

THE PENSION ACTUARY

Vol. XXVIII, Number 5

September-October 1998



IN THIS ISSUE

Safe Harbor 401(k) Plans Under §401(k)(12) 3

Documents on the Dawn of the Remedial Amendment Period 4

“Negative” Elections are Positive for 401(k) Plans 6

Qualified Retirement Plan Self-Audits 8

ASPA Lends a Hand 21

Focus on CE 22

Focus on E&E 23

Focus on ASPA PERF 24

Calendar of Events 27

PIX Digest 28



Sears Named ASPA President

Carol R. Sears, FSPA, CPC, EA, MAAA, has been named as ASPA's President for the 1998-99 term. Ms. Sears, a graduate of the University of Illinois with a degree in Actuarial Science and Finance, attained her enrolled actuary designation in 1983. In 1989, Sears received the highest designation bestowed by the American Society of Pension Actuaries - Fellow. She most recently served as ASPA's President-Elect. She was elected to ASPA's Board as a Director in 1991 and as a Vice President of the Executive Committee in 1995. Ms. Sears served on the Education and Examination Committee for 12 years, most recently as the General Chair during 1996 and 1997.

Ms. Sears is active in the American Academy of Actuaries, the Retirement Administrators and Designers of America, and was the 1994 chair for the Heart of Illinois Employee Benefits Forum. She is also a frequent local and national speaker on topics relative to retirement plan administration. The additional members of the 1999 Executive Committee include:

President-Elect

John P. Parks, MSPA
Pittsburgh, Pennsylvania

Vice Presidents

Craig P. Hoffman, APM
Jacksonville, Florida

Scott D. Miller, FSPA, CPC
South Salem, New York

George J. Taylor, MSPA
State College, Pennsylvania

Secretary

Gwen S. O'Connell, CPC, QPA
Eugene, Oregon

Treasurer

Cynthia A. Groszkiewicz, MSPA
Atlanta, Georgia

Immediate Past President

Karen A. Jordan, CPC, QPA
Anchorage, Alaska

WASHINGTON UPDATE

Pension Reform Continues in the Senate

by Brian H. Graff, Esq.

On July 21, seven members of the Senate Finance Committee, Senators Bob Graham (D-FL), Charles Grassley (R-IA), Orrin Hatch (R-UT), John Breaux (D-LA), Jim Jeffords (R-VT), Max Baucus (D-MT), and Alfonse D'Amato (R-NY), introduced the Pension Coverage and Portability Act of 1998. Several other members of the Sen-

ate Finance Committee are expected to join as co-sponsors.

The bill follows the work of Representatives Rob Portman (R-OH) and Ben Cardin (D-MD) who, in May, introduced the Retirement Security for the 21st Century Act described in a previous *Pension Actuary* (see May-June 1998). Although the Senate bill is not as aggressive as the House version, particularly with respect to the various dollar limits applicable to qualified plans, it contains numerous provisions designed to strengthen the private pension system. ASPA's Government Affairs Committee (GAC) worked closely

with the Senators and their staffs in putting the bill together, and a large number of ASPA GAC proposals are included.

Following is a brief summary of some of the more important provisions contained in the bill. Differences with the House bill are highlighted where appropriate.

Plan Loans for Self-Employed

The prohibited transaction rules would be modified to allow for plan loans to sole proprietors, partners, and subchapter S corporation shareholders.

Contributions to IRAs Through Payroll Deductions

ERISA would be modified to clarify that providing for IRA payroll deductions would not be considered sponsoring an employer-sponsored retirement plan under ERISA. This provision was not included in the House bill.

SAFE Plan

The Senate bill includes the simplified defined benefit plan for small

business, called the SAFE plan, which the ASPA GAC helped develop. The SAFE plan has been described in detail in several issues of the *Pension Actuary*.

Modifications of Top-Heavy Rules

A number of changes would be made here:

- Family attribution in determining key employees would be repealed and the definition of key employee would be modified to more closely resemble the HCE definition.
- Elective deferrals would not trigger top-heavy minimums and elective deferrals (and allocable earnings) would not count toward determining whether the plan was top-heavy.
- Matching contributions would count toward satisfying the top-heavy minimums and the matching contribution 401(k) plan safe harbor would be deemed to satisfy the top-heavy rules.

Continued on page 12

Correction

In the July-August *Pension Actuary*, an article by Karen Jordan, CPC, QPA, contained a misprinted character. On page 18, second column, the character “o” should actually be “½”. We apologize for any confusion this caused.

The Pension Actuary is produced by the executive director and Pension Actuary Committee. Statements of fact and opinion in this publication, including editorials and letters to the editor, are the sole responsibility of the authors and do not necessarily represent the position of ASPA or the editors of the *Pension Actuary*.

The purpose of ASPA is to educate pension actuaries, consultants, administrators, and other benefits professionals, and to preserve and enhance the private pension system as part of the development of a cohesive and coherent national retirement income policy.

Editor in Chief

Brian H. Graff, Esq.

Pension Actuary Committee Chair

Stephanie D. Katz, CPC, QPA

Pension Actuary Committee

Donald Mackanos

Christine Stroud, MSPA

Daphne M. Weitzel, QPA

Managing Editor

Stephanie D. Katz, CPC, QPA

Associate Editors

Jane S. Grimm and Amy E. Emery

Technical Review Board

Lawrence Deutsch, MSPA

Kevin J. Donovan, APM

Henry J. Garretson, FSPA

David R. Levin, APM

Duane L. Mayer, MSPA

Marjorie R. Martin, MSPA

Nicholas L. Saakvitne, Esq.

Layout and Design

Chip Chabot

ASPA Officers

President

Karen A. Jordan, CPC, QPA

President-elect

Carol R. Sears, FSPA, CPC

Vice Presidents

Sarah E. Simoneaux, CPC

Gwen S. O'Connell, CPC, QPA

Craig P. Hoffman, APM

Secretary

Cynthia A. Groszkiewicz, MSPA, QPA

Treasurer

John P. Parks, MSPA

Immediate Past President

Richard D. Pearce, FSPA, CPC

American Society of Pension Actuaries, Suite 820, 4350 North Fairfax Drive, Arlington, Virginia 22203-1619
Phone: (703) 516-9300, Fax: (703) 516-9308, E-mail: aspa@aspa.org, World-Wide Web: <http://www.aspa.org>

Safe Harbor 401(k) Plans Under Section 401(k)(12)

The following are excerpts from a letter to J. Mark Iwry, Benefits Tax Counsel, Department of the Treasury, Office of Tax Policy, concerning safe harbor 401(k) plans under section 401(k)(12). It was prepared by ASPA's GAC 401(k) Subcommittee, chaired by Joan A. Gucciardi, MSPA, CPC with the assistance of Marjorie R. Martin, MSPA.

As employers are considering now whether to adopt safe harbor provisions in their 4

fective in 1999 plan years, we are requesting that guidance be issued with as much lead time as possible. As practitioners, we suggest that the following issues be addressed in any upcoming guidance.

1. Notice requirement

Section 401(k) plans that claim safe harbor status are required to provide notice within a reasonable period of time before any year stating the employee's rights and obligations under the 401(k) arrangement. Guidance from the Service should outline the period of time deemed "reasonable" for this purpose and the specific details to be included in the notice.

ASPA recommends that a 30-day advance notice period be deemed reasonable for this purpose. In addition, plan sponsors should be deemed to satisfy the timing requirement with fewer than 30 days notice if employees are permitted a minimum of 30 days from the date of the notice to deliver participation elections, despite any otherwise applicable election deadlines used for the plan. A maximum advance notice time period should not be imposed.

2. Negative Elections

The timing rules should address plan sponsors who choose to adopt the President's recommendation of automatic enrollment. In such cases there could be a very short time period from the employee's date of hire to the date of joining the plan on an automatic basis. This short time frame should not prevent the sponsor from claiming safe harbor status. Conversely, such an employer might provide notice upon hire, even though automatic enrollment would not occur until after the completion of a year of service and perhaps the attainment of age 21.

3. Options Available to the Plan Sponsor

We recommend that the plan sponsor have considerable flexibility in deciding on a year-by-year basis as to whether it will choose to use the safe harbor option. Because the matching contribution option will have an impact on an employee's choice to participate (and the level of such participation), we suggest that the participant be given 30 days notice in advance of any plan year in which the plan sponsor chooses this option.

Because the nonelective option should not have an impact on whether an employee chooses to participate,

we suggest that the plan sponsor be permitted to choose the nonelective option (in lieu of testing) any time up to 12 months following the close of the plan year, as long as the nonelective contribution is made to the plan by this same deadline.

4. Contents of the Notice

We suggest that the communication of the safe harbor arrangement be provided to plan participants in two formats:

1. A simple one-page notice should be provided to participants in advance of the plan year (see above) indicating that the plan sponsor has chosen to make the safe harbor matching contribution for the upcoming plan year.
2. The Summary Plan Description should contain information about the fact that an employer may choose, on a year-by-year basis, to make a safe harbor matching contribution, a safe harbor nonelective contribution, or none at all. If another plan is being used to provide the safe harbor contributions, the Summary Plan Descriptions of both plans should cross reference this.

5. Use of Nonelective Safe Harbor as Top-Heavy Minimum Contribution and for Other Nondiscrimination Tests

A number of plan sponsors with top-heavy plans satisfy the top-heavy minimum contribution obligation through a qualified nonelective contribution (QNEC). This QNEC assists the plan in passing the ADP test

Continued on page 9

Dealing with Documents on the Dawn of the Remedial Amendment Period

by Craig P. Hoffman, APM and Robert M. Richter, APM

The Small Business Job Protection Act of 1996 (“SBJPA”) made a number of important changes in the laws that apply to qualified retirement plans. One year later, the Taxpayer Relief Act of 1997 (“TRA ‘97”) made further changes, which although not as significant, nevertheless require additional updating of every qualified plan document. This article will explore concerns and recent developments pertaining to the process of bringing plans into compliance with these most recent changes in the law.

Background

When Congress enacted SBJPA and TRA ‘97, it was clear that all retirement plans would need to be amended to remain qualified for favorable tax treatment. As originally envisioned by Congress, plan amendments for SBJPA would be done during the 1998 plan year and for TRA ‘97 during the 1999 plan year (with additional time provided for governmental plans). The Internal Revenue Service, realizing the magnitude of the task, authorized an extension of the statutory deadline under the auspices of IRC Section 401(b).

Revenue Procedures 97-41 and 98-14 provide a single deadline for updating plans to bring them into compliance with the recent changes made not only by SBJPA and TRA

‘97, but also those made by The Uruguay Round Agreements Act of 1997 (“GATT”) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”). (These required changes have come to be known as the “GUST” amendments.) The GUST amendment deadline for most qualified plans will generally be the last day of the first plan year beginning on or after January 1, 1999. (Governmental plans will generally have until the 2000 plan year.) However, in the interim, plans must be operated in compliance with the new laws and when adopted, the amendment must be made retroactively effective.

