

THE PENSION ACTUARY

Vol. XXVII, Number 6

November-December 1997



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PWBA Investigations — Pitfalls and Opportunities

by Martin M. Heming, APM, and C. Frederick Reish, APM

The Pension and Welfare Benefit Administration of the U.S. Department of Labor has increased its investigations of qualified retirement plans. The most publicized of these involves the late deposit of employees' elective deferrals into 401(k) plans. In addition, the PWBA and the Internal Revenue Service have intensified their efforts to coordinate their examinations. As a result, the PWBA and IRS have implemented a working relationship which routinely results in the referral of cases from one to the other. (A summary of the areas of coordination prepared by IRS and PWBA representatives is on page 17.)

Washington Update Actuary-Client Privilege

by Brian H. Graff, Esq.

If you have been following the news, you know that the hottest thing on Capitol Hill these days is Internal Revenue Service restructuring. On November 5, the U.S. House of Representatives passed (425-4) a bill overhauling governance of the IRS. The bill would create a largely private-sector management board at the IRS, consolidate congressional oversight of the IRS, and shift the burden of proof to the IRS in certain civil tax cases, along with other provisions enhancing taxpayers' rights. Given the overwhelming vote in the House in favor of the bill,

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This means that the chances of a PWBA investigation have significantly increased, as has the likelihood that the IRS will conduct an audit of the plan based on a PWBA referral. A PWBA investigation has "traps" which can only be avoided with experienced advice. It is possible to avoid these pitfalls, like the ERISA section 502(1)

penalty, while taking advantage of the opportunities offered by the IRS voluntary programs to correct the tax qualification issues resulting from problems discovered during the PWBA investigation.

If, during the course of its investigation, the PWBA discovers a fiduciary breach or other ERISA Title I violation, the PWBA routinely imposes the ERISA section 502(1) penalty. ERISA section 502(1) provides for a penalty of 20 percent of the amount recovered by the plan, payable to the government, on a fiduciary who breaches its duties or

commits another violation of ERISA, such as a prohibited transaction. However, in most cases it is possible to devise a strategy to avoid the section 502(l) penalty.

In addition, the asserted fiduciary breach or prohibited transaction may violate both Title I of ERISA and the Internal Revenue Code. If there are violations that the PWBA will refer to the IRS, then action should be taken quickly to correct the defect under an IRS voluntary program.

Recently, we worked with a third-party administrator on a PWBA investigation which illustrates both the pitfalls and opportunities discussed in this article.

This case involved a manufacturing company with a traditional profit-sharing plan. The plan invested about \$900,000 of its \$2 million in plan assets in several real estate limited partnerships. The partnership interests were never appraised and were continuously shown on the Form 5500 at their original

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Correction

With our apologies to the author, item 9 of "10 Pension Tidbits form a Past President," by Howard M. Phillips, MSPA, which ran in the September-October issue of the *Pension Actuary*, should have read as follows:

9. QDROs do not apply to IRAs

When there is to be a division of retirement plan assets between two spouses involved in a marital dissolution, a QDRO is usually used in order to split the ownership of the qualified retirement plan asset. However, the qualified plan rules for QDROs (found in IRC section 414(p)) don't apply to IRAs. Court domestic relations orders (DRO) will control the division, but will not necessarily satisfy all of the restrictions imposed on "qualified" orders. Although a distribution occurring as a result of a QDRO from a qualified plan is exempt from the 10 percent premature distribution penalty, if the distribution occurs before age 59½, that same exemption does not apply to a distribution from an IRA account because of a DRO. However, IRC section 408(d)(6) allows the IRA holder's spouse a tax-free rollover to a separate IRA.

Similarly, DROs under governmental and church plans escape most of the qualified plan requirements for QDROs. But unlike IRAs which are subject to the 10 percent penalty for DRO distributions, the governmental and church plan DRO distributions gain an exemption because of the specific definition in 414(p)(11) which deems the DRO in these situations to be a "QDRO."

The same cross-reference is used to allow the spouse or former spouse under a governmental (or church) DRO to achieve a rollover.

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.

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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@erols.com, World-Wide Web: <http://www.aspa.org>

IRS Voluntary Compliance

ASPA's GAC has had several meetings with the Internal Revenue Service about expanding its various self-correction programs. Based on these meetings, the IRS announced (Announcement 97-121) extension of the APRSC self-correction period for significant defects from one to two years. The announcement indicated that the IRS plans to issue a field directive to provide additional insight on the APRSC and to clarify certain aspects, including timing for correction. Based on additional discussions with ASPA's GAC, the IRS is planning further improvements to its various self-correction programs. For example, ASPA has had discussions with the IRS about setting a fixed range of penalty amounts under Walk-In CAP for plans with form defects that operationally comply.

