

*Larry Starr, Craig Hoffman, and George Taylor met with Paul Shultz, Director, EP Determination Redesign, and Marty Pippins, Manager, EP Technical Guidance and Quality Assurance of the Internal Revenue Service. The meeting took place in Arlington, VA on September 20, 2004. Additional conference calls were held subsequent to that date.*

*The purpose of the meeting and calls was to provide the IRS officials with questions which were submitted by members of ASPPA. It is intended that the responses or deferrals to the questions provide the basis for discussion at the 2004 Pension Actuaries and Consultants Conference during the IRS Question and Answer session. The answers reflected in this presentation are the ASPPA representatives' interpretation of the IRS officials' responses, and not direct quotes. They are intended to reflect as accurately as possible the statements made by the government representatives. This material does not represent the official position of the Internal Revenue Service, the Treasury Department, or any other government agency; nor has it been reviewed or approved by the Service or Treasury.*

*It is intended that this written material will meet the requirements necessary to qualify for Continuing Education Credits.*

*ASPPA wishes to thank Mr. Steven Miller, Ms. Carol Gold, Mr. Paul Shultz, Mr. James Holland, and Mr. Marty Pippins for agreeing to this meeting, and for their cooperation and assistance in making this portion of the program a success.*

**2004 ANNUAL CONFERENCE - IRS QUESTIONS AND ANSWERS**

1. This question has to do with 401(k)(3)(F). Please clarify what the first part of this statute means - it reads:

(F) SPECIAL RULE FOR EARLY PARTICIPATION. - If an employer elects to apply section 410(b)(4)(B) in determining whether a cash or deferred arrangement meets the requirements of subparagraphs (A)(i), the employer may, in determining whether the arrangement meets the requirements of subparagraph (A)(ii), exclude from consideration all eligible employees (other than HCEs) who have not met the minimum age and service requirements of section 410(a)(1)(A).

Does this mean the employer must first apply 410(b)(4)(B) and satisfy coverage for the otherwise excludables \*including\* any HCEs in that group?

*A: Yes*

And then you leave the HCEs (in the otherwise excludable group) in the statutory 401k testing group?

*A: Yes*

2. A 401k plan provides for forfeitures to be used to reduce employer contributions. An employer has been operating the plan by applying forfeitures to cover both the employer's elective deferral and matching contribution obligation, on the basis that elective deferrals are treated as employer contributions. To the extent forfeitures are allocated to satisfy the employer's elective deferral contribution obligation, is this a prohibited transaction under IRC §4975 or ERISA §406, or otherwise violate other provisions of the tax code or ERISA (e.g., exclusive benefit rule)?

*A: This question is currently under discussion within the Service and may be resolved in the final 401(k) regulations that we expect to be out by the end of November, 2004*

3. I have been appointed Trustee for an Orphan Plan, where the DOL has negotiated a settlement with the old Trustee. The settlement requires that he forfeit his account balance, and reallocate it to the other participants. This is occurring in conjunction with a plan termination. The question is whether this forfeiture should be viewed as a "taxable distribution" to the old Trustee, subject to 1099 reporting. Some people believe that this is really several transactions wrapped up in one, as it alleviates the need for the old Trustee to take a taxable distribution and to then repay the plan. Others believe that it is not really a distribution at all, and should not be reported on a 1099. Along these lines, note that all funds will be taxed when ultimately paid out to the participants.

*A: It would appear that this amount should not be taxed twice and therefore, we feel that the old trustee should not have a 1099 issued to him for the settlement.*

4. The Pension Funding Equity Act has increased the interest rate for determining maximum lump sums to 5.5%. However, PFEA also specifies that, for lump sums paid in 2004, the maximum lump sum under IRC 415 cannot be less than the lump sum that would have been calculated using the applicable interest rate in effect as of the last day of the 2003 plan year. In the instance of a calendar year plan, for example, does this mean literally the December 2003 30-yr Treasury rate? Or does it mean the rate as defined in the plan document, including the lookback and stability periods?

