United States Senate
WASHINGTON, DC 20510

March 20, 2013

The Honorable Jacob J. Lew
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Lew:

We write to you on behalf of the Delphi Salaried Retirees Association and the more than 20,000 retirees they represent. As you know, these retirees saw their pension benefits severely reduced due to the bankruptcy of General Motors. We remain extremely concerned about the impact this is having on families in our states, and we are exploring all options to find an equitable solution.

Last July, the Association sent a proposal for restoring these pension benefits to President Obama. We have enclosed a copy of that proposal for your consideration and ask that you meet with the Association to discuss solutions to a problem that has remained unresolved for far too long. It is our sincere hope that a meeting with you will help to finally resolve this matter.

We continue to hear from retirees and their families who are facing serious financial and medical hardships as a result of this unexpected loss of income and benefits. These retirees earned their pension benefits through years of hard work and loyalty to their employer, only to see them suddenly taken away through no fault of their own.

Thank you for your consideration of our request.

Sincerely,

Debbie Stabenow

Sherrod Brown

Chuck Schumer

Rob Portman

Kirsten E. Gillibrand

DSRA Settlement Proposal

June 25, 2012

We want to engage in serious settlement discussions to resolve the litigation we are in with the PBGC. *Black, et. al. v. PBGC*, No. 2:09-cv-13616 (E.D. Mich. filed Sept. 14, 2009). We have an offer that we believe is fair, just, and most importantly, easily accomplished as it would not require *any* federal money to fund. The PBGC has stated in court filings that at the time of the Plan's termination:

1. The Plan had present sum liabilities of approximately $5.2 billion;
2. The Plan had assets of approximately $2.5 billion;
3. The PBGC would guarantee approximately $2.1 billion of the Plan's liabilities (present sum);
4. Leaving the Plan participants to bear a loss of approximately $600 million in unfunded, non-guaranteed benefits.

Based on the information we have so far obtained, we have evidence which suggests that in seeking to justify the Plan's termination, the PBGC overestimated the Plan's liabilities by approximately $1.1 billion, and that the true liability figure was closer to $4.1 billion. If true, the possibility exists that each individual participant could be made whole simply by requiring the PBGC honor the $2.1 billion guarantee to participants (as $2.5 billion in assets + $2.1 billion in guaranteed funds exceeds the $4.1 liability figure).

If it turns out that the liability sum exceeds what can be funded by combining the Plan's assets with the PBGC $2.1 billion guarantee, the PBGC has additional funds at its disposal to make the Plan's participants whole. Again, the PBGC has estimated that the Plan has approximately $600 million in unfunded benefits. Assuming that number to be accurate, the PBGC had received more than that sum in connection with its agreement to terminate the Salaried Plan and release liens and claims assertable on Delphi assets as a result of the Salaried Plan's underfunding. In fact, as of March 2011, the PBGC had received over $650 million in cash and equity from General Motors Company in exchange for agreeing to release those liens and claims on Delphi assets so that GM's supply of Delphi parts could remain secure. Clearly these funds should have been used first to alleviate any underfunding to GM's former pension plan, and equity would

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demand that the funds be used for that purpose to the extent that any shortfall actually exists.

There is no question that the PBGC has the ability to enter into such a settlement. The PBGC was established as a federal corporation under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1302(a). The PBGC is charged under ERISA with three purposes: encouraging the continuation and maintenance of voluntary private pension plans for the benefit of their participants; providing for the timely and uninterrupted payment of pension benefits to participants and beneficiaries of ERISA covered plans; and maintaining premiums established by the Corporation at the lowest level consistent with carrying out its obligations under Title IV of ERISA. *Id.*

In order to carry out these aims, ERISA gives to the PBGC all the powers conferred upon a nonprofit corporation under the District of Columbia Nonprofit Corporation Act (the "DCNCA"), including the power "to sue and be sued, complain and defend, in its corporate name." 29 U.S.C. § 1302(b)(1); DC ST § 29-301.05(1). And the PBGC has the power to "enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to the corporation by this Act." 29 U.S.C. § 1302(b)(8); *see also* DC ST§ 29-301.05(8) (granting the power to "make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income").