The IRS also plans to publish a consolidated guide to all the IRS voluntary compliance programs. The guide will include contact information for offices involved with the compliance programs, which operate out of the Employee Plans and Exempt Organizations key district offices. In response to ASPA's request, the IRS has provided the following interim list of IRS personnel that ASPA members may contact regarding the self-correction programs. This list was prepared by the IRS national office, and they assure us that ASPA members are welcome to call. In addition, they indicated that ASPA members could discuss possible correction methodologies with the APRSC contacts.

Closing Agreement Coordinators (CAC) and Closing Agreement Specialists (CAS)

Northeast Region

Brooklyn EP/EO Division

(718) 488-2010
Cathy Jones (CAC, Walk-In CAP)
Chief, Review Staff
(718) 488-2400, Fax: (718) 488-2405
10 Metrotech
625 Fulton St.
Brooklyn NY 11201

Buffalo

Stan Pustulka (CAS, Field CAP)
(716) 551-3031, Fax: (716) 551-3060
P.O. Box 425
Niagra Square Station
Buffalo NY 14201-0425

Southeast Region

Baltimore EP/EO Division

(410) 962-3290
Stewart Copeland (Walk-In Cap)
(410) 962-3499
Jerry Livingston (Field CAP)
(410) 962-3195, Fax: (410) 962-0867
EP Technical Staff
P.O. Box 13163
Baltimore MD 21203

Midstates Region

Dallas EP/EO Division

(214) 767-1490
Al Dorevitch (CAC)
(312) 886-1277, Fax: (312) 886-1080
Zenobia Ford (Asst. CAC)
(312) 886-4710, Fax: (312) 886-3275
Group: 7106
230 S. Dearborn
Chicago IL 60604

Western Region

Los Angeles EP/EO Division

(213) 894-3748
Marianne Davis (Walk-In CAP)
(213) 725-1852
Steve Adler (Field CAP)
(213) 725-2529, Fax: (213) 725-0676
McCaslin Industrial Park
2 Cupania Circle
Monterey Park CA 91755

Headquarters

Washington, D.C. EP Division

(202) 622-8300
Carlton Watkins
HQ Coordinator, CAP, APRSC
(202) 622-7567, Fax: (202) 622-5997
CP:E:EP:P:2, Rm. 6702
1111 Constitution Avenue, NW
Washington DC 20224

APRSC Coordinators

Northeast Region

Brooklyn EP/EO Division

(718) 488-2010
Cathy Jones
Chief, Review Staff
(718) 488-2400, Fax: (718) 488-2405
10 Metrotech
625 Fulton St.
Brooklyn NY 11201

Midstates Region

Dallas EP/EO Division

(214) 767-1490
Robert Wendell
Chief, EP Branch (CHI) (1)
(312) 886-4700, Fax: (312) 886-3275
230 S. Dearborn
Mail Stop 4900CHI
Chicago IL 60604

Headquarters

Washington, D.C. Division

(202) 622-8300
Carlton Watkins
HQ Coordinator, CAP, APRSC
(202) 622-7567, Fax: (202) 622-5997
CP:E:EP:P:2, Rm. 6702
1111 Constitution Avenue, NW
Washington DC 20224

Southeast Region

Baltimore EP/EO Division

(410) 962-3290
Judy Cook
(410) 962-0075, Fax: (410) 962-0132
EP Technical Staff
P.O. Box 13163
Baltimore MD 21203

Western Region

Los Angeles EP/EO Division

(213) 894-3748
Thelma Diaz
(213) 725-1857, Fax: (213) 725-0676
EP/EO Review Section
McCaslin Industrial Park
2 Cupania Circle
Monterey Park CA 91755

ASPA Testifies at DOL Hearing on Proposed Revised Form 5500

Joan Gucciardi, MSPA, CPC, was one of eight witnesses who testified on behalf of ASPA at a public hearing concerning the revised Form 5500 package published on September 3, 1997. Representatives from the Department of Labor, Internal Revenue Service, and Pension Benefit Guaranty Corporation worked jointly to simplify and streamline the form's reporting requirements, changes which many witnesses found to be "a positive first step."

Gucciardi, a member of the ASPA board of directors, summarized ASPA's written comments by highlighting ASPA's top five requests for the proposed 5500 series forms:

Issue the forms earlier and publish the list of edit checks;

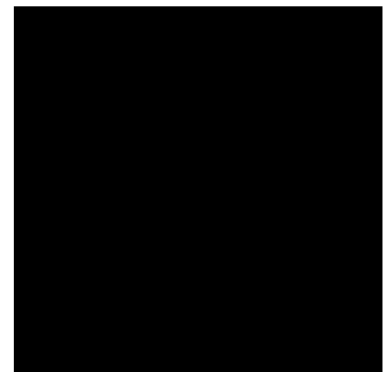
Require the newly-created Direct Filing Entity to submit the Schedule D directly;

Create an enforcement mechanism to ensure that all insurance carriers provide timely and accurate information for completion of the Schedule A;

Use the outside limit contained in the DOL regulations regarding Schedule FIN, Line 4a (the timing of the transmittal of participant contributions); and

Require that Schedule Q be filed each year.