*A: This will be discussed from the podium; the Service is currently working on guidance.*

5. Application of IRC404(a)(1)(D)(iv): A plan subject to Title IV terminates as of 12/31/03. Assuming a calendar plan and fiscal year, what is the date as of which the plan's unfunded benefit liabilities are calculated for purposes of § 404(a)(1)(D)(iv)? If the date is 12/31/03, then what happens if the ultimate unfunded benefit liability at the date of distribution is more or less than the amount calculated at date of termination? If the calculation is to be done at the date of distribution, what happens if that date is after 9/15/04?

*A: We believe the sponsor should be able to deduct the amount necessary to make the full distributions due.*

Can the sponsor contribute at least the 412 minimum and deduct it on his 12/31/03 tax return?

*A: Yes*

Can the sponsor then contribute the remainder of the UBL and deduct that amount at 12/31/04, even though the funding standard account stopped at 12/31/03?

*A: Yes*

6. A participant in a 401(k) plan has a deferral account and is otherwise not vested in any other plan accounts. Is that participant considered non-vested for purposes of the rule of parity?

*A: This will be discussed from the podium.*

7. After all avenues (letter to last known address, IRS/SSA letter forwarding service, use locator firm, internet search) have been used, what can be done about the participants who just cannot be found? It seems that there is no satisfactory solution. Amounts over \$5000 cannot be cashed out without the participant's consent and sometimes the spouse's (who may also be missing); amounts under \$5000 generally can't be transferred into an IRA because the IRA sponsor won't open an account without a participant's signature; the amount cannot be remitted to IRS as 100% withholding. What to do?

*A: The IRS is actively working on this issue and coordinating with the DOL for guidance.*

*See the DOL Field Assistance Bulletin 2004-02 issued on September 30, 2004 and the ASPA ASAP #04-36 for a solution that can solve this problem for many DC plans. See also the automatic rollover regulations for distributions under \$5,000 as discussed in ASPA ASAP #04-35 .*

8. If you terminate a DC plan, can you force distributions to participants with account balances greater than \$5,000 if the participant does not respond to numerous requests to respond and complete distribution paperwork?

*A: This may require a legislative solution.*

9. If a plan document provides that the administrative committee may limit HCE deferrals in order to prevent ADP testing violations, and the plan administrator takes that action through resolution and not by plan amendment, is this considered to be an "employer-provided limit" so that contributions in excess of this imposed limit are eligible to be treated as catch-up contributions?

*A: Yes*

Is there any availability issue under 414(v) or 401(a)(4), since the limit applies only to HCEs if all NHCE employees can defer at that level, just not as catch-up contributions?

*A: No*

10. A 403(b) Plan for a public University has been advised in mid-2004 by its insurance carrier that the Plan has failed its ACP test for 2001, 2002, and 2003. The Plan is tested using a one year entry and minimum age 21 and does not have a 1000 hour allocation requirement, nor employment the last day of the plan year for allocations.

Although the University has a uniform match on deferrals, it agrees to contribute at least 2% to any employee who meets the eligibility and special allocation conditions of the Plan. General information distributed to newly eligible employees which includes a highlight description, an SPD and ultimately, the actual document, all include reference to a requirement for the completion of a formal "Application" in order to be eligible for an actual allocation of 2% of compensation. The information is specific and states that no allocations will be made without completion and submission of the Application.

Examination of the failed ACP test for 2001, show inclusion of certain employees who failed to complete an Application. Although not substantial in number, once excluded from the ACP test, the test can pass, at least for 2001.