It is important to note that the extension only applies to those changes which are effective before the 1999 plan year. In most cases, this should

not cause significant problems since the changes that are effective in 1999 will be reflected in the amendment adopted in 1999. However, plan sponsors who want to take advantage of the new 401(k)(12) safe harbor design may need to take action by the beginning of the 1999 plan year since this is a change in the law which becomes effective at that time.

The extension of the statutory amendment deadline applies to plan provisions, which if not brought up-to-date for the new laws, would result in the plan no longer being qualified. It also applies to plan provisions which are “integrally related” to a qualification requirement that has been changed by the new law, even if no plan amendment would be required to preserve the plan’s qualified status.

The application of the extended deadline for plan provisions “integrally related” to the new laws is particularly important. This is because the GUST changes, in many cases, loosened the qualification requirements. For example, beginning with the 1997 plan year, the family aggregation rules for certain highly compensated employees no longer apply. However, a plan would not necessarily need to be amended to preserve its qualified status because of this

change. Nevertheless, a plan may be operated to take advantage of this “looser” because it is “integrally related” to a change in the qualification requirements made by SBJPA. If the Service had not permitted the operational compliance/retroactive amendment approach for “integrally related” changes, plans would have needed to be updated right away to take advantage of the repeal of family member aggregation. Unfortunately, the sponsors of defined benefit plans may still need to amend their plans sooner than the 1999 plan year deadline as a result of a recent announcement by the Service in Revenue Procedure 98-42.

Revenue Procedure 98-42 Answers Funding and Deduction Questions

When Revenue Procedure 97-41 was released, it evoked concern among plan sponsors and practitioners regarding the proper funding and deduction limits during the remedial amendment period for plans that are subject to the mandatory funding requirements of IRC §412 (*i.e.*, defined benefit and money purchase pension plans). In the Procedure, the Service cited regulations issued under IRC §412 which provide that a reasonable funding method does not anticipate changes in plan benefits that become effective as a result of a future plan amendment, even if the amendment is to be made retroactively effective. As a result, until the plan is amended, funding and deduction limits will be based upon the current provisions of the document, rather than what the plan might say once it has been updated.

At the ASPA annual conference in October of 1997, IRS officials indicated that, because of the 412 regulations, defined benefit and money

purchase pension plans may need to be amended to remove plan language that limits the compensation of certain highly compensated family members to an aggregate of \$160,000. Otherwise, plan funding and deductions would be based on the aggregate limit of \$160,000 as specified in the existing plan document rather than being based on the new rules which repealed the aggregation requirement. Thankfully, Revenue Procedure 98-42 eliminates this need for an early plan amendment. Unfortunately, the relief only applies to money purchase pension plans.

Revenue Procedure 98-42 provides that an amendment to a money purchase pension plan related to SBJPA, GATT or TRA '97 which is made retroactively effective will be deemed to have been adopted and put into effect as of the amendment's retroactive effective date for purposes of applying the minimum funding standards under IRC §412 and the limitations on deductions under IRC §404. This rule will apply to a particular plan year of a money purchase pension plan only if: the contribu-

Defined benefit plans may need to be amended sooner than the GUST deadline to entitle the plan sponsor to full de- ductions right away.

tion is actually made to the plan within 8½ months after the close of such plan year; the contribution is allocated to participants in accordance with the plan (as amended) as of the date within such plan year; and the retroactive amendment is adopted within the remedial amendment period for GUST as provided in Rev-

enue Procedures 97-41 and 98-14. Because a target benefit plan is considered to be a type of money purchase pension plan, the relief provided by the Procedure would be equally applicable.

Needless to say, Revenue Procedure 98-42 is good news for the sponsors of money purchase pension plans who should now be able to contribute and deduct amounts without the need to amend their plans early to remove family member aggregation language. However, the Procedure is not applicable to defined benefit plans which consequently may still need to be amended sooner than the GUST deadline to entitle the plan sponsor to full deductions right away.

Not every defined benefit plan may need immediate attention. Some defined benefit plans were drafted in such a way that the family member aggregation provisions “self-destructed” as a result of the change in law made by SBJPA. In other words, the plan language was written to provide that if Congress changed the laws and repealed family member aggregation, the plan would automatically take that into account. As a result, the plan would not need an amendment to remove family aggregation. This would mean that the proper funding and deduction limits would be determined without regard to the family aggregation compensation limit, which applied under prior law. It is also quite possible that in some plan documents language relating to this

issue is not clear. In which case, the plan may be susceptible to more than one reasonable interpretation as to whether the family aggregation provisions “self-destructed” as a result of the SBJPA changes. Hence, practitioners and sponsors should examine each plan's language closely to determine its meaning and the proper

Continued on page 10

“Negative” Elections are Positive for 401(k) Plans

by Steven R. Oberndorf, Esq.

The IRS recently issued Revenue Ruling 98-30, holding that default salary-deferral elections (commonly known as “negative elections”) are permitted under Code §401(k). According to the Ruling, an employer may require elective deferrals by employees in the absence of their affirmative election if employees are: (1) given an explanation of their right to make salary deferral elections, and (2) the employees have the right to modify or cancel the default election at any time. The Ruling also permitted a plan provision that automatically invests elective deferrals and employer matching contributions in a balanced investment fund in the event that the affected participant fails to make an investment selection.

Background

Several employers, most notably McDonalds Corp., have instituted programs in which new employees are automatically enrolled in §401(k) plans. Automatic enrollment represents a unique mixture of self-interest and old-fashioned paternalism. The immediate goal is to assure that elective deferrals and employer matching contribution percentages will not be pulled down by large numbers of employees who fail to make elections. It also promotes employee savings for retirement. The “forced” savings aspect assumes the typical human response to make no changes once payroll withholding begins. In theory, negative elections will cause

a dramatic increase in plan participation and improved opportunities to maximize ADP and ACP testing results. A controversy arose as to whether automatic enrollment was possible in view of 401(k) regulatory language that implied that an affirmative election to reduce compensation was required. There was also the issue of whether consent was required under state payroll law. The Service’s Ruling officially sanctions automatic enrollment, subject to providing sufficient disclosure of the automatic enrollment feature and to providing affected employees with the ability to revoke elective deferrals made on their behalf. An earlier Department of Labor ruling (*Opin-*

ion Letter 96-01A) that ERISA preempted consent requirements with respect to participant loan repayments under state payroll law may also help ease the way for this type of default enrollment.

The 401(k) plan described in Revenue Ruling 98-30 permitted any employee to make elective deferrals regardless of years of service. In the event the employee did not make an affirmative election to contribute to the plan, the individual’s salary was reduced automatically by 3%, and this amount was contributed to the plan. There was an employer match; however, this benefit was restricted to employees with one year of service. Although a broad range of investment vehicles was available to participants, in the event a participant failed to direct his or her investments, the plan automatically defaulted to a balanced investment fund. The employee had the right to modify or terminate the automatic 3% elective deferral at any time. New employees were provided with a notice explaining the automatic enrollment and their ability to make investment selections and changes in their contributions at the time of hire or at any time in the future. As part of its ruling, the Service required that all employees be provided with an annual reminder concerning their rights to

participate (and implicitly not to participate) in the plan.

The IRS ruled that the foregoing arrangement was permitted by Code §401(k) and its implementing regulations. The Service reasoned that the plan's automatic enrollment proce-

Revenue Ruling 98-30 finally provides employers with a legal basis for implementing automatic enrollments in 401(k) plans.

cedure was not a prohibited one-time irrevocable election under Treas. Reg. §1.401(k)-1(a)(3)(iv) because the election could be changed at any time. In addition, the employees were considered to have been provided with an effective opportunity to make a cash or deferred election under Treas. Reg. §1.401(k)-1(a)(3)(i) since they received sufficient notice of their rights at the time of hire, and were provided with a reasonable period to make changes to or terminate the automatic election.

Default Investment Selection - A Cautionary Note

The IRS commented that ERISA §404(c) impacted the plan's requirement that contributions be invested in its balanced investment fund in the absence of employee direction. Under ERISA §404(c), an employer may be able to escape liability for investment decisions made by participants in a participant-directed individual account plan if certain requirements are met. The Service noted the Labor Department's position, as stated in Labor Reg. §2550.404c-1, that a default investment selection is the antithesis of participant direction. In such a situation, the employer retains fiduciary

liability for any investment losses or lost investment opportunities.

In the situation described in the Ruling, it appears that the use of a balanced investment vehicle is a safer approach for the employer. A balanced investment vehicle (if available) may provide more protection for the employer since that type of investment, by definition, provides diversification. If a balanced investment vehicle is not available, the employer's job is more difficult since the employer and trustee (if different), as fiduciaries, should take into consideration such individual

factors as the employee's age and time until retirement in making an appropriate investment decision on the employee's behalf. A blanket approach, such as automatic assignment to a fixed income or stock vehicle, may create greater risks for the fiduciary charged with investment responsibility. Obviously, it is in the employer's interest to communicate with an affected employee as soon as possible to try to obtain positive confirmation of the default selection or to implement the employee's choice.

Document Issue or Administrative Procedure

It is not clear whether negative election provisions must be included in the plan documentation or may be implemented administratively using plan enrollment forms. At first blush, providing new employees with detailed information concerning automatic enrollment and default investment selection in absence of an affirmative direction seems to comply with the Ruling. However, a more formal approach may be better from a legal standpoint. Considering that new employees may not fully understand the consequences of their inaction, the more conservative approach is to incorporate negative

election language directly into the plan document and summary plan description. This certainly is prudent if the employer imposes a default investment choice. In a regional prototype plan, a plan provider may want to incorporate an election in the adoption agreement as to whether negative elections will apply to the employer's plan.

Conclusions

Revenue Ruling 98-30 finally provides employers with a legal basis for implementing automatic enrollments in 401(k) plans. In conjunction with the earlier position taken by the Labor Department on ERISA preemption, this should provide an incentive for employers who have hesitated in the past. An immediate effect of negative elections should be improved nondiscrimination testing results; however, they also serve a social purpose by creating "forced" savings for retirement. This has the potential for improved testing results and savings rates in the retail and service industries where participation has historically been low due to lower wages. Considering the Social Security System's highly publicized funding problems, statements made at the June Retirement Savings Summit, and the heavy emphasis in the media for individuals to take personal charge of their investments for retirement, the paternalistic aspects of automatic enrollment appear appropriate.

A potential drawback remains with respect to default investment vehicles. Many employers who have structured their plans for compliance with ERISA §404(c) may be reluctant to reassume fiduciary responsibility for such investment decisions. Thus, these employers will have to weigh the advantages of negative elections against increased fiduciary responsibility. This problem may be

Continued on page 26

WHY, WHEN AND HOW

Qualified Retirement Plan Self-Audits

by John P. Griffin, J.D., LL.M. and Charles D. Lockwood, J.D., LL.M.

