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Testimony of Craig Hoffman, President

ASPPA, 4245 North Fairfax Drive, Suite 750, Arlington, VA 22203-1619 before the Committee on Ways & Means, Subcommittee on Oversight, U.S. House of Representatives

Washington, DC 20515 . March 5, 2002

Introduction

Thank you, Mr. Chairman and members of the subcommittee. My name is Craig Hoffman. I am Vice President and General Counsel of SunGard Corbel, a division of SunGard, headquartered in Jacksonville, Florida. SunGard Corbel is the nation's largest supplier of pc-based software and technical support to retirement plan administrators and other professionals who work with retirement plans.

I am here today to present the views of ASPPA, for whom I currently serve as President. ASPPA is a national organization of over 5,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. The vast majority of these plans are maintained by small businesses. ASPPA members are retirement plan professionals of all types, including consultants, administrators, actuaries, and attorneys. ASPPA's membership is diverse, but united by a common dedication to the private pension system.

ASPPA shares the concerns of this subcommittee, of the Congress, and of America about the tragic consequences arising from the bankruptcy of Enron Corp. We applaud this committee's leadership in exploring whether, and where, our nation's pension laws may need strengthening. We also commend the subcommittee for its stated commitment to maintaining the framework of laws upon which is built a strong, employer-based system of providing retirement income benefits to our nation's workers.

However, it is critically important that any legislative response to the Enron tragedy be carefully measured. We certainly do not want to impose rules that will result in reduced retirement plan coverage. In particular, we need to carefully consider any new burdens that may be imposed on small businesses that are already struggling to provide retirement benefits to their employees. Given the experience of ASPPA's membership with small business retirement plans, my remarks will highlight these potential small business concerns.

ASPPA Generally Supports H.R. 3669

ASPPA commends this committee's Representatives Rob Portman (R-OH) and Ben Cardin (D-MD) for their legislation, the Employee Retirement Savings Bill of Rights (H.R. 3669), which would:

- Prohibit companies from forcing employees to invest any of their own retirement savings (401(k) money) in the stock of the employer.
- Allow employees, after three years of service, to reinvest their employer's matching contributions made in publicly-traded company stock into other investment options provided under the plan.
- Allow employees, after five years of service, to have the right to diversify out of 100% of the non-elective contributions that had been made in publicly-traded company stock.
- Require 21 days notice to employees in advance of any significant period during which employees will be unable to change investment options in their company's retirement plan.
- Require companies to provide employees with an explanation of generally-accepted investment principles, such as diversification, when workers enroll in a retirement plan and annually thereafter.
- Provide a new tax incentive to help employees pay for the cost of retirement planning services.

These common sense provisions will help our nation's workers achieve the retirement security that is the goal of our nation's pension laws, without discouraging meaningful retirement plan coverage. In particular, by providing an exception for closely-held stock, the bill effectively addresses the unique challenges and special concerns faced by small businesses trying to offer a retirement plan for their employees. However, as the committee further evaluates this legislation ASPPA believes that the subcommittee should consider the following:

As with the Administration's proposal, stand-alone ESOPs, funded entirely with employer nonelective contributions-not employee or matching contributions-should be excluded from any possible changes to our nation's pension laws. ESOPs are an important way to enable American workers to obtain a stake in their company.

It should be made clear that any new notice or statement requirements could be provided by electronic means. This will significantly reduce the costs of administering a plan, a particular concern of small businesses.

Delayed effective dates are needed to give plan sponsors and plan administrators the time necessary to change systems to effectively implement any new legal requirements. For example, the new notices required by the bill would be effective 60 days after regulations implementing the provision are issued. It is virtually impossible for plan sponsors, particularly small businesses, to practically comply with that limited of time frame.

Lockdowns Periods Are Necessary for Plan Administration

One issue being debated in the wake of Enron is whether the law should be amended to restrict so-called "lockdowns" of defined contribution plans. A lockdown, also called a "blackout" or "transaction suspension period," is a time during which plan participants may not direct certain transactions in their retirement plan accounts, such as transfers among investment options and participant loans, or receive final distributions.

Typically a lockdown is needed when an employer changes its pension plan service provider. It is analogous to changing ordinary checking accounts. Time is required for outstanding checks to clear, and for the new account to be set up. Similarly, accurate records cannot be compiled, transmitted, and set up by the new pension plan service provider if investment changes, loan activity and/or withdrawals are ongoing during the transfer. During such a lockdown period, participant records and plan assets must be reconciled before they are turned over to the new service provider, which must then set up the recordkeeping information for the plan on its own system. If participant records are in good order, the lockdown can often be less than a week. However, it may take much longer, particularly for small business retirement plans where records may be more difficult to gather.