Further study of the nature of the insurance annuity contract between the University and its insurance carrier, specifically shows a contract, which can not be issued without an Application, and legal counsel for the insurer confirms in writing, that funds would be returned by the insurance carrier on behalf of any one employee, unless accompanied by a completed Application from the employee. That contract was in force in 2001 and subsequently replaced in 2002 by a contract, which would allow transfer of contributions without a formal Application. Nevertheless, the University continues its plan's written policy of not making any allocations to any otherwise eligible employee, without completion of an application.

a) For 2001, can those employees who did not meet the non-regulatory allocation condition of completion of a formal Application, be excluded from the ACP test?

b) For 2002 and thereafter, can those employees who did not meet the non-regulatory allocation condition of completion of a formal Application, be excluded from the ACP test?

*A: This will be discussed from the podium.*

11. We have a client who went through a divorce proceeding three years ago. As part of the property settlement, our client's spouse was to be awarded 100% of his 401(k) account via a QDRO. The attorney drafted a proposed QDRO and gave it to us (the TPA) to review. We returned the proposed QDRO with a letter, listing several recommended (and required) changes. Months passed and we sent a follow-up letter, inquiring as to the QDRO's status. We have heard nothing since; it has been three years. What obligation does the TPA (who is also the client's CPA) have to do anything further?

*A: None.*

In addition, other than a potential malpractice claim against the attorney, does the spouse have any recourse against the plan?

*A: From the IRS perspective, we believe the TPA and the plan have no additional responsibility for this order.*

12. A 401(k) plan provides for immediate eligibility and uses the otherwise excludible employee rule to perform its ADP and ACP testing (Treas. Reg. 1.410(b)-6(b)(3) and 1.410(b)-7(c)(3)). In determining which employees belong in a particular testing group, must the employer use the plan's entry dates or may it use the maximum entry dates permissible under Code Section 410(a)(4)?

Similarly, would the same rule apply for purposes of the early participation rule under Code Section 401(k)(3)(F)?

*A: Our informal position has been that the maximum entry dates are permissible. This will be specifically dealt with in the final 401(k) regulations due out shortly.*

13. What happens when a plan engages in a transaction that would otherwise be a prohibited transaction under IRC 4975 except that it does not involve a disqualified person? Specifically, a NHCE gets a plan loan that exceeds 50% of that NHCE's vested plan account balance. Since the NHCE is not a member of any of the categories listed in 4975(e)(2); the NHCE is not a disqualified person. Looking at the statutory framework of 4975, because there is no disqualified person involved, there is no prohibited transaction (under the Code) and consequently no excise tax for giving the NHCE a plan loan exceeding 50% of the vested account balance. Does the IRS concur?

*A: Yes. However, there may still be a violation of Title I of ERISA which could be prosecuted under a criminal statute. In any case, if there is a prohibited transaction under Title I, it must still be corrected.*

14. A calendar year defined benefit plan has used 12/31 as the actuarial valuation date through 12/31/03. At 1/1/04 it is decided to change the

valuation date to 1/1/04 in accordance with sec. 3.13 of Rev. Proc 2000-40. Later in the year it is decided to terminate the plan effective 9/30/04. Does the plan termination nullify the 1/1/04 automatic approval? Assume that the plan was not fully funded at the date of plan termination.

*A: Yes. The automatic approval to 1/1/04 would be nullified. You could request a specific ruling approving the change if you wish.*

15. What amendments are needed under terminated DB plans with respect to the final 401(a)(9) regulations. Although Rev. Proc. 2003-10 postponed the requirement for amendment until the end of the EGTRRA remedial amendment period, presumably a terminated plan will have to adopt something if it terminates before the end of such period. Would the Rev. Proc. 2002-29 model amendment, although based on the 2002 temporary and proposed version of 1.401(a)(9)-6, suffice?

*A: Generally, Yes. This will be discussed additionally from the podium.*

16. Assume a calendar year safe harbor 401(k) plan with a 3% nonelective contribution. The 3% safe harbor contribution is “hard wired” into the plan document. For the year beginning 1/1/2004, no safe harbor notice is given to the plan participants by the required date. Is the result of no notice being given that (a) the plan must perform 401(k) testing for 2004 and (b) the plan sponsor must still contribute 3% for everyone?