Copies of the 17-page comment letter, written by the ASPA GAC Reporting and Disclosure Subcommittee, are available upon request from the ASPA office.



1997 ASPA Annual Conference

U.S. Rep. Earl Pomeroy (D-N.D.) addresses ASPA's Annual Conference in Washington, D.C., November 4. Look for highlights from the conference in the next issue of the *Pension Actuary*.

What's Your View?

Letters to the editor can be sent to—

Pension Actuary
Letters to the Editor
ASPA, Suite 820
4350 North Fairfax Drive
Arlington, Virginia 22203-1619

or by E-mail to —

aspa@erols.com

REVENUE PROCEDURE 97-41

Guidance on SBJPA '96 Amendments

by Craig P. Hoffman, APM

The pension law changes made by the Small Business Job Protection Act of 1996 (also known by its acronym, SBJPA) were significant and far-reaching. Government officials at the Internal Revenue Service and Treasury Department remain hard at work on the follow-up guidance needed to answer many of the open questions posed by the new law. One area of concern has been the amendment deadlines and procedures for bringing retirement plans into compliance. With the recent release of Revenue Procedure 97-41 (and accompanying regulations), many of the questions in this area have now been answered.

When Congress passed the Small Business Job Protection Act, it was clear that all qualified retirement plans would need to be updated in order to comply with the new law. To provide for an orderly amendment process, SBJPA generally provides that plans do not need to be updated any earlier than the 1998 plan year as long as there is operational compliance with any change that would be required to preserve the plan's qualified status. Additionally, when the plan is ultimately updated, the amendment must be retroactively effective and reflect how the plan was operated during the interim period.

In the months that have followed the enactment of SBJPA, there has been some controversy over what Congress intended with regard to plan amendments. Several IRS representatives informally indicated

that certain changes made by SBJPA did not "require" a plan amendment in order to preserve the plan's qualified status. As a result, these officials indicated that plan sponsors might need to amend their plan documents right away if they wanted to follow the new law in areas where a plan amendment would be "permitted" but not "required." In other words, the operational compliance/retroactive amendment approach would not be available for so-called "permissive" amendments. The ASPA Government Affairs Committee met with IRS officials on several occasions to explain the difficulties that might be caused by such a strict interpretation. Thankfully, the official guidance recently released by the IRS does not draw such a fine distinction between permissive and required amendments. Instead, it

provides a very practical approach to the amendment process which should make an unpleasant chore a little bit easier for both plan sponsors and practitioners.

Revenue Procedure 97-41 was published in the August 18 edition of the *Internal Revenue Bulletin*. It provides a single deadline by which all plans will need to be amended to comply not only with SBJPA, but also with certain changes made by GATT as well as the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Under Revenue Procedure 97-41, the deadline for updating nongovernmental plans for the many changes covered by these laws will be the last day of the first plan year beginning on or after January 1, 1999. For governmental plans, the deadline will generally be the last day of the first plan year beginning on or after January 1, 2000.

Although the procedure provides a blanket extension of the plan amendment deadline, there are some very significant differences in the manner in which certain provisions under the new law may be addressed. The remedial amendment period rules found in Internal Revenue Code section 401(b) were invoked by the IRS as the basis upon which the deadline was extended. This section of the Internal Revenue Code was substantially rewritten by ERISA. Un-

der its present form, its purpose is to provide a remedial amendment period during which plan sponsors can correct disqualifying defects in the language of a new plan or an amendment to an existing plan. If an employer adopts a retroactive corrective amendment during the so-called "remedial amendment period," the plan is not disqualified. The remedial amendment period is the time period during which corrective amendments may be made under IRC section 401(b).

Under the rules of section 401(b), the deadline by which a corrective amendment must be adopted is the due date of the plan sponsor's income tax return, including extensions, for the year in which a defective new plan, or a defective amendment, is adopted. For example, the remedial amendment period for a new calendar-year plan, sponsored by a sole proprietor, would normally be the April 15 due date of the sole proprietor's income tax return. If the sole proprietor requested the automatic extension of his filing deadline, the remedial amendment period would stretch until August 15.

The remedial amendment rules of IRC section 401(b) are designed to work hand-in-hand with the determination letter application process. This is exemplified by the automatic extension of the remedial amendment period if a determination letter application is filed with the IRS before the period would have otherwise expired. The corrective amendment period then remains open while the IRS reviews the plan document. This gives the plan sponsor the opportunity to make a corrective amendment if a defect is uncovered during the IRS review.