ASPPA recently surveyed retirement plan administrators on their experiences with lockdowns. More than 250 firms responsible for administering over 85,000 retirement plans that permit participants to direct the investment of their retirement accounts responded to the survey. On average, lockdowns for the plans surveyed lasted between three to four weeks. However, the survey indicated that lockdowns could last two months or even longer when records are difficult to gather. Finally, the survey showed that lockdowns are relatively infrequent and usually happen for a plan only once every three to four years.

Many times a lockdown is part of a process whereby a plan sponsor changes plan service providers in order to improve the investment alternatives or other plan features offered to plan participants. However, in response to the Enron bankruptcy, proposals have been made to limit the length of lockdowns or prohibit them altogether. ASPPA believes these proposals are misplaced and would actually hurt plan participants. Restrictions on lockdowns would be particularly inappropriate when a plan contains no employer stock, since there would be no opportunity for the type of manipulation that is alleged to have occurred in the Enron plan. ASPPA, however, does believe that the law should be amended to require adequate notice and full disclosure to plan participants of impending lockdowns so that participants have the opportunity to make appropriate changes to their accounts in advance of a lockdown.

ASPPA also agrees, as has been suggested by the Administration, that ERISA should be clarified to provide that employers have a fiduciary responsibility to monitor plan investments during a lockdown when participants are not permitted to change investment options. However, it is important to emphasize that such

a proposal should not impose absolute liability for investment losses during a lockdown, such as investment losses due to typical market performance. Only when there is a fiduciary breach, should the employer be held liable. Further, it is critical that employers, particularly small businesses, be given clear guidance by the Administration on how to satisfy their fiduciary responsibilities during a lockdown. As noted earlier, lockdowns are often instituted when an employer is improving plan services for employees. Right now, because of the public controversy surrounding Enron, employers are reluctant to improve plan services for employees for fear of potential liability if they impose a lockdown. In order to give confidence to employers that they are complying with the law, regulatory guidance, including safe harbors, needs to be provided on what to do during a lockdown.

Diversification of Plan Investments

Legislative proposals have been introduced that would limit the percentage of plan assets that may be held in employer stock. Other proposals would require that plan participants be able to diversify their plan accounts out of employer stock after varying time periods. ASPPA does believe it is appropriate to reexamine the rules regarding the ability of participants to diversify the investments in their individual accounts. However, ASPPA is concerned about proposals to place artificial hard caps on the ability of individual participants to choose to invest in employer stock because such caps do not take into account the individual financial circumstances of each participant. For example, if an employee is covered by both a defined benefit plan and a defined contribution plan, investing a higher percentage of defined contribution assets into employer stock may be an entirely prudent investment decision due to the existence of the valuable and guaranteed defined benefit plan.

ASPPA believes that plan participants should be able to exercise free choice as to investing their plan accounts in employer stock. Participants should be able to diversify their plan investments after a reasonable time, the length of which will vary depending upon the type of plan. However, it is important that any diversification requirements take into consideration the special concerns of small businesses. Small business stock is not publicly traded, and, consequently, it requires significant expense to value such stock. Generally, ERISA requires small business stock to be valued once a year. Any proposals that would require more frequent valuations would be an undue burden on small businesses.

To further promote diversification, ASPPA supports the Administration's proposal to require quarterly statements. However, it is critical that this requirement be limited to only those plans that permit participants to direct investments. Otherwise, it could be extremely burdensome for small businesses to comply. For example, it would be very expensive for small businesses to have to quarterly value closely-held stock contained in an ESOP where participants do not have the right to direct investments.

Strengthening the Private Pension System

The current plight of the Enron 401(k) plan participants highlights the need to expand and reform the private pension system. This need is especially acute with respect to encouraging plan sponsors to adopt and provide defined benefit pension plans. Unlike 401(k) and other defined contribution plans, defined benefit plans provide a guaranteed retirement benefit for employees. Further, and very importantly, the employer, and not the employee, bears the risk of investing the assets of a defined benefit plan. In addition, the Pension Benefit Guaranty Corporation insures the payment of a minimum level of retirement benefits under a defined benefit plan. However, since the passage of ERISA, restrictive and complex laws have been enacted and complicated regulations issued which have seriously impeded the ability of large and small businesses alike to maintain defined benefit pension plans for their employees.

If Congress wants to provide greater retirement security for American workers, then it must do more than revise the fiduciary responsibility rules of ERISA. It is time to revitalize defined benefit plans and to once again make them attractive to both employers and employees. ASPPA is developing a proposal that combines the best features of 401(k) plans-participant choice-with the best features of defined benefit plans-a guaranteed benefit. We call it the DB-K and we would happy to discuss it more with you.

Thank you, Mr. Chairman and members of the subcommittee, for this opportunity to make our views known. I would be pleased to answer any questions you may have.

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