*A: No; You have an operational defect which should be corrected under EPCRS. This will be additionally discussed from the podium.*

17. Presume a Safe Harbor 401(k) plan for CY 2004 that provides the 3% safe harbor NEC notice by 12/1/03. On 12/1/04 the plan sponsor decides to not make the 3% NEC safe harbor contribution for 2004. Does the sponsor have to amend the plan accordingly or does it just do the ADP test for 2004? At the 2003 ASPA Summer Academy the government panelist said the plan sponsor must amend the plan. As to what date must the plan amendment be: a) Effective? b) Adopted?

*A: If the original notice provided was the “maybe we’ll make the 3% contribution” notice, then no amendment is necessary. If the notice provided was the “fixed 3% contribution”, the no amendment to eliminate the 3% contribution is POSSIBLE (barring plan termination).*

18. There are two prevalent methods for performing the ACP test when deferrals must be returned due to a failed ADP test: The first method forfeits all matching contributions associated with the excess contributions under the ADP test. The ACP test is then run. Under the second method, the ADP and ACP tests are both run. Corrective distributions are made first then any matching is forfeited if necessary. Are both of these methods acceptable or is there one specific method that should be used?

*A: Either method is acceptable as long as it is in conformance with the plan language. We believe most plans utilize the second approach.*

19. A corporation sponsors a DB plan, either traditional or 412(i) with life insurance. Life insurance meets the rules regarding incidental death benefits. Life insurance has disability waiver of premium rider. Is that portion of the premium deductible to the employer?

*A: Revenue Ruling 2004-20 provides that it is NOT deductible.*

20. How long does the Plan Administrator need to maintain records under ERISA? a) Six years from the filing of year the plan’s annual filing of form 5500? b) Six years from the last distribution of benefits for all participants in the plan, or c) Other?

*A: There is support for the answer of "forever." Look at section 209 of ERISA, and proposed DOL reg. 2530.209-2(a). You always have to have the records sufficient to determine the benefits. This would imply that the information needed for that purpose would need to be maintained “forever” , whatever that might mean.*

21. Is it possible to aggregate a DB and a DC plan for (a)(4) purposes when the specific benefits, rights and features are different?

*A: Yes.*

Does a DB plan have to provide lump sum options in order to be aggregated with a DC plan that provides a lump sum distribution option?

*A: No; see Reg 1.401(a)(4)-9(b)(1)-(3)*

22. A PS plan with a 1000 hour and last day requirement would like to quarterly fund contributions for some of its employees (i.e., 5% owners), but not all. Plan allows for individual brokerage accounts for all participants. Is this action possible without violating the qualification requirements of §401(a)(4)?

*A: No. This would not satisfy the requirement that benefits, rights and features be currently available to a nondiscriminatory group.*

23. In order to avoid having a deemed CODA, would it be possible for an employee to execute an irrevocable election not to participate which only applies to a particular component of a plan? For example, could an employee elect to salary defer under 401(k) but irrevocably elect to not receive any employer contribution?

*A: This election would not comply with the irrevocable waiver language that is available to avoid a deemed CODA.*

24. A money purchase plan is merged into a profit sharing/401(k) plan. Can the old money purchase benefits be eligible for in-service distributions under the new profit sharing plan (assume it so provides)? Same question for hardship distributions?

*A: The money purchase benefits retain their money purchase characteristics. It would not be able to be used to provide in-service distributions or hardship distributions since those distributions are not available for money purchase plan benefits.*

25. Suppose you have a 401(k) plan that fails ADP/ACP testing where the correction will be made by making distributions to the HCEs. Suppose you find this out after an HCE has already taken a complete termination distribution from the plan and it was directly rolled into an IRA or another plan. What is the plan's responsibility?

*A: The plan must notify the participant. See 1.401(k)-1(f)(4)(i).*

Does it need to contact the other plan or IRA?

*A: No.*

Is it enough to notify the participant?

*A: Yes.*

Do 1099's need to be re-done with regard to the rollover?