Employers are in a constant quandary over balancing the benefits of maintaining a qualified retirement plan with their potential exposure if they run afoul of the complex plan qualification rules. Of course, most opt for the benefits and are willing to take the risks associated with maintaining a qualified plan. Still employers would like to minimize the risks, if possible.

Plan "self-audits" offer one means of reducing an employer's exposure upon an Internal Revenue Service (IRS) or Department of Labor (DOL) examination. Plan self-audits come in many shapes and sizes.¹ The scope of the audit often depends on the purpose for the audit. Is the IRS or DOL knocking at the door? Are there known compliance or operational problems? Who will be performing the audit - internal staff or an outside expert? Are new plan administration personnel afraid of the sins of their predecessors? Many factors determine the type and scope of a plan self-audit.² Each employer's situation is different, and each self-audit will depend on that situation.

This article explores the current compliance environment that encourages plan self-audits, the availability of the IRS correction programs, and the different types of self-audits an employer may consider.

Current Compliance Environment

The compliance environment today is very different than the one that

existed as few as ten years ago. During the 1980's, the IRS was reluctant to impose its ultimate (and only) sanction for violation of a plan qualification rule - plan disqualification. Only in the most egregious situations was such an onerous penalty warranted. Even the IRS recognized this. Even though nearly every plan had (and has) some disqualifying defect, disqualification generally was too onerous a penalty, especially if the violation was minor. For example, the failure to use the precise definition of compensation as set forth in the plan document could result in plan disqualification. This was like getting the death penalty for running a red light. The sanction did not fit the crime.

The IRS's hands were tied because plan disqualification (at least technically) was the only remedy for plan defects. Since the IRS felt uncomfortable disqualifying plans, in any particular year you would find only a handful of seriously flawed plans getting this "death penalty."

The rest of the plan sponsors with

plan defects were told to fix the problems and to not let it happen again. Employers recognized this dilemma for the IRS and, despite the apparent threat of plan disqualification, most employers knew they were virtually immune to the penalty.

The Introduction of Audit CAP

The situation started changing in the early 1990's when the IRS announced the Closing Agreement Program (CAP - now referred to as Audit CAP). Under CAP, if the IRS found a disqualifying defect upon examination, it would offer a settlement option for the employer and allow the employer to avoid plan disqualification.

One of the IRS's main reasons for introducing CAP was to put some teeth into its examination program. IRS agents were much more willing to impose a monetary CAP sanction than to disqualify a plan. In fact, several large employers were hit with CAP sanctions amounting to millions of dollars. Small and mid-sized employers were also penalized under the CAP.

Many employers became very concerned with this new risk in maintaining a qualified plan. Even though the possibility of an IRS examination remained small, the likelihood was that, if the IRS showed up at the doorstep, significant sanctions could be imposed.

Continued on page 16

Safe Harbor 401(k) Plans

and serves to satisfy the top-heavy minimum requirement.

A number of these plan sponsors will wish to use the 401(k) 3% safe harbor option in 1999. SBJPA committee reports suggest these contributions can be used to satisfy other nondiscrimination rules, unlike QNECs, which generally could not be used to support other nondiscrimination tests. Neither the committee reports nor the statute suggests that the 3% safe harbor contribution is in any way restricted in being used to satisfy the top-heavy minimum contribution obligation. There is no statutory basis to suggest that a nonelective contribution cannot be used to satisfy the top-heavy minimum contribution requirements under Code Section 416 simply because it also satisfies the safe harbor contribution obligation of Code Section 401(k)(12).

Please confirm that the nonelective contribution will satisfy the top-heavy minimum contribution requirement for non-key employees and may be used simultaneously in other nondiscriminatory amounts tests under Code Section 401(a)(4).

6. Amount of the Safe Harbor Contribution

A number of issues arise as to the amount of the safe harbor contribution and the participants eligible to receive it. Guidance should address these issues:

1. What compensation is counted? We suggest that compensation from date of entry into the plan be counted for purposes of the nonelective contribution as a minimum standard. Note that plan sponsors may wish to use total plan year compensation in the case of a top-heavy plan, where the nonelective safe harbor

is used to satisfy the top heavy minimum contribution requirement (see above).

2. Who is eligible to receive the safe harbor contribution? We suggest that the plan sponsor (as a minimum standard) be permitted to require that, in order to receive a safe harbor contribution, employees be:

- Employed on the last day of the plan year
- Have worked 1,000 hours

This provision would be applicable only if the group of employees eligible for the safe harbor contribution satisfies the minimum coverage requirements of Code Section 410(b).

3. How is the safe harbor matching contribution computed? We suggest that plan sponsors have three options with respect to making the matching contributions:

- On a periodic (per-payroll) basis, with no “true-up” at the end of the year (this would be used by a plan sponsor that does not incorporate a 1,000 hour or last-day requirement).
- On a periodic (per-payroll) basis, with a “true-up” at the end of the year, ensuring that participants who switch deferral percentages during the year, but make an aggregate elective contribution of at least 5% of pay, will receive a matching contribution exactly equal to 4% of pay.
- On an annual basis.

7. Vesting Issues

The cross-references between Code Section 401(k)(12) and 401(m)(11) raise issues that warrant guidance. Please confirm our interpretations of these sections:

- A plan sponsor may use the ADP safe harbor option only.
- A plan sponsor may use both the ADP and ACP safe harbor options.
- If any of the safe harbor options are used, multiple use testing is not required.
- If the ACP safe harbor option is chosen, it appears that the employer matching or nonelective contributions (except for matching or nonelective contributions used to satisfy the ADP safe harbor) need not be fully vested nor subject to the hardship withdrawal restrictions.

8. Plan Document Issues

We suggest an approach similar to the SIMPLE 401(k) plan for plan documents. This would allow plan sponsors to “snap-on” an amendment to their existing plan documents.

We suggest that the guidance should confirm that an employer’s annual choice of compliance approach need not be specified in the plan document. For example, a plan could state that the normal nondiscrimination tests will apply in the absence of an actual 3% nonelective contribution or safe harbor matching contribution. The notice to employees described above should constitute part of the plan document.

Joan A. Gucciardi, MSPA, CPC is an enrolled actuary and President of Gucciardi Benefit Resources, Inc., a benefits consulting and actuarial firm. She has co-authored several books, and is editor-in-chief of “The Journal of Pension Benefits”. Marjorie Martin is Senior Research Consultant/Actuary in the Sedgwick Noble Lowndes Technical Resources Center, based in Roseland, New Jersey. Martin is an Enrolled Actuary, and an active participant of the Regulations Subcommittee of the Government Affairs Committee of ASPA, and a member of the Technical Review Board for The Pension Actuary.

Dealing With Documents

funding and deduction limits, with or without an amendment.

Opening of the GUST Determination Letter Program

As already discussed, Revenue Procedure 98-14 extended the deadline for updating plans for TRA '97. The Procedure is also important because it announced the opening of the IRS review programs for the GUST changes.

On April 27, 1998, the IRS began taking into account the provisions of the new laws when reviewing plans for determination, notification and opinion letters. However, the review process is limited to the changes made by GUST which are effective before the 1999 plan year. Consequently, plans submitted at this point will not be reviewed with respect to matters such as the repeal of 415(e), the 401(k)(12) design-based safe harbors, or the special ADP/ACP testing rules for plans which permit employees to become eligible before completion of one year of service or attainment of age twenty-one.

Another exception to GUST review under Revenue Procedure 98-14 pertains to determination letter requests for plans that are adopted using prototype documents. If the underlying prototype language has not been updated and reviewed for the GUST provisions, then any determination letter issued to an adopting employer using the prototype will not take into account the GUST changes.

Revenue Procedure 98-14 does not specifically address the treatment of plans submitted for determination letters under the volume submitter program. The IRS Cincinnati Key

District Office initially interpreted the Procedure to require volume submitter plans submitted on or after April 27, 1998 to include the GUST provisions, which are effective prior to 1999. Since most specimen volume submitter plans have not yet been approved for the applicable GUST provisions, the inclusion of the GUST language in a particular employer's plan would be considered a modification to the approved TRA '86 version of the specimen volume submitter plan. When an approved volume submitter plan is modified by an employer, the IRS has the discretion to treat the plan as a pure indi-

The IRS review process is limited to GUST changes which are effective before the 1999 plan year.

vidually-designed plan rather than as a volume submitter plan. Typically this occurs when the changes being made to the approved language are determined by the IRS to be "significant." Unfortunately, the Cincinnati Key District Office had taken the position that in most cases, the GUST provisions were considered to be "significant" changes. Thus, the position taken by the IRS was that in order to obtain a determination letter for a plan which was prepared using a volume submitter plan approved without GUST, the plan must be updated to include the GUST provisions. However, in most cases when the GUST provisions were added, they were treated as "significant" changes to the preapproved language which would take the plan out of volume submitter status and re-

quire a higher user fee. (A "catch-22" that would have made Captain Yossarian proud.)

The IRS National Office did not intend to temporarily shut down the volume submitter program. Accordingly, the Cincinnati Key District Office was informally apprised that it could interpret the Revenue Procedure to treat volume submitter plans in a manner similar to the treatment of prototype plans. As a result, the Cincinnati Key District Office has now changed its position regarding the application of Revenue Procedure 98-14. In a change of policy implemented internally, but not formally announced, employers using volume submitter plans which have not been approved for GUST will have two options when requesting a determina-

tion letter. First, the employer can request that the plan be reviewed for the provisions of GUST which are effective prior to 1999. If such a review is requested, the IRS will in most cases not treat the plan as a volume submitter plan. The issue turns on whether the GUST provisions are a "significant" change to the preapproved language. If the GUST changes are deemed to be "significant," the plan will be treated as an individually-designed plan which must be submitted using Form 5300 with the higher user fees (generally \$700 rather than \$125).

Alternatively, an employer can request that a plan be reviewed without taking into account any of the GUST provisions. In this case, the plan can still be treated as a volume submitter plan and submitted using Form 5307 with the lower user fee. In such cases, the favorable determination letter will indicate that the plan has not been reviewed for GUST.

This second alternative is not found in any official announcement from the IRS. And, even though Rev-

enue Procedure 98-14 does not specifically permit this approach, the IRS National Office has unofficially sanctioned it. Currently, if a plan is submitted for a determination letter under the volume submitter program, a technical screener will contact the plan representative to ask which alternative should be used. It is recommended that a cover letter be included with the submission package, which clearly addresses this issue and designates which alternative the plan sponsor is requesting for review of the submitted plan.

Should Plans Be Submitted at This Time?

Even though GUST reviews by the IRS are now available, most employers will not want to update and submit their plans at this time. This is because of the limited scope of the review, which is presently available. Even if a plan is not affected by the Section 401(k)(12) safe harbor provisions or the repeal of Section 415(e), it is expected that the IRS will issue further updated guidance on the pre-1999 effective date changes made by the new laws. If this happens, a plan submitted to the IRS now may need to be amended yet another time (and possibly resubmitted) once the full program is open. Of course, the likelihood of a second GUST amendment is increased if the plan is affected by the provisions which become effective in 1999 and later. It should also be noted that under Revenue Procedure 97-41, the extended remedial amendment period applies to all plans and amendments adopted after December 7, 1994. This means that the sponsor of a new plan established after December 7, 1994, can generally wait until the end of the 1999 plan year to submit the plan to the IRS for a determination letter. Hence, there is no reason to submit a new plan any sooner than an existing plan.