In addition to being subject to ERISA, as a "wholly owned Government Corporation," the PBGC is also covered by the Government Corporation Control Act (the "GCCA"). 31 U.S.C. § 9101(3)(J). Government corporations covered by the GCCA are understood to have the statutory authority "(1) to sue and to be sued in their own names and (2) to settle their own claims or to have their financial transactions treated as final and conclusive." *Opinion of the Comptroller General of the United States,* 53 Comp. Gen. 337 at *3-4 (November 15, 1973) (finding that the FHA, while not specifically chartered as a corporation, is a wholly owned Government corporation covered by the GCCA, and was consequently authorized to settle its own claims and have its financial transactions treated as final). Furthermore, the budgets of corporations subject to the GCCA are required to "*provide for emergencies and contingencies and otherwise be flexible* so that the corporation may carry out its activities." *Id.* at § 9103(a)(3) (emphasis added).

ERISA, the GCCA, and the DCNCA are all in agreement that the PBGC has the power to sue and be sued. These authorities also agree that the PBGC can incur liability for its actions, and that it has the ability to enter into a contractual agreement to resolve that liability. This is reflected in its powers under ERISA to "enter into contracts, to execute instruments, [and] to incur liabilities;" to "make contracts and incur liabilities, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income" under the DCNCA; and, as with all government corporations "to sue and to be sued in their own names and to settle their own claims or to have their financial transactions treated as final and conclusive."

When taken together, these broad delegations of litigation authority presuppose the power to settle litigation. *See FDIC v. Irwin*, 727 F. Supp. 1073, 1075-76 (N.D. Tex. 1989) ("it is apparent that Congress intended to give the FDIC broad authority to carry out its duties, and that it also provided the FDIC with broad discretion as to how to carry out these duties, including how to comport itself within a suit. Thus the Court finds that the FDIC has independent authority to settle this cause of action and that the settlement entered into between the FDIC and the Defendants is valid."). *Irwin* is particularly compelling in light of the fact that the subject of its decision is the Federal Deposit Insurance Corporation, the Government Corporation upon which the PBGC was modeled. *See* Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Vol. III, 4794 (Comm. Print Apr. 1976) (statement of Sen. Bentsen) ("This bill establishes a program of pension insurance -- modeled after the Federal Deposit Insurance Corporation for banks -- which will insure that after this law goes into effect all employees will be protected in the event that their plan does terminate before becoming fully funded."). Given the fact that the PBGC is modeled upon the FDIC, it is not surprising that the two corporations have both been vested with the same litigation autonomy. *Compare* 12 U.S.C. § 1819 (vesting the FDIC with the power "to sue and be sued, complain and defend, in any court of law or equity, State or Federal . . .) *with* 29 U.S.C. § 1302 (granting the PBGC the power "to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal.").

The above is consistent with that the PBGC frequently enters into broad ranging agreements settling litigation or claims, some of which obligate the PBGC to waive powers vested to it by Congress (*e.g.*, the ability to seek restoration of a terminated plan, or the ability to place liens upon the assets of a control group member where a plan is insufficiently funded). Indeed, given the broad grant of power to enter into contracts that Congress has given to the PBGC, the only legitimate hurdle that the PBGC must overcome before it may enter into a settlement agreement is a demonstration that the exercise of such power is in furtherance of its statutory goals.

See e.g., Doe v. Devine, 703 F.2d 1319, 1326 (D.C. Cir. 1983) (Ruth B. Ginsburg, J.) ("A court reviewing an agency's negotiation of a contract . . .properly may demand . . . a coherent, even if post-hoc, statement of the agency's bargaining objectives and concerns, that the court may compare against the objectives prescribed by law"). A settlement by the PBGC whereby the Salaried Plan's participants are made whole is of course entirely consistent with ERISA's objectives, in that it would actually allow the PBGC to ensure the timely and uninterrupted payment of benefits to the participants of the Salaried Plan while at the same time ensuring that the PBGC pay out the guaranteed benefits to participants in accordance with its statutory obligations.

On behalf of Delphi Salaried Retirees Association (DSRA Inc.)

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