*A: Yes. See the instructions to the 2004 1099R form.*

26. Suppose a participant's required beginning date for minimum distributions is 4/1/06. On 3/1/06 he receives a lump sum distribution from this DB plan of his entire accrued benefit and wants to roll it over to the IRA, minus the required minimum distribution (RMD). How is this RMD calculated?

*A: Will be discussed from the podium*

Is the account balance method available based on the lump sum received?

*A: No.*

27. What is the longest period allowed for a principal residence loan? To NRD? 30 years? 50 years? Is there any legal limit?

*A: The limit would be what is commercially reasonable.*

28. In regard to a QDRO where X dollars have been assigned to cover back child support, who pays the taxes on the portion distributed to pay the child support?

*A: The child support amount is taxable to the participant (assuming it is paid to the child and not the ex-spouse).*

29. Assume a deferral only 401(k) plan is top heavy and fails ADP testing. Suppose the only HCE (compensation of \$200k) originally defers \$10,000 (i.e., 5% of pay) but is required to be refunded \$5,000 to pass ADP (i.e., “adjusted” deferral/benefit rate = 2.5%). Is the top heavy minimum contribution equal to 2.5% or 3.0%?

*A: 3%*

30. If an NHCE employee receives a QNEC but isn’t eligible for a profit sharing allocation in a cross tested plan, is he/she entitled to the gateway minimum contribution?

*A: Yes*

31. Is it acceptable to define cross-tested allocation groups using employee names?

*A: Yes*

Is it acceptable to have a separate allocation group for each and every participant?

*A: Yes*

32. Plan allows for forfeiture of lost participants accounts. If you had originally put that participant on an SSA, do you (in the year of the forfeiture) take them off the SSA (that is, list them as Code D on the subsequent SSA)?

*A: No.*

33. IRS required language for standardized plans makes all employees in a brother-sister controlled group “eligible employees” even if the

other members of the controlled group have not adopted the plan. Assume the first employer (A) of a two company controlled group adopts a standardized plan and the second member (B) of the controlled group does not adopt the plan. It seems impossible that a plan adopted by one business could have any affect on an employer who does not adopt the plan. Can you confirm that this is correct, and that the only issues will be with the standardized plan adopted by the A; if B does not adopt a plan, it has no liability for any benefits or contributions or fiduciary issues for its employees. under the plan adopted by A

Now, what are the issues for Company A? In the standardized plan, does it HAVE to make contributions for Company B employees? What if it doesn't even have access to Company B employee information? Is it prohibited from making contributions for Company B employees because they are not employees of Company A? If it does make contributions for Company B employees, are they deductible? If not deductible, are they subject to excise taxes as non-deductible contributions? Perhaps standardized plans should not be allowed to be adopted for controlled groups (as an IRS rule)?

*A: Will be discussed from the podium.*

34. What about trans-gender? Is a man living as a woman considered a woman and able to enter a spousal relationship? What is Administrator's "duty to determine"?

*A: Unless a court has officially changed the gender of someone, they continue to be the gender they were originally determined to be. The administrator of a plan is not required to inquire into these issues, so it is possible that in some circumstances a man and a trans-gendered man living as a woman as the first man's "wife" would escape detection as not really being "man and wife". If the administrator has reason to suspect and issue here, the administrator is duty bound to request documentation such as birth and marriage certification.*

35. Code Section 416(g)(2) defines aggregation groups for Top Heavy plans, and was NOT amended by EGTRRA. Reg 1.416-1, Q&A T-6 defines a Required Aggregation Group and includes a five-year

"lookback" which is not in Code Section 416(g)(2). In light of the removal of the five-year "lookback" rule under EGTRRA to the definition of key employee (416(i)(1)) and to the distributions to termines added back in (416(g)(3)), is the IRS considering removing the five-year "lookback" in reg 1.416-1 T-6?