Actions to Consider Now

Although most plan sponsors will want to wait to begin the updating process, there are certain situations in which actions must or should be taken now. As we already discussed, the sponsors of defined benefit plans may want to immediately update their plans to eliminate the family aggregation compensation limit. Another prime example is an employer that wishes to take advantage of the 401(k)(12) safe harbor design, which becomes available in 1999. Since this is a GUST provision which is effective after the 1998 plan year, operational compliance now coupled with a later adopted retroactively effective amendment will not work. This apparently means the plan sponsor will have to act sooner rather than later, perhaps even before the beginning of the 1999 plan year, in order to take advantage of this new design alternative. This process is made more difficult because at the time this article went to press, the IRS had not yet issued any formal guidance pertaining to 401(k) safe harbor designs. This guidance is expected at any moment, and it is possible that some type of transitional relief will be provided. Until then, plan sponsors will be forced to write their plan documents without knowing how the IRS interprets the new law.

Another reason a plan sponsor may wish to adopt a plan amendment before the GUST amendment deadline would be to take full advantage of the exception to the optional benefit anti-cutback rules for in-service distributions at age 70½. Plan sponsors are permitted to eliminate in-service distribution options for the individuals affected by this change subject to certain conditions and restrictions (see Reg. §1.411(d)-4 Q&A 10). However, the elimination can only apply to those employees

who attain age 70½ in 2000 if the amendment is adopted in 1999. On the other hand, if the amendment is adopted during 1998, the in-service distribution option can be eliminated for employees who attain age 70½ in 1999.

What to Expect in the Future

According to informal comments made by IRS officials, the remaining guidance for the GUST changes, which are effective after 1998, should be released before the end of this year. Assuming this schedule is met, the determination, notification and opinion letter programs providing full review for all the GUST changes should be open during the first quarter of 1999. (As of now, the Service has not decided whether complete plan restatements will be required, or if short amendments to existing plan documents might also be acceptable.) If their expectations are met, and there are no further changes made to the pension laws by Congress in the interim, IRS officials believe a further extension of the GUST updating deadline will not be necessary. Nevertheless, many practitioners remain skeptical in light of the enormity of the task ahead. Time will tell, as the remedial amendment period moves from dawn to high noon.

Craig P. Hoffman, APM, is general counsel of Corbel, a Jacksonville, Fla., provider of plan document and software services to the employee benefits industry. Hoffman is a vice president of ASPA, cochair of ASPA's Government Affairs Committee, and a member of ASPA's Long Range Planning Committee. Robert M. Richter, APM, is director of technical services for Corbel. Richter also serves as chair of the HW-1 part of ASPA's Education and Examination Committee.

Washington Update

- The 5-year look-back rule applicable to distributions would be shortened to one year.
- Employers would not be required to include top-heavy language in their plans if the plan is not top-heavy and if it is reasonable not to expect the plan to become top-heavy.
- Businesses with 50 employees or less would be eligible for an annual tax credit equal to 50% of employer's contributions with respect to NHCEs, up to a maximum of 3% of such employees' compensation. This credit would be available for the first five years of a plan's existence.

In the bill, the IRS user fee would be waived for new plan determination letter requests.

Salary Reduction Only SIMPLE Plans

The bill would permit small businesses who have not maintained a retirement plan for the preceding two years to adopt a salary-reduction-only SIMPLE plan under which up to \$4,000 in elective deferrals can be made (as compared to \$5,000 in the House bill). No employer contributions would be required.

Credit for Small Employer Retirement Plan Contributions and Start-up Costs

The bill would provide two new tax credits (not included in the House bill) for new small business retirement plans where no plan has been maintained for at least three previous years:

- Businesses with 100 employees or less would be eligible for an annual tax credit of up to \$500 in administrative costs incurred during the first three years of a plan's existence.

Increase SIMPLE Plan Deferral Limit

The \$6,000 annual limit on elective deferrals would be increased to \$8,000. The House bill raised this limit to \$10,000.

Qualified Staffing Firms

The proposal would codify the status of "qualified staffing firms" as employers for employment tax and benefit purposes. Such firms must be liable for wages and benefits without regard to payments received from the customer (i.e., the service recipient). Qualified staffing firms could elect, for any year, to have its qualified plan tested for nondiscrimination and coverage as if it were maintained by multiple employers (i.e., on a customer-by-customer basis) and as if its employees who are leased employees with respect to the customers were employed by those customers. The provision would also reduce the level of required contribution under a leased employee safe harbor plan from 10% to 7.5%. In addition, unlike the House bill, the Senate bill would require the staffing firm to make available to employees a 401(k) plan or similar arrangement.

Reduced Variable Rate Premium for New Plans

Any variable rate premium that might be assessed against a new defined benefit plan would be phased-in as follows: 0% for the first plan year; 20% for the second; 40% for the third; 60% for the fourth; 80% for the fifth, and 100% for the sixth and succeeding plan years. Both PBGC and Treasury have responded positively to this proposal.

Elimination of IRS User Fee for New Plan Determination Letters

The IRS user fee for a determination letter request would be waived with respect to any new qualified retirement plan. This provision was not in the House bill.

Compensation Limit Not Applicable to SIMPLE 401(k) Plan

As with the SIMPLE IRA, the section 401(a)(17) compensation limit would not apply to a SIMPLE 401(k) plan utilizing the 3% matching contribution formula. This provision was not included in the House bill.

Exclusion of Elective Deferrals from Deduction Limit

Elective deferrals would no longer be considered employer contributions for purposes of the section 404 deduction limits.

Repeal of Coordination Requirements for Section 457 Plans

The section 457 limit on deferred compensation would not be reduced by elective deferrals under other types of arrangements. Further, deferred compensation would not be taken into account for purposes of the section 403(b) catch-up rule.

New "Negative Election Trust" Safe Harbor

The bill would create a new safe harbor 401(k) plan (not included in

the House bill) called the "Negative Election Trust ("NET"). The NET would be exempt from ADP and ACP testing and would be exempt from top-heavy if the following requirements were satisfied:

- Elective deferrals of at least 3% of compensation are made for all newly eligible employees who do not opt-out of such contributions.
- For the plan year, or the preceding plan year, at least 70% of NHCEs must have made some level of elective deferrals into the plan.
- The employer must provide matching contributions equal to 50 cents for every dollar deferred up to 5% of compensation. Such contributions would have to be 100% vested.

Repeal of the 25% of Compensation Limitation

The 25% of compensation limitation under 415(c) would be repealed. The dollar limitation would still apply. This proposal continues to garner a great deal of support in both the House and Senate as many baby-boomer women, who are returning to the workforce, are restricted from catching-up with respect to their retirement savings because of the limitation.

Faster Vesting for Matching Contributions

Employer matching contributions would have to be vested under a maximum 3-year cliff or 6-year graded vesting schedule.

Deferred Annuities for Surviving Spouses of Federal Employees

The law governing the Federal retirement plan would be modified so that all surviving spouses would be eligible for a survivor annuity if they survive a former employee who dies while eligible for a deferred annuity.

Clarification of Tax Treatment of Section 457 Plan Benefits Upon Divorce

Distributions of section 457 plan benefits pursuant to a QDRO would be taxed under the same rules applicable to qualified plans (i.e., taxable income to the recipient of the distribution).

Spousal Notification

Spouses would have to be given a copy of the written explanation required to be given to the participant pursuant to section 417. This provision, supported by Treasury, was not in the House bill.

Simplification of Minimum Distribution Rules

Under the bill, the age 70-1/2 required beginning date would be increased to age 75. Further, a safe harbor amount of \$300,000 defined contribution plan and IRA assets would be exempted from the minimum distribution. The safe harbor amount would not apply to defined benefit plans. Also, the excise tax for failure to make a required minimum distribution would be reduced from 50% to 10%.

Remove Portability Barriers Between Defined Contribution Plans and IRAs

The bill would permit rollovers from the various types of defined contribution arrangements (i.e., 401(k), 403(b), and governmental 457) to each other without restriction. In addition, IRA amounts (other than from a conduit IRA) could be rolled over into any of these arrangements, provided only deductible IRA contributions had been made previously. Further, after-tax employee contributions could be included in an eligible rollover distribution to a plan or IRA. Finally, IRS would be given authority to extend the 60-day rollover period where failure to comply is due to casualty, disaster or other events

beyond the reasonable control of the individual.

Repeal of Same-Desk Rule

This rule would be eliminated by replacing "separation from service" under section 401(k)(2)(B) with "severance from employment."

Allow Transfers Between Plans

An employee may elect to transfer benefits from one plan to another without requiring the transferee plan to preserve optional forms of benefits if the following requirements are satisfied:

- The transfer was a direct transfer.
- The transfer was authorized under the terms of both plans.
- The transfer was pursuant to a voluntary election by the participant upon receipt of proper notice.
- Spousal consent for the transfer, if required, was obtained.
- The participant could have elected a lump sum distribution.

Purchase of Service Credit in Governmental Defined Benefit Plans

State and local government employees would be able to use funds from their section 403(b) arrangements or section 457 plans to purchase service credits under their defined benefit plans.

Rollover Can Be Disregarded From Cash-Out

For purposes of determining whether a terminated participant can be cashed out, a plan may elect to ignore any rollover contributions (and allocable earnings) by such participant. This provision was not in the House bill.

Repeal the Current Liability Full Funding Limit

The limit would be phased-up in 5% increments beginning with the 1999 plan year. For plan years be-

gining after December 31, 2002, the current liability full funding limit would be completely repealed. Also, section 404(a)(1)(D) would be changed to allow funding up to the unfunded termination liability rather than the unfunded current liability, and would be available to all plans regardless of size.

Expansion of Missing Participant Program

Under the Senate bill, the PBGC's missing participant program would only be expanded to cover multi-employer plans. The House bill made it optional for defined contribution plans.

Waiver of Civil Penalties for Breach of Fiduciary Responsibilities

ERISA section 502(l) would be amended to make the assessment discretionary with the DOL rather than mandatory. This change would allow the DOL to refrain from assessing the 20% penalty in certain cases or to assess a lower amount. Enactment of this provision would pave the way for the DOL to adopt the Voluntary Fiduciary Correction program suggested by ASPA.

Credit Card Loans Prohibited

Qualified plans would be prohibited from allowing loans by credit card. This item was not in the House bill.

Non-Deductible Excise Tax

The 10% excise tax on nondeductible contributions would not apply to any contributions to a defined benefit plan up to the accrued liability full funding limit.

