Higgins v. Commissioner*, 312 U.S. 212 (1941), *Whipple v. Commissioner*, 373 U.S. 193 (1963), and *Zink v. United States*, 929 F.2d 1015 (5th Cir. 1991). Although those cases do not generally characterize passive investment activities as a trade or business, such characterizations, when read in context with the facts of each case, refer to individuals managing their own personal investments rather than to partnerships, like the Fund, whose purpose is to acquire, hold, and sell securities and other investment interests in United States industrial businesses.

In *Higgins*, an individual taxpayer deducted expenses in connection with the management of his investments in stocks and bonds. The Court held that the taxpayer's investment activities did not constitute a trade or business because the taxpayer "merely kept records and collected interest and dividends from his securities."[36]

The Fund, unlike the taxpayer in *Higgins*, is not: (1) an individual acting on his own behalf; (2) merely keeping records and collecting dividends and interest from investments; and (3) solely receiving a return as an passive investor. Instead, the Fund is a "trade or business" because it regularly is involved in investment activities of a much more active nature than those in *Higgins*. This is reflected in the responsibilities of its agent, "N" who: (i) provides investment advisory and management services to others (i.e., its partners); (ii) hires a third-party (i.e., "H") to assist in selecting and purchasing potential investments (e.g., the Other Companies) and in distributing the net profits and losses from these companies to itself and limited partners; and (iii) receives compensation for such services (e.g., 20% of all realized profits from the Fund's investments).

In *Whipple*, an individual taxpayer, who owned a controlling interest in and managed several corporations, deducted a bad debt relating to a loan that he had made to one of the corporations, a soft drink bottling company. The Court held that the taxpayer was not entitled to the deduction because the debt was not in connection with activities the tax law recognizes as trades or businesses.[37] The Court characterized the debt as a non-business bad debt because the taxpayer "was not engaged in the business of money lending, of financing corporations, of bottling soft drinks, or any combination of the three."[38]

In addition, the Court stated that although the taxpayer's activities in the corporation, to which he loaned money, may have produced:

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[36] *Higgins*, 312 U.S. at 218.

[37] *Whipple*, 373 U.S. at 201-204.

[38] *Whipple*, 373 U.S. at 193.

> income, profit or gain in the form of dividends or enhancement in the value of an investment . . . [such a] return is distinctive to the process of investing . . . [which can be] distinguished from the trade or business of the taxpayer himself . . . [and] the product of the . . . [taxpayer's] services arise not from his own trade or business but from that of the corporation.[39]

The facts in *Whipple* are distinguishable because the Fund, as evidenced by its tax returns and Partnership Agreement, was directly and substantially involved in a recognized business activity (i.e., providing investment advisory and management services) for the benefit of several other entities (i.e., its general and limited partners). Thus, the Fund's activities differed from those of the taxpayer in *Whipple*, who had incurred personal investment losses on loans that the Court decided had not arisen from his own trade or business activities.[40] Furthermore, in contrast to the taxpayer in *Whipple*, "N" as the Fund's agent was entitled to compensation for investment advisory and management services it performed.

In *Zink*, a husband and wife invested in an airplane component business and deducted research and experimentation expenses pursuant to IRC § 174(a)(1). The Court disallowed the deduction because the taxpayers' did not "participate . . . in the actual activities of developing or marketing aircraft components or . . . exercise any control over those activities other than the right to yank their investments.[41] Accordingly, their activities in connection with . . . [such] products never surpassed those of investors" and did not constitute a trade or business.[42]

Unlike the taxpayers in *Zink*, the Fund, a business entity (partnership), was formed to select, acquire, dispose of, and manage investments (trades or businesses) on behalf of its partners, and did so through its agent, "N". Indeed, with respect to "C" the Fund - through a series of complex financial transactions including the issuance of over $[redacted] in debt instruments - acquired a controlling (96.3%) interest in "C" stock. This put the Fund in the position where it, through "N" could exercise control over "C" management. Such control with respect to management is consistent with the Fund's stated purposes, which includes "exercising all rights, powers, privileges, and other incidents of ownership or possession with respect to investments held or owned by the Partnership" and "managing and supervising such investments."

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[39] *Id.* at 202.

[40] *Whipple*, 373 U.S. at 202.

[41] *Zink*, 929 F.2d at 1023.

[42] *Id.*

Thus, the "passive" investment activities described in *Higgins*, *Whipple*, and *Zink*, as well as the other cases you cite, are distinguishable from the much more active involvement of the Fund (through "N" with respect to its investments. We further concluded, for the reasons discussed above, that the Fund's delegation of many of its management functions to other entities, which in "C" case occurred through its Management Agreement with "H" does not establish that the Fund was merely a "passive investor." Accordingly, the Appeals Board, having fully analyzed the holdings in the court cases you cite in your appeal, decided that the Fund is a trade or business for purposes of controlled group liability under ERISA.

D. Assessment of Interest

Your appeal asserts that, if the Appeals Board finds the Fund liable under 29 U. S. C. § 1362(b)(1), PBGC should not assess interest on that liability for the period between [redacted] through [redacted] due to PBGC's delay. You state that the Fund should not incur interest for that period because: (1) PBGC had known about the ownership of "C" stock and the Fund's belief it is not in "C" controlled group since at least [redacted] (2) PBGC did not notify the Fund of PBGC's controlled group determination before issuing the [redacted] letter; (3) the Fund, based on legal precedent regarding the "trade or business" issue, "reasonably" believed during this period that it was not liable to PBGC; and (4) you did not receive the procedures for appealing that determination until [redacted]

ERISA § 4062(b) and PBGC's regulation at 29 C.F.R. § 4062.7 establish the applicable liability for interest under 29 U. S. C. § 1362(b)(1). ERISA § 4062(b) and PBGC's regulation do not provide for the abatement of interest for reasons of delay, or on any other grounds. The Appeals Board must follow ERISA and PBGC's regulations, and accordingly your request that PBGC not assess interest is denied.

E. Request for Hearing

PBGC's Rules for Administrative Review of Agency Decisions provide, at 29 C.F.R. § 4003.55, that the opportunity to appear before the Appeals Board "will be permitted at the Board's discretion." In general, the Appeals Board will permit an opportunity for a hearing before the Board if the Board determines that there is a dispute as to a material fact. Because there is no dispute as to the material facts in this case, the Appeals Board denied your request for an oral hearing.

IV. DECISION

Based on the foregoing facts and authorities, the Appeals Board decided that, under Title IV of ERISA, "C" was under common control with the Fund as of the date the Plan terminated. Accordingly, the Fund and "C" are jointly and severally liable to PBGC under

29 U. S. C. § 1362(b)(1) for the $3,234,699.00 in unfunded benefit liabilities of the Plan as of DOPT, plus applicable interest. Pursuant to 29 C.F.R. § 4003.59, your client has exhausted its administrative remedies and may seek judicial review of this decision.

Sincerely,

Charles Vernon

Charles Vernon
Chair, Appeals Board

Enclosure: Selected Pages of Form 10-K dated April 2, 1999.