*A: The regulations as currently written are in effect and we do not currently have a project on the business plan to review this issue.*

36. Is the IRS considering issuing plan termination regulations and guidelines for 403(b) plans? Many plans linger in limbo because the employer goes out of business without arranging for distribution of participants' accounts.

*A: Look for upcoming proposed 403(b) regulations which may address the issue of 403(b) plan terminations. We hope that they will be out by year end.*

37. The 2004 401(a)(9) regulations eliminated the Account Balance Method as an option for calculating minimum distributions from a defined benefit plan. However, plans may continue to use this method, under transitional rules prescribed by Q&A-17 of the 2004 Regulations, through 2005. Suppose a defined benefit plan commenced minimum distributions prior to 2006 using the Account Balance Method. The distribution method is modified starting in 2006 to conform to the annuity distribution rules in the 2004 Regulations. Although this "event" is not listed in Q&A-13 of the 2004 Regulations as a circumstance under which the payment period may be changed, is it implicit in the transitional rule that this change will not violate Q&A-13?

*A: Should be OK*

38. Similar to the issue raised in the previous question, if an annuity was commenced under the 2002, 2001, or 2002 Regulations, and then is modified, no later than 2006, to comply with the 2004 Regulations, will that modification be deemed not to violate the requirements that the annuity payment period not be modified and that the annuity

provide for nonincreasing payments, except as permitted under Q&A-13 and Q&A-14 of the 2004 Regulations?

*A: Should be OK*

39. A new employee is hired in 2006. The employee is the father of a five-percent owner so, because of attribution, also is a five-percent owner. The employee turns age 70-1/2 in 2006. The RBD under IRC §401(a)(9) is April 1, 2007. As of the end of the first distribution calendar year (December 31, 2006), this employee does not have any vested accrued benefit. His first vested accrual, is as of December 31, 2007. Is the first minimum distribution due by December 31, 2007?

*A: Since 12/31/06 accrued benefit was zero, no distribution is due 12/31/07. The first distribution will be required for 12/31/08.*

40. Would use of the Account Balance Method be permissible under a cash balance plan (or other hybrid plan which defines the accrued benefit as a dollar amount) after 2005?

*A: No.*

41. Q&A-13 of the 2004 Regulations prescribes rules under which the annuity payment period may be modified after the annuity starting date. One of the conditions for making the modification is that the modified annuity stream also must satisfy the IRC §415(b) limit, determined as of the original annuity starting date, using interest rates and mortality tables applicable to such date. Suppose an annuity commences at the maximum dollar amount allowed under IRC §415(b), and the plan increases the annuity for subsequent increases in the IRC §415(b) dollar limit. Later, the participant wants to modify the annuity payments upon retirement, consistent with one of the exceptions permitted under Q&A-13. However, the modified payments would not be able to satisfy this rule because the interest rate applied to increases in the dollar limit prior to the modification was different from the interest rate assumption being used to make the necessary IRC §415 calculations under Q&A-13. Would this preclude the modification, or is there an implied exception if the subsequent increases in the annuity payment were allowed by IRC §415(b)?

*A: Will be addressed in regulations.*

42. Section 1.401(a)(9)-8, Q&A-12, of the 2002 Regulations allows a plan to eliminate optional forms of benefit that do not satisfy IRC §401(a)(9). a) Does this apply also to benefits that have commenced, so that, no later than 2006, a defined benefit plan is required to comply with the 2004 Regulations, it can modify a benefit stream that has already commenced?

*A: Yes*

b) Would consent of the participant (and spouse, if applicable) be required?

*A: Yes, if you want a distribution other than a QJSA.*

43. We just had a client go bankrupt. The plan was a prevailing wage plan (25% MP plan). We completed the 2003 report to the client and participants and the report went out (contributions due at the end of 2003 were not made as of the time of our report so they showed as a receivable). Now, the client has gone bankrupt; it is not likely that the 2003 contribution (or any part of the 2004 contribution that would have been due for 2004 prior to the bankruptcy) will be contributed.