Clarification of "Color-Tile" Provision

The provision in TRA'97 preventing more than 100% of elective deferrals from being invested in employer securities or real property would be clarified as not applying to

elective deferrals invested in real property before January 1, 1999. This provision was not in the House bill.

Periodic Pension Benefit Statements

A benefit statement would have to be given to a defined contribution plan participant at least once a year. Statements would have to be provided to defined benefit plan participants at least once every three years. The House bill covered only DC plans.

SBA Advice to Small Business

SBA would be directed to develop information programs for small businesses interested in establishing and maintaining retirement plans. This item was not in the House bill.

Clarification of Employer-Provided Retirement Advice

It would be clarified that retirement advice provided to employees on an individual basis would be a nontaxable fringe benefit to the extent such services are made available on substantially equivalent terms. This item was not in the House bill.

Dissemination of Retirement Education Programs

The Director of the Federal Office of Personnel Management would be directed to make available successful retirement education strategies. This item was not in the House bill.

Intermediate Sanctions

The proposal would provide that the IRS could not impose any sanction or penalty on a plan sponsor for any inadvertent plan violation voluntarily corrected prior to audit. Further, any penalties imposed after audit would have to be reasonable in relation to the severity of the plan violation. This proposal is quite controversial. ASPA continues to work with the IRS to expand and improve the voluntary compliance programs.

Modification of Timing of Plan Valuations

Defined benefit plans would be permitted to use a valuation date up to one year prior to the beginning of the plan year. The change would apply at the election of the employer but would not be available to an underfunded plan.

Rules for Substantial Owners Relating to Plan Terminations

The same five-year phase-in that currently applies to a participant who is not a substantial owner would apply to a substantial owner with less than a 50% ownership interest. For a majority owner, the phase-in would depend on the number of years the plan has been in effect, rather than on the number of years the owner has been a participant and the initial plan benefit.

ESOP Dividends May Be Reinvested Without Loss of Dividend Deductions

An employer would be allowed to deduct dividends paid to an ESOP when its employees are allowed to elect to take the dividends in cash or leave them in the plan for reinvestment in employer stock.

Modification of 403(b) Exclusion Allowance

IRS would be directed to update section 403(b) regulations to reflect the impending repeal of section 415(e).

Nondiscrimination Safety Valve

Plans would be allowed to satisfy the section 401(a)(4) nondiscrimination requirement using the pre-1994 facts and circumstances test when mechanical tests do not appropriately reflect the nondiscriminatory nature of a plan, provided:

- the plan satisfies conditions appropriately limiting the use of the facts and circumstances test as prescribed in regulations; and
- the plan is submitted to the IRS

for a determination that the test is satisfied.

Coverage Test Flexibility

Plans would be permitted to use the pre-1989 facts and circumstances test when the mechanical tests are not appropriate. Regulatory safeguards would apply, similar to the ones applicable to the nondiscrimination test safety value.

Simplify Cash-Out Amount

Plan sponsors would no longer be required to "look-back" to determine whether the participant's benefit ever exceeded \$5,000 in value.

Excess Benefit Plans for Tax-Exempt Employers

Sections 415 and 401(a)(17) mirror plans would be disregarded for purposes of the section 457 limits on deferred compensation.

Under the bill, the SAR would no longer have to be distributed.

Increase 90-day Rule

The notice and consent period regarding distributions would be expanded from 90 days to one year.

Definition of Compensation to Include Parking

Pre-tax employee payments for parking would be allowed to be treated as compensation for purposes of the retirement plan rules.

Repeal of Unnecessary Transition Rule

The special 1986 Act grandfather applicable to the definition of HCE would be repealed in light of the changes to the HCE definition in 1996. This really only applied to the J.C. Penney Co.

International Organization Plans

The same nondiscrimination and coverage exemptions which apply to

state and local governmental plans would apply to governmental plans maintained by an international organization.

SARs Made Elective

Under the bill, the summary annual report would no longer have to be distributed. Instead it would only have to be made available upon request. This item was not in the House bill.

Employees of Tax-Exempt Entities

Employees of a tax-exempt entity who are eligible to make elective deferrals under a section 403(b) arrangement could be excluded in applying the coverage rules to a section 401(k) plan (or a related section 401(m) plan) if: 1) no employee of a tax-exempt 501(c)(3) organization is eligible to participate in the section 401(k) (or 401(m)) plan; and 2) 95% of the nonexcludable employees who are not employees of a tax-exempt 501(c)(3) organization are eligible to participate in the section 401(k) (or 401(m)) plan.

Repeal the Multiple Use Test

The regulatory multiple use test applicable to 401(k) plans would be repealed.

Provisions Relating to Plan Amendments

Amendments to a plan or annuity contract made pursuant to any amendment made by the Act would not be required to be made before the last day of the first plan year beginning on or after January 1, 2001. In the case of a governmental plan, the date for amendments would be extended to the first plan year beginning on or after January 1, 2003. Operational compliance would, of course, be required with respect to all plans as of the applicable effective date of any amendment made by the Act. In addition, timely amendments to a plan or annuity contract made

pursuant to any amendment made by the Act would be deemed to satisfy the anti-cutback rules.

The current level of partisanship being displayed on Capitol Hill is, unfortunately, making it less likely that you will see any of these provisions actually enacted into law this year. However, if a realistic vehicle for enacting some tax legislation surfaces this year, the ASPA GAC will attempt to attach some of the provisions in this bill. Regardless, both the Senate and the House bills set the stage for more comprehensive pension reform in the next Congress.

Brian H. Graff, Esq., is executive director of ASPA. Before joining ASPA, Graff was legislation counsel to the U.S. Congress Joint Committee on Taxation.

NOTICE OF MEMBERSHIP MEETING VOTING ITEM

At the Membership Meeting during the ASPA annual conference (Monday, October 26, 1998 from 8:15 a.m. to 9:00 a.m.), credentialed ASPA members are invited to vote on the following proposed amendment to the ASPA bylaws:

Article 5, Section A, shall be amended by adding the following sentence at the end thereof:

"If a duly elected officer resigns or is otherwise unable to complete his or her term of office, the Nominating Committee shall select a replacement officer for the remainder of such term."

Qualified Retirement Plan Self-Audits

New Correction Programs

Employers and practitioners screamed for fairness and alternative means of avoiding IRS sanctions. From this outcry evolved the Walk-In Closing Agreement Program (Walk-In CAP), the Voluntary Compliance Resolution (VCR) program, and what is now called the Administrative Policy Regarding Self-Correction (APRSC). These new correction programs allow plan sponsors to be more proactive in identifying plan problems and correcting them. Depending on the program, the employer may have to pay nothing or only a minimal penalty (or fee) to the IRS. This year, the IRS has consolidated all of these correction programs into the Employee Plans Compliance Resolution System (EPCRS) under Revenue Procedure 98-22.

The IRS's compliance resolution programs (which this article refers to as the EPCRS programs³) are an effort by the IRS to have plan sponsors take a more significant role in self-policing plan problems. With these programs, the IRS believes it is offering employers a reasonable means of avoiding significant penalties and rectifying potential plan disqualification problems. The IRS has also indicated that because these programs are available it will be less likely to accept excuses when an examination reveals problems.

So we are now in a new era of plan compliance. The EPCRS programs, created by a "kinder and gentler" IRS, do provide excellent opportunities to correct significant and insignificant plan defects. If

employers are willing to take a look at their plans and their operation, they

If employers are willing to take a look at their plans and their operation, they may avoid substantial monetary sanctions.

may avoid substantial monetary sanctions.

The Promotion of Plan Self-Audits

With the new EPCRS programs, the IRS is attempting to have plan sponsors and practitioners perform some of its compliance enforcement work. Currently, the IRS has significant resource deficiencies and realizes it cannot devote enough agents to qualified plan examinations. The EPCRS programs promote self-audits of a plan in order for employers to take advantage of reduced or non-existent sanctions if the IRS examines their qualified plans. The possibility remains, however remote, that on examination, the IRS "hammer", may "nail" a plan sponsor with significant penalties under the Audit CAP program. Plan disqualification also remains a possibility for the most egregious violation.

IRS spokespersons have repeatedly encouraged plan sponsors to perform self-audits and to develop comprehensive practices and procedures to help avoid operational qualification problems. In fact, they have

indicated that IRS agents will be more sympathetic and receptive to reducing penalties if the employer whose plan is under examination can show that it has made a reasonable effort (e.g., through good plan procedures and periodic self-audits) to prevent and identify plan defects.

Given the current compliance environment, self-audits make a lot of sense. By identifying and correcting qualification defects before an IRS examination, an employer can avoid large sanctions. Plus, a good plan self-audit will identify design flaws, operational inefficiencies and cost savings opportunities.

Although an employer's internal staff may perform a self-audit, the complexity of the qualification rules usually makes this approach impractical. The next section of this article discusses different types of self-audits. For each type, having a plan compliance expert perform the initial audit generally makes the most sense. To the extent formal practices and procedures are developed from the audit, internal staff can perform periodic future audits with minimal outside assistance.

If an employer retains an outside specialist to perform the self-audit, proper selection of the specialist is important. Experience with plan audits is essential to a quality job. The plan qualification rules are among the most technically difficult areas of the law. The law, regulations, IRS rulings, and plan qualification "folklore" are challenging enough. Combine this with the constantly changing nature of this specialty and having an expert perform the audit will provide the plan sponsor with the highest level of confidence.

Even if the most experienced and knowledgeable expert is retained for the audit, plan sponsors should have realistic expectations. A plan compliance expert cannot ensure that he

or she will find all potential plan defects. The sheer volume of records that would have to be reviewed, does not allow adequate time for a complete review. For this reason, any written report (if provided) by the specialist should set forth the scope of the audit and contain a caveat with respect to finding all potential problems.

Types of Self-Audits

As mentioned earlier, every plan audit will differ depending on the purpose and scope desired. This section discusses three general types of audits which can be tailored to a particular situation. The first type, the preemptive audit, provides the least flexibility because a preemptive audit is in preparation for an already initiated IRS plan examination. The other two types, the diagnostic audit and the operational audit, provide more flexibility and opportunity for the plan sponsor to take advantage of one of the EPCRS programs and to identify plan inefficiencies.

Preemptive Audits

If the IRS has communicated its intent to examine an employer's qualified plan, it is generally too late to use the EPCRS correction programs. However, an employer may take advantage of the APRSC program to correct an "insignificant" defect even after the IRS has initiated an examination.

Generally, the IRS will start its examination by forwarding to the employer a comprehensive listing of the items it wishes the employer to send to the IRS or to make available when (and if) the IRS agent arrives on-site for the examination.⁴ An employer in this situation should perform, generally with the assistance of an outside expert, a preemptive audit. In this type of audit, the "auditor" should review the IRS examination list and begin a formal compilation

of the documents and other items being solicited. This compilation will identify missing and deficient items and allow the organization of the items into an "examination file."

Next, the auditor should review the documents and other information for potential problems. The auditor plays the role of the IRS agent. For this reason, knowledge of the IRS process and thinking is imperative. After the review, the significance of any problem is determined and a strategy is developed to deal with the IRS examination and to "explain" any discovered problems to the IRS agent.

Remember, the law, regulations and other guidance are complex for everyone, including the IRS agent. Chances are that the agent will not discover all problems or may think there is a problem when none really exists. Some agents will focus on their particular strengths or philosophies (e.g., an agent may focus on consents to distributions and ignore top-heavy issues).

Developing a strategy to deal with the agent during the actual examination is extremely important. How cooperative should the employer be? (Generally, good cooperation is helpful, but over-cooperation can lead to the unwanted discovery of certain problems.) Who should handle the IRS agent's questions? (The company president, the human resources director, in-house counsel, etc.) Should an outside attorney or compliance expert be available or present during the examination? (This is strongly recommended unless the client is very familiar with compliance issues.)

In any event, experience has shown that preparation is key to a "good" IRS examination for an employer. Neither the employer nor the IRS likes surprises. Knowing where you stand before the IRS shows up

provides a huge advantage in handling the examination.

Diagnostic Audits

A diagnostic audit in some ways is similar in scope to a preemptive audit. The auditor will look at many of the same items an IRS agent would ask for upon examination. However, because the audit takes place without the threat of an impending IRS examination, it allows the employer to take advantage of any of the EPCRS correction programs.

Preemptive audits are the least flexible because they are in preparation for an already initiated IRS plan examination.

Generally, an employer that wishes to assess its current plan compliance situation will entertain a diagnostic audit. The EPCRS programs offer a wonderful opportunity to correct the inevitable problems a plan will encounter in a cost efficient and relatively painless manner.

Generally, a diagnostic audit will entail several steps. The scope of the entire audit and each of its steps may vary significantly depending on the purpose of the diagnostic audit. However, the basic steps are:

Step 1 – Document Review

Step 2 – Interviews

Step 3 – File Testing

Step 4 – Report

Step 1 - Document Review: In this stage, plan-related documents are reviewed for compliance with applicable IRS and DOL requirements. The items may include the formal plan document, summary plan description, benefit state-

ments, Forms 5500, administrative manuals, etc. This review will provide the foundation for the remaining steps.

Step 2 - Interviews: After becoming familiar with the documents, the auditor will interview selected persons who are involved with plan compliance and administration. In a small organization, this may be a single person. In a large organization, this may include numerous persons and departments. This stage helps assess the plan procedures and operation.

Step 3 - File testing: In this stage, random personnel and plan files are selected for review. Different types of plan transactions and operations are examined. For example, the auditor may review items such as initial plan participation, hours crediting, compensation definitions, participant and spousal consents, Form 1099-R reporting, Code Section 415 compliance, 401(k) plan testing methodology, highly compensated employee determination, etc. This stage helps to determine the significance and extent of compliance problems.

Step 4 - Report: The final step involves reporting the auditor's findings. This report may be written or oral. (Some employers prefer oral reports because of the fear that the IRS, DOL or a plan participant may ask for any written report.) If a written report is provided, some employers will attempt to retain the protection of "attorney-client" privilege by having the report solicited by and forwarded to the employer's legal counsel.

Generally, a report will include technical compliance issues, options for correction, the availabil-

ity of the EPCRS correction programs, and recommendations for improving plan processes. This report also provides the basis for developing a course of action for the plan sponsor.

Operational Audits

An operational audit is generally much more comprehensive than a diagnostic audit. The operational audit not only includes the

An operational audit is generally much more comprehensive than a diagnostic audit.

diagnostic audit elements, but also provides a very in-depth review of plan administrative processes. Generally, an operational audit is performed by several different auditors, each with different expertise, such as plan compliance, administration, payroll, etc.

Different situations may prompt the need or desire for an operational audit. An employer may have discovered serious deficiencies in plan compliance, identified problems with internal or external administration processes, or simply wants to get its "hands around" the practices and procedures of the plan.

In general, the steps of an operational audit are the same as the diagnostic audit, except much more time and effort are expended in each stage. This is particularly true at the interview and file testing stages. The interviews are much more extensive and may include outside service providers. The file testing includes a much closer look at plan processes and procedures.

The final report is very comprehensive and is often used by the em-

ployer as the basis for developing new and more detailed practices and procedures for the plan.

Conclusion

Whether an employer should perform a self-audit depends on several factors: the employer's risk tolerance; the employer's confidence in the plan administration process; the discovery of plan problems, etc. An employer must weigh the cost of the audit versus the potential benefit. Given the current compliance environment and the opportunity to correct under the EPCRS programs, the benefits of a self-audit will usually outweigh the costs.

If the employer chooses the self-audit route, selection of a qualified auditor is vital to the value the employer will receive from the audit. Hiring an expert in plan compliance and administration can reduce the overall cost of the audit while increasing the confidence the employer will have in the results. In some situations, the employer may wish to take over future audits after the initial outside audit. This should save money and develop an internal expertise on which the employer may depend.

Endnotes

¹ A plan self-audit is not the same as an ERISA plan audit conducted by an independent accounting firm. While an ERISA audit may uncover plan qualification problems, the primary focus of the audit is to examine the financial integrity of the plan. A plan sponsor should not rely on an ERISA audit to discover plan qualification problems.

² Note that the term "self-audit" refers to both an audit of the plan by internal staff or more typically, an audit by an outside expert retained by the employer.

³ While Revenue Procedure 98-22 includes a discussion of the Audit CAP, this article does not in-

clude Audit CAP as one of the "correction" programs.

- ⁴ This article focuses on IRS examinations. However, the Department of Labor also may examine a plan for Title I violations. A plan sponsor should take these types of DOL examinations very seriously.

John P. Griffin, J.D., LL.M., and Charles D. Lockwood, J.D., LL.M., are partners in a Colorado-based employee benefit consulting practice. Each has over 15 years of experience in the employee benefits area. Mr. Griffin's experience includes work with the Internal Revenue Service, the U.S. Department of Labor and 11 years of private consulting. Mr. Lockwood also has worked with the Internal Revenue Service and has 9 years of private consulting experience. Both have conducted numerous plan self-audits, including audits for several Fortune 500 companies as well as for small and mid-sized companies. Their practice currently specializes in plan compliance issues, and they are drafting prototype retirement plans for FDP Corporation.

Get Your 1997 Financial Survey Results While They Last!

This publication features analysis of the 1997 and 1992 ASPA financial surveys and is designed to identify the trends in various facets of the pension industry over the last five years. This comprehensive study contains hundreds of pages of tables, charts, and graphs detailing a number of industry issues including:

- Compensation
- Benefits
- Employees and Hours
- Marketing
- Fees
- Plan Statistics

Now available to ASPA members at a **50% discount** – only \$150!

To order, copy this advertisement and mail to **ASPA, Department 725, Alexandria VA 22334-0725** or fax to **(703) 516-9308** with payment of \$150 per copy.

Quantity: _____ Amount enclosed: _____

I want to pay by Check Visa Mastercard

Card no.: _____

Exp. date: _____ Signature: _____

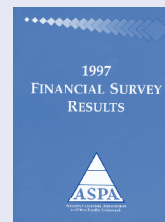
Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Daytime phone number: (_____) _____

The results of the 1997 Financial Survey are still available for purchase, but they're going fast. Make sure you get your copy now because this valuable resource will not be reprinted.



INFORMATION RESOURCES CATALOG

As a service to ASPA's membership, a list of the books and reference material important to every retirement plan professional has been compiled. The Information Resources Catalog provides a quick and easy way to determine which books are available through ASPA.

There are numerous texts and reference books that every retirement plan professional needs in his or her library. The cata-

log is organized by subject matter to make the material you need easy to find. Also, check out our prices!

Take a moment to look at the catalog enclosed for ASPA members and order the reference books you need. Not only will it enhance your pension library, it may save you money. Your order also helps to support the services ASPA provides to its members.



Staff News

McCormack and Deuschl Earn CMP Designation

Brian H. Graff, Esq., Executive Director, is proud to announce that Adele C. McCormack, Director of Meetings, and Piper J. Deuschl, Assistant Director of Meetings, have been awarded the designation of Certified Meeting Professional (CMP). McCormack and Deuschl join the elite group of 4,669 meeting professionals across the U.S. who have earned the prestigious CMP designation.

ASPAs Thirtieth Annual Conference

Three Decades of Learning and the Future to Grow On

ASPAs 30th annual conference will take place in Washington, D.C., on October 25-28 at the Grand Hyatt Washington hotel. All indications are that this year's conference will be as important an industry event as its predecessors.

Here's what **Celeste C. Calabria**, Pension Administrator, Retirement Planning Associates, Waterford, Conn., said about the 1997 conference, "I found the con-



ference to be very enlightening. I had missed a few conferences in prior years and was reminded of how valuable they can be. Not only were the presentations informative, but it gave me the opportunity to exchange ideas and views on new developments with experts in the pension field as well as fellow administrators."

Tony Ornatek, MSPA, President, Teak Associates, Inc., South Portland, Maine, said, "The conference was practical...ideas I could put into practice as soon as I returned to the office."

Eight more workshops have been added, and more sessions will be repeated, for a total of 50 workshops, four panel discussions, four informal sessions, and three



general sessions. "What I liked best is the broad variety of subjects, to the point where it's difficult to choose which workshop to attend. There are frequently several at the same time that I want to go to," said **Ronald E. Ziebell**, MSPA, Tax Sheltered Compensation, Inc., Edina, Minn.

For the first time ever, conference materials will be available on diskette after the conference for an additional fee.

The conference will begin on Sunday, October 25th at 1:00 pm and conclude on Wednesday, October 28 at 11:55 am. The conference dress code is casual, unless you plan to attend the March on the Hill.

Hotel arrangements can be made at either the Grand Hyatt Washington or the Marriott Metro Center. Please call the hotels directly; the telephone numbers are: Grand Hyatt: (202) 582-1234 and Marriott Metro Center: (202) 737-2200.

For more information, call the ASPA Meetings Department at (703) 516-9300 or e-mail meetings@aspa.org.



REGIONAL SEMINARS EARN HIGH MARKS!

This summer, ASPA regional seminars were held in San Diego and Boston. Both programs were well attended, and speakers received high marks. Among the comments received from participants were: "The quality of speakers was inspiring," "great diversity of topics," "The handout materials, professionalism of the ASPA speakers and the CE earning opportunities were great."

Speakers in San Diego included Craig P. Hoffman, Esq., APM, LL.M, Corbel; Paul S. Polapink, MSPA, Price, Raffle & Browne Administrators, Inc.; and C. Frederick Reish, Esq., APM, Reish & Luftman. These ASPA members presented the session entitled "Ask the Experts," a conference favorite.

In Boston, Janice M. Wegesin, CPC, QPA, JMW Consulting, Inc. presented the session "Translating Form 5500, It's Not A Foreign Language!" and won rave reviews for its timely information.