Let us assume that there will be NO recovery for these amounts. The plan has pooled investment accounts (no participant direction). What would the IRS recommend with regard to the 2003 valuation and the missing money?

a) Go back and redo the 2003 report on a cash instead of accrual basis. If the money was not contributed for 2003, don't show it in the report or the PARTICIPANT account values as of the end of 2003 for purposes of the termination value calculations. That way, only the individuals who should have gotten a contribution but didn't will be taking the hit for the 2003 contribution not made. On the plan level accounting, we would still show a receivable due (with the likelihood that it won't ever be paid).

b) Leave the 2003 participant values as they were (including the un-contributed funds) and simply treat the failure to make the payment as

a loss to the assets of the plan when distributed. That way, all the participant accounts take a hit based on their respective share of the total plan. Thus, someone who didn't even participate in 2003 would suffer a reduction in his account value to reflect this "loss" to the plan

*A. The correct answer is a.*

44. The Relative Valuation regulations have created a good bit of concern with Plan Administrators and their advisers. The Code states that the J&S benefit must be at least as valuable as any other form of income provided for in the plan. However, it will become clear to participants that the lump sum value, except in cases where the Actuarial Equivalence is the same as the 417(e) rates, has a greater current value than the J&S benefit. This could possibly cause some legal problems. There does not seem to be anything in the Code or Regs. that effectively addresses this situation. How would the IRS reconcile this problem?

*A: Recent Announcement 2004-58 should be helpful. Additional guidance is expected soon. To be discussed from podium.*

45. The instructions to the Sch. B provides that for the first year of the plan the funded % should be reflected as 100%. Quarterly contributions are not required if the funded % for the prior year is 100% or more. It would appear that, since the funded % for the first year of a DB plan is reported as 100%, quarterly contributions for the second year of a DB plan would not be required. Does the IRS agree with this conclusion?

*A: Yes*

46. Participant gets loan for principal residence payable over 15 years; interest rates fall and he wants to refinance.

1. If the terms of the loan remain the same other than the interest rate (which results in level payments for remaining period being smaller, but otherwise paid off in the original 15 year term), is loan still good for 15 year period or does it run afoul of rule that home loans have to be for acquisition of your home and this is a refinance?

2. Does it matter that the proposed refinancing regs say you don't have two loans outstanding since the first is being paid off w/in the original term?
3. Does it matter if more money is taken out?
4. If more money is taken out but paid off over 5 years w/ the increased payments during the overlap period per proposed regs, are you ok?

*A: Will be discussed from podium; Q&A 20 of the 72p regs is on point.*

47. Assume a same sex couple "gets married" in Massachusetts and then moves to California. Does ERISA recognize the marriage for QJSA purposes or QDRO purposes?

*A: The federal Defense of Marriage Act applies, and makes the Massachusetts law "not effective" for purposes of qualified retirement plans.*

48. Does a married couple have to get a divorce to obtain a domestic relations order to divide the marital assets in a plan?

*A: No. You would look to state law to make sure that the domestic relations order (for example, in the case of a legal separation) is under appropriate state law provisions.*

49. If a plan sponsor amended a plan to conform with EGTRRA prior to amending it to conform with GUST, does the sponsor a) now need to re-amend the plan to re-conform with EGTRRA? If so, what effective date is used? b) At the annual ASPA meeting, the answer to this question was "Yes". We were told that the Service would be "nice to us" in the way they implemented this interpretation. What does "nice" mean?

*A: The Service has issued what is called "soft guidance". Take a look at the 12/19/2003 memo on the IRS web site and also the ASPA ASAP on the topic of this "soft guidance".*

50. Does a company have to give eligibility and vesting credit under Code section 414(n)(4)(B) to an employee who previously worked for the company through an employment agency that maintained a 414(n)(5) safe harbor plan? Assume both that a) the employee did not, and then b) the employee did work 12 months on a substantially full time basis.