In 1999, ASPA is holding one conference in San Francisco. Entitled "The 1999 ASPA Summer Conference", it will offer an expanded schedule of workshop sessions, and the chance to visit vendors who provide products and services to the pension industry. The 1999 ASPA Summer Conference will be held at the Fairmont Hotel on July 11-14. For more information please contact the ASPA Meetings Department at (703) 516-9300, or e-mail meetings@aspa.org.





ASPA STAFF LENDS A HELPING HAND

by Kathleen Havey, Government Affairs Manager

On August 27, ASPA staff participated in a volunteer effort to renovate a 16-unit apartment building for

low-income senior citizens. Located in the Shaw neighborhood of Washington, D.C., the building was constructed in the 1920s and had never

been renovated – most units still had their original kitchens and bathrooms when they were closed down by the city.

Work on the property began earlier this year after five years of legal hurdles. Through Washington's Homestead Program, the city purchased the foreclosed building from the bank, then sold it for a minimal amount to Manna, a nonprofit housing development organization that constructs and rehabilitates housing throughout Washington.



In the 16 years of their existence, Manna has rehabilitated over 500 units, resulting in home ownership for hundreds of low-income families. Similar to the well-known Habitat for Humanity

program, Manna redevelopments are sold, not rented, to low-income families. The particular building ASPA worked on will be designated for singles and couples ages 55 and older. "I really liked knowing we were fixing up the place for senior citizens," commented Sheka Tinner shortly afterwards.

ASPA staff worked on a variety of jobs in the hot August sun. A group of staffers spent hours removing the cement foundation from the building, while others worked on scraping

paint, stripping the old windows to get them ready for new windows, sizing and cutting aluminum door jams, and shoring up joists.

"I felt like I earned my day's pay," said Dave Kwon. Judging by the aches and pains the next day, others certainly agreed. "We gained a new appreciation for those who do manual labor," stated Pamela Edwards.

Most of ASPA's staff had never participated in a community revitalization effort before, so it was a



learning experience for many. Nonetheless, Chip Chabot summed up the general consensus of the staff when he stated, "It was a lot of hard work, but it left me with a good feeling driving away." We look forward to being invited back next spring for the ribbon-cutting ceremony.



FOCUS ON CE

The 1998 ASPA Annual Conference Meets Half Your ASPA Continuing Education Requirements!

by Anna M. Delaney, CPC

The ASPA 1998 Annual Conference is an exciting opportunity to learn the latest developments in the pension industry, meet other pension professionals, and fulfill half of your ASPA continuing education requirements at one time. Over 50 workshops and panel discussions to choose from covering topics such as *Attorney-Client Privilege, What It Means for You and Your Firm; Impact of Corporate Mergers and Acquisitions; News from the PBGC; and Social Security Issues and Imperatives* make something interesting for everyone.

The ASPA 1998 Annual Conference also provides up to 20 Joint Board for Enrolled Actuaries' (JBEA) credits. Core topics are offered at each time segment. CPAs can also earn continuing education credit because ASPA is registered with the National Association of State Boards of Accountancy as a sponsor of continuing professional education on the National Registry of CPE sponsors. Based on a 50-minute credit hour, ASPA recommends that the 1998 ASPA Annual Conference entitles the CPA attendee up to 20 credit hours. The final authority on JBEA and CPA credit rests solely with the Joint Board for Enrolled Actuaries and the

National Association of State Boards of Accountancy respectively.

Credentialed ASPA members or individuals approved to receive an additional designation after December 31, 1990, must satisfy continuing education requirements to retain their post-1990 ASPA designation. Each ASPA credentialed member is required to earn 40 continuing education credits in each continuing education cycle subsequent to the cycle in which the member receives his or her post-1990 ASPA designation. For the initial continuing education cycle in which the post-1990 designation is granted, the number of credits required will be prorated based on the date of admittance or designation

within the two-year continuing education cycle. The current cycle began on January 1, 1997 and will end on December 31, 1998. All continuing education forms must be filed by January 8, 1999.

The 1998 Annual Conference begins on Sunday, October 25 and ends on Wednesday, October 28. ASPA members who register prior to October 19, 1998 pay only \$735. Onsite registration is \$765.

For more information on ASPA's continuing education program, contact Kevin Scott at (703) 516-9300 or e-mail the Education Services Department at educaspa@aspa.org. For more information on the 1998 ASPA Annual Conference, contact the ASPA Meetings Department at (703) 516-9300 or e-mail meetings@aspa.org.

Anna M. Delaney, CPC, is a compliance officer with American Express Trust Company in Minneapolis, Minn. Delaney is chair of the Continuing Education Committee. A member of ASPA's board of directors, Delaney also serves on the Education Policy Committee, Principles, Practices and Risk Management Committee, and Standards Committee.

ASPAs Education and Examination Department Highlights Program Changes

by Scott D. Miller, FSPA, CPC

There are some changes being made to ASPAs successful examination program. A couple of the changes affected the June 1998 exams and others will be made in time to impact the December 1998 exam administration.

The C-3 exam recently was revised from a multiple choice and short answer essay format to an all short answer essay format. This change was first made in December 1997.

Beginning with the December 1998 administration, the C-4 exam will contain 10 questions: six covering core topics and four covering non-core topics. All six core questions need to be answered; however, the candidate will only be required to answer two of the non-core questions.

The following are core topics which will be covered in every C-4 exam: cash or deferred arrangements (401(k) plans); common control (in-

cluding affiliated service groups and employee leasing); correction programs (including VCR, CAP, and APRSC); defined benefit plans; non-discrimination testing under Code Section 401(a)(4) (general test); and plan design.

The four non-core topics for the C-4 exam will be selected from the following list: life insurance; nonqualified and 457 plans; Davis-Bacon plans; 403(b) arrangements; ESOPs; ancillary and incidental benefits; post-normal retirement age accruals; and Social Security.

Neither the C-3 nor the C-4 exam graders will be concerned with gram-

mar, spelling, or punctuation. The graders will look for a demonstration of consistent and thorough knowledge of the topics. In many cases, a complete outline will demonstrate knowledge better than paragraphs using complete sentences.

Graders have been given "sample" answers to use as a guideline to ensure that all topics within a given section are covered. Sample answers to the December 1997 exam have been included in the 1998-99 C-3 and C-4 study guides.

The HW-1 is undergoing a big change. Effective immediately, the exam will no longer be given twice a year at Sylvan centers, but will be a take-home exam in a style similar to the very popular PA-1A and PA-1B program. This change will allow the candidates to take the exam on demand. The study guide will become the only reference material that will be required.

All these changes were designed with the exam candidate in mind and will greatly improve ASPAs education program. The Committee continues to welcome thoughts and ideas on the program from its candidates and members.

Sunset in a Nutshell

All ASPA exams are subject to a newly revised eight-year sunset provision. Exams will expire on the January 1 after they are eight years old unless the candidate is an ASPA-credentialed member and the exam is needed for an additional credential. The exam can be renewed by meeting continuing education requirements.

When applying for renewal, the candidate will lose credit for an

eight-year old exam unless:

1. The candidate has earned 40 ASPA continuing education credits within the 24 months immediately preceding the date of the membership application and provides documentation of the credits; or
2. The candidate retakes and passes the initial dated examinations within eight years of the oldest examination.

Scott D. Miller, FSPA, CPC, is president of Actuarial Consulting Group Inc. in South Salem, N.Y. Miller is vice chair of ASPA PERF, a member of ASPAs board of directors, and serves as the examination chair of ASPAs Education and Examination Committee. He is also an ex-officio member of the Executive Committee.

FOCUS ON ASPA PERF

The Pension Rights Center

by Curtis E. Huntington, APM

The ASPA Pension Education and Research Foundation Inc., or ASPA PERF, is a not-for-profit 501(c)(3) corporation formed to foster excellence in pension education and to promote scholarly research in the pension education field. It is supported by tax-deductible member contributions.

One of the activities that ASPA PERF contributes to annually on behalf of our organization is The Pension Rights Center, in Washington, D.C. The Pension Rights Center (Center) is the only consumer advocacy organization dedicated solely to protecting the pension rights of workers, retirees and their families. As the nation's pension watchdog group, the Center has taken the lead in targeting pension inequities, proposing realistic reform measures, and helping individuals understand and enforce their pension rights. Numerous laws, regulations and landmark lawsuits are traceable directly to Center initiatives. Millions of retirees, widows and divorced women are receiving pensions as a result of the Center's activities.

The Center is also one of the country's foremost pension educators. It has published countless fact sheets, newsletters, pamphlets and books to improve public understanding of pension issues. These include: "The Pension Book," "Your Pension Rights at Divorce," "Where to Look for Help with a Pension Problem,"

"Protecting Your Pension Money," "A Working Women's Pension Checklist" and "A Guide to Understanding Your Pension Plans."

The Director of the Center is Karen Ferguson. Over the years, Ms. Ferguson has disagreed repeatedly with pension-industry leaders. At the same time, she has earned respect for her sound grasp of the issues and determined advocacy of her views.

Consider the following answer, given by Ms. Ferguson in "Enrolled Actuaries Report" to the question: "Should defined benefit (DB) pensions be given up for dead?"

"Workers see DB plans as unfair to shorter-service and lower-paid employees because of integration and back-loading formulas. But the basic concept is very sound. Indexing of deferred benefits would make DB plans more credible to a mobile work force. In addition, cash-balance plans are an ingenious effort to preserve the defined benefit idea, although we've seen abuse in the way cash-balance plans are used. The decline of DB plans directly affects

the livelihood of actuaries, so they should have extra incentive to take the lead on this issue."

Now, in its third decade, the Center is confronting new challenges. They are collaborating with top pension experts to develop retirement policies for the next century, joining with activists around the country to spearhead a grassroots pension reform campaign, and working with government agencies and professional associations (including ASPA) to develop a nationwide pension counseling and legal assistance system.

ASPA PERF is pleased to be a major contributor to The Pension Rights Center and to support their many activities.

If there is an activity in your local community that you would like considered for possible funding by PERF, please let us know. Although we have limited funding available, we are always looking for new and creative ways to support our mission.

Curtis E. Huntington, APM, is a professor of mathematics and director of the actuarial program at the University of Michigan (Ann Arbor). He is a member of ASPA's board of directors, serves as the quality control chair of ASPA's Education and Examination Committee, and is chairman of the ASPA PERF Committee.

You are cordially invited...

to attend the Government Affairs
Committee events at the 1998
ASPA Annual Conference.
Scheduled events include:

| | |
|--|-------------------------|
| Government Affairs Update | Sunday, 5:15pm - 6:30pm |
| General Session, highlighted by the IRS Update and Q&A session | Monday, 10:30am - noon |
| Informal Government Affairs Session | Monday, 5:35pm - 6:35pm |
| March on the Hill | Monday - Wednesday |

You are cordially invited...

to attend the Education &
Examination Coordinators and
Instructors Lunch at the 1998
ASPA Annual Conference,
Washington, D.C., Tuesday,
October 27, noon to 1:45 p.m.