*A: a) No. b) Will be discussed from the podium.*

51. Assume a calendar year plan is expected to fail the ADP test for the 2003 plan year, but the sponsor terminates the plan and distributes all assets prior to the completion of the ADP tests. Can making a QNEC contribution prior to December 31, 2004 rectify this defect?

*A: This will be discussed from the podium.*

52. A money purchase plan contains the standard QJSA language. Assume that there is a \$1M account balance for a participant in the money purchase plan. How much of the money can be distributed without spousal consent? \$500,000? One million dollars minus the cost of the survivor annuity?

*A: Zero*

53. It appears that contributions to a SEP do not count towards gateway in a subsequently adopted cross-tested profit sharing plan. What is the rationale for not allowing SEP contributions to apply to the gateway?

*A: A SEP is, legally, NOT a qualified plan. Therefore, it is not considered in the gateway determination.*

54. If we have a plan sponsor with separate 401(k) matching formulas by division, do they qualify to adopt a prototype, volume-submitter, or only an individually designed plan?

*A: No to prototype; yes to VS and individually designed.*

What about a two-tiered match by years of service (i.e. <5 years 100% match vs. > 5 yrs 200% match)?

*A: Same answer as above.*

55. Presume a Safe Harbor 401(k) plan for CY 2004 that provides participants with the safe harbor match notice by 12/1/03. Further presume that the plan sponsor executes appropriate resolutions and plan amendments by 12/31/03. The HCE's accelerate their deferrals to the extent allowed by the plan document, and they defer up to the IRC sec 402(g) limit by 3/31/04

a) Can the plan sponsor amend out of the safe harbor match as of 4/1/04, and then ADP/ACP test for the period 4/1/04 to 12/31/04?

*A: Can amend out 4/1/04, but the testing will apply to the whole year (not just 4/1 - 12/31).*

b) If yes, what date must the plan amendment be adopted?

*A: 30 days before the suspension is applicable.*

c) Are there notice requirements and when must the notice be provided?

*A: Yes; see Q&A 6 of Notice 2000-3.*

56. A Profit Sharing Plan fails the requirements of 401(a)(4) or 410(b) for a particular year. The Plan adopts a corrective amendment under Reg. Sec. 1.401(a)(4)-11(g) which provides for additional contribution allocations to only certain NHCEs who are enumerated by name. Prior to the 1.401(a)(4)-11(g) amendment, these NHCEs did not receive any allocation. The allocation under the 1.401(a)(4)-11(g) amendment is fully vested. After the inclusion of these employees the plan satisfies 410(b) using the 70% ratio percentage test, and satisfies the general test under 401(a)(4) regulations.

a) Does the fact that the amendment names the NHCEs by name cause the amendment to fail to satisfy the requirements of a corrective amendment under Reg. Sec. 1.401(a)(4)-11(g)?

A. *No*

b) Does the amendment satisfy the requirement that the allocation formula be definitely determinable pursuant to Reg. Sec. 1.401-1(b)(1)(ii)?

A. *Yes.*

57. An employer with a cross tested profit sharing plan receives a contribution projection/allocation estimate approximately two months prior to its year end and approves the recommendation. After that date but before the year end, a NHCE participant quits. The plan has a last day employment provision. When the new contribution calculation is completed after year end, significant adjustments in allocations are required to pass non-discrimination tests now that the terminated employee is excluded. Can a -11(g) amendment be adopted to provide the terminated employee (who is already 100% vested) with the same contribution that he would have gotten had he not terminated, thus passing the non-discrimination tests?

*A: YES, so long as the -11(g) amendment is non-discriminatory and meets the meaningful benefit rule. Reg 1.401(a)(4)-11(g)(2) specifically includes the language: ... “a corrective amendment... may grant accruals or allocations to individuals who did not benefit under the plan during the plan year being corrected.” Since this participant is a vested NHCE, a -11(g) amendment that adds him back and gives him an allocation that allows the non-discrimination test to pass (the amount does not have to be what he would have received if he had not terminated) would be acceptable under the regs.*