Please join us for an interactive
discussion about ASPA's
education and examination
program.

ASPA's Passlists Now
Available on the Internet

ASPA is now publishing the most recent exam passlists on the Internet. You can check for your name, or your colleagues' names, by accessing ASPA's web site at www.aspa.org.

The list of passing candidates for the June C-1, C-2(DB), C-2(DC), C-3, and C-4 exams are posted now! Candidates who have passed the PA-1A and/or PA-1B exams during the 1997-98 PA-1 year will also be posted.



ASPA Benefits Councils Contact List

ASPA Benefits Council of Atlanta
PO Box 421981
Atlanta, GA 30342
Chair: Carol J. Ladd, QPA
(404) 588-7603

ASPA Benefits Council of Chicago
PO Box 061107
Sears Tower
Chicago, IL 60606-1107
President: Leslie A. Klein, APM
(312) 876-8201

ASPA Benefits Council
of Cleveland
c/o Ronald S. Gross, MSPA
Moskal Klein, Inc.
One Cleveland Center #1850
1375 East 9th Street
Cleveland, OH 44114-1724
President: Ronald S. Gross, MSPA
(216) 771-4242

ASPA Benefits Council of
Delaware Valley
PO Box 58487
Philadelphia, PA 19102-8487
President: Stephen H. Rosen,
MSPA, CPC
(609) 795-6834

ASPA Benefits Council of New York
PO Box 575
Northport, NY 11768
Chair: Harvey Katz, Esq.
(212) 704-0100

Employee Benefits Council of
Central Florida
c/o Tarra B. Sullivan
PO Box 3808
Orlando, FL 32802
President: Tarra B. Sullivan
(407) 237-4828

PBGC Educating Workers about Traditional Pensions

The Pension Benefit Guaranty Corporation announced the availability of a new publication, *A Predictable, Secure Pension for Life: Defined Benefit Pensions*, and a special section on its Internet site that provides easy-to-understand information on traditional pension plans insured by the federal insurance agency.

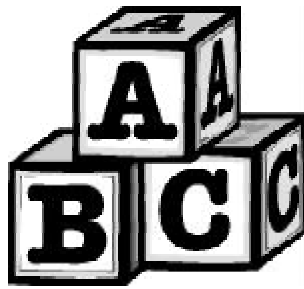
According to Executive Director David M. Strauss, "This is important information for both workers who are covered by traditional pension plans and others who want to know how these plans operate and the advantages they provide. Only defined benefit pensions offer predictable, secure benefits for life. We are getting the word out about the value of defined benefit plans and taking steps to remove the barriers to these plans that are of the most concern to employers and workers."

The new publication helps workers understand what defined benefit plans are, how they operate, and the rights and options of the workers covered by them. Also, it contains a pension checklist designed to help people already covered by a private-sector defined benefit pension plan to better understand the provisions of their specific pension plan and provides a handy place to keep information about their plan.

The booklet and the special Internet section, which contains a map with state-by-state information on defined benefit plans, may be accessed through the PBGC's homepage at www.pbgc.gov. A free copy of the booklet is also available by writing to:

Consumer Information Center
Dept. 639E
Pueblo, Colorado 81009

ATTENTION ABC MEMBERS!!



Do you know someone who is an ABC member, but is not a member of ASPA?

We've got a great deal for any dues-paying member of an ASPA Benefits Council, who is

not yet enjoying the benefits of affiliation with the national organization!

ASPA is offering a \$50 discount on membership dues to any ABC member who is not a member of ASPA. Join ASPA today and receive this one-time \$50 dues credit!

Call ASPA's membership department for an application and more information.

Telephone (703) 516-9300

Facsimile (703) 516-9308

<http://www.aspa.org>

CONTINUED FROM PAGE 7

"Negative" Elections are Positive

alleviated if employers concentrate on improving communications with participants to either confirm or modify elections. As noted above, the DOL has expressly provided that a default election, even to a balanced fund, does not transfer liability to the participant. As with other investments controlled or designated by the plan fiduciary, liability for the default investment will remain with the fiduciary. The result will be additional administrative complexity if the employer retains responsibility for some, but not all of participants' investments. However, employers should also remember that ERISA §404(c) relief is limited since they retain fiduciary responsibility for the appropriateness of all investment vehicles made available to participants.

Lastly, the IRS's ruling in conjunction with the previously noted

DOL advisory opinion, should help to settle concerns about state garnishment law issues. Although ERISA should preempt state law in these situations, not all practitioners agree that the DOL advisory opinion will accomplish this result. However, it is important to note the focus of the state laws in question. Most state garnishment laws deal with the employer deducting or retaining wages for the benefit of a third party. In the negative election situation, the amounts deducted from the employee's wages are used for the "exclusive benefit" of that employee and are 100% vested at all times.

*Steven R.
at McKay Hochman Company, Inc.,
a Butler, New Jersey, employee benefits consulting firm.*

PIX Digest

posited within the 404 deadline is deductible. The issue of the non-deductible excise tax was avoided entirely. Of course, if the sponsor had been a corporation, both the deduction and 412 deadlines would have been September 15, the contribution would have been too late to have been deducted, and the problem with the FFL and the non-deductible contribution excise tax could arise in the next plan year.

Despite our best efforts to communicate the earlier 412 deadline of September 15 to non-corporate sponsors of pension plans, often times these sponsors assume, or their non-pension advisors tell them, the contribution is not due until their extended Form 1040 due date of October 15. Keeping in mind the differences between 404 and 412, as discussed in this thread, at least allows us to minimize the damage of a late contribution. To read this thread, download 404-4122.fsg.

Visit PIX at the National Conference!

Be sure to stop by the PIX booth while attending the National Conference in Washington. Current subscribers may pick up a CD-ROM with the latest version of WOD for Windows, our exclusive software, at no charge. Those of you who are still using the DOS version of WOD should make a point of stopping by to pick up the Windows version. WODWin does more and offers all the familiar benefits of Windows interface.

At the conference, PIX will also be offering new subscribers the chance to sign up for a 1999 subscription to PIX and begin using it immediately - 14 months for the price of 12!

1998-99 CALENDAR OF EVENTS

| | | ASPA CE Credit |
|------------|--|-------------------|
| Oct 25-28 | 1998 ASPA Annual Conference — Washington, D.C. | 20 credits |
| Nov. 7 - 8 | C-2(DB), C-2(DC), C-3, and C-4 Weekend Classes - Denver, CO | 15 credits |
| Nov 16 | Jointly sponsored examination A-3 (EA-2) | * |
| Dec 2 | C-1, C-3, C-4, and A-4 Examinations | * |
| Dec 3 | C-2(DC) Examination | * |
| Dec 4 | C-2(DB) Examination | * |

1999

Feb. 1 - Mar. 10 Registration for spring courses

April - May Two Defined Benefit Workshops (TBA)

* Exam candidates earn 20 hours of ASPA continuing education credit for passing exams, 15 hours of credit for failing an exam with a score of 5 or 6, and no credit for failing with a score lower than 5.

ASPA Benefits Councils Calendar of Upcoming Events

| Date | Location | Event |
|---|-----------------------------|--|
| October 1 | Cleveland | Luncheon Meeting |
| <i>Topic and Speaker TBA</i> | | |
| October 20 | Philadelphia (Bryn Mawr) | Members Only Roundtable: Pension Plan Issues in Mergers and Acquisitions |
| October 26 | Washington, D.C. | ABC Cocktail Party |
| October 27 | Washington, D.C. | Informal Session: Introduction to ABCs |
| November 10 | Atlanta | Case Study: Ethical, Practical & Liability Considerations |
| <i>Speakers: Earle Garvin, MSPA and attorneys Eleanor Banister and John Hubbuch</i> | | |
| November 10 | Orlando | DOL: An Insiders View |
| <i>Speaker: Frank Bitzer, a former DOL employee</i> | | |
| November 12 | Cleveland | Luncheon Meeting |
| <i>Topic and Speaker TBA</i> | | |
| November 18 | Philadelphia | Luncheon: Emerging Trends in Nonqualified Plans |
| <i>Speaker: Joe Hessenthaler</i> | | |
| For more information, please call the ASPA office at (703) 516-9300. | | |

Benefits Contingent on Elective Deferrals vs. Employee Choice

The 401(k) regulations provide that no other plan benefits (other than matching contributions) may be contingent upon an employee's electing to make or not to make salary deferral contributions. A recent thread shows how this requirement may sometimes thwart what would otherwise seem to be a permissible plan design.

A PIX user presented the situation where an employer wanted to offer its union employees a choice of one of two plans, either a relatively modest defined benefit pension plan, or a 401(k) plan with matching contributions. The employee group is large enough that 401(a)(26) will not create a participation problem for the defined benefit plan, and neither plan would cover highly compensated employees. Therefore, there would be no discrimination issues to deal with.

At first, the idea seemed feasible and several other PIX users stated so. Another user, however, pointed out the contingent benefit restrictions applicable to 401(k) plans. Specifically, 1.401(k)-1(e)(6) states that a cash or deferred arrangement satisfies the regulations "only if no other benefit is conditioned directly or indirectly upon the employee's electing to make or not to make elective contributions...".

In the client's proposed plan design, participation in the defined benefit plan is effectively contingent upon a participant's election to not make salary deferral contributions.

This is contrary to the broad language of this regulation.

As another user pointed out, there would be no problem with giving participants the choice of electing to participate in either a defined benefit plan or a defined contribution plan without a CODA. It is the presence of the CODA and the applicability of this contingent benefit requirement that creates the problem. It would likely be possible for the sponsor to offer employees the choice of either a DB or DC plan, then have a separate 401(k) plan available for all.

To read the entire thread, *Dual Union Plans with EE Choice*, download the file *conting2.fsg*.

Failure to Meet Minimum Funding, Deductibility and Full Funding Limits

This thread started with a discussion regarding a sole proprietor defined benefit plan sponsor who did not meet the minimum funding deadline of September 15, but did make the contribution by October 15, the extended due date of his income tax

return. In the next plan year, the contribution was partially restricted by the full funding limit. A PIX user wanted to discuss the potential problems with deductibility, the excise tax for non-deductible contributions as well as the excise tax for failure to meet minimum funding standards.

The contribution which had been made late was \$18,000. The deficiency was reported and the excise tax paid. In the following plan year, the FFL limited the contribution to less than \$18,000, but the original \$18,000 had already been deposited to the plan. It had simply been one month late. The initial discussion focused on whether the non-deductible contribution excise tax would apply to the amount of the \$18,000 contributed in excess of the FFL contribution amount. The conclusion was that the sponsor would be stuck paying a non-deductible excise tax on the same contribution on which he had already paid a funding deficiency excise tax.

Another user pointed out, however, that because this is a non-corporate sponsor, and because the original contribution had been made by 10/15, that the contribution was still deductible for the year in which it was due, regardless of its being too late for Section 412. 404 stands on its own, and a contribution properly deductible under 404 and timely de-

Continued on page 27