The IRS has issued proposed and temporary regulations that will expand the reach of the 401(b) rules.

Under the new rule, the definition of a "disqualifying provision" has been expanded. It now specifically includes plan provisions, designated by the IRS, which would fail to satisfy a qualification requirement because of a change in the law. It also includes plan provisions which are integrally related to a qualification requirement that has been changed by a new law. In other words, if there is a change in the law which requires plan amendments, the IRS can designate those changes as disqualify-

Although plan amendments are not required right away, plan sponsors must still operate their plans in accordance with the new law (for those changes that are effective before 1999).

ing provisions, and this will then give plan sponsors more time to update their documents. Additionally, the IRS can also provide the same extension for plan provisions which are "integrally related" to the qualification requirements that have been changed.

The IRS has chosen to do exactly that with respect to the many new requirements that have been added or changed by USERRA, GATT, or SBJPA. However, the extension only applies to those changes which are effective *before* the 1999 plan year. This should not cause a problem since the changes that are effective in 1999 will be reflected in the amendment adopted in 1999. Its only impact may be to require the updating process be done in the early part of the 1999 plan year, rather than the later part so as to avoid IRC section 411(d)(6) cutback problems.

Although plan amendments are not required right away, plan sponsors must still operate their plans in

accordance with the new law (for those changes that are effective before 1999). When adopted, the retroactive updating amendment must reflect the compliance choices the plan sponsor made in operating the plan. This would also be true for the changes which are integrally related to the plan provisions that are affected by the new law.

Revenue Procedure 97-41 also emphasizes that in certain circumstances, the law or other guidance requires plan amendments to be adopted in a way that would preclude use of the remedial amendment/retroactive amendment approach. Examples cited include the mandate under IRC section 417(e)(3)(B) that until a "pre-GATT" defined benefit plan is actually amended to implement the new GATT interest rate approach, ben-

efits must be determined under the plan's pre-GATT terms. Similarly, Revenue Procedure 97-9 generally provides that 401(k) plans cannot be amended on a retroactive basis to add the new SIMPLE provisions as a way to satisfy the 401(k) and 401(m) tests.

The extension of the remedial amendment rules of IRC section 401(b) to the latest changes in the law is important relief for plan sponsors. This is particularly true for plans which were the subject of determination letters that qualified for "extended reliance." The extended reliance program was used by the IRS as a means of encouraging plan sponsors to update their plans early for the many changes made by the Tax Reform Act of 1986. Plans that were submitted within certain deadlines for determination, opinion, or notification letters were entitled to an "extended reliance period." During this period, plans which qualify don't need to comply or be amended for regulations or administrative guid-

ance issued after the date of the letter. The plan sponsor simply follows the terms of the plan as written. The extended reliance period for TRA '86 is still open and continues until the last day of the 1998 plan year. As a result, extended-reliance plans would have needed to be updated during the 1999 plan year, even if there hadn't been a change in the law. Under Revenue Procedure 97-41, the updating process for "extended-reliance" plans can now be all-inclusive for the new law changes as well as the regulatory guidance that has been issued in the interim.

Another concern of plan sponsors addressed by Revenue Procedure 97-41 relates to the application of the anticutback rules of IRC section 411(d)(6) to SBJPA amendments. As a general rule, a plan amendment may not retroactively eliminate or reduce a benefit protected by the anticutback rules unless otherwise specifically permitted by law or official guidance published by the IRS. Based upon informal comments made by several IRS officials, there was concern in the employee benefits community that in certain circumstances, plan amendments retroactively implementing the repeal of the family member aggregation rules would be considered to have violated the anticutback rules of IRC section 411(d)(6). Thankfully, this should not be the case.

Section 6.09 of Revenue Procedure 97-41 specifically provides that a plan amendment eliminating the family aggregation provisions will not violate the requirements of IRC section 411(d)(6) if the amendment is effective as of the first day that the plan is operated in accordance with the amendment (but in no event earlier than the 1997 plan year). The effect of this provision is that sponsors can choose to operate their plans by ignoring the family aggregation rules without having to immediately

amend the documents. This is particularly good news for the sponsors of profit-sharing plans since, in many cases, it may be too late to amend their plans to remove family aggregation for the 1997 plan year without violating the anticutback rules.

Unfortunately, the sponsors of defined benefit and money purchase pension plans may have a need to update their plans sooner rather than later. Section 8 of Revenue Procedure 97-41 addresses minimum funding and deduction issues. Therein, the IRS cites Regulation section 1.412(c)(3)-(d)(1)(i) which generally provides 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. (IRC section 412(c) provides an exception in certain instances for collectively bargained plans.) As a result, Revenue Procedure 97-41 states, "Contributions to a defined benefit plan will be deductible subject to the limitations of section 404, with section 412 minimum funding standards determined without anticipating such future amendments."

What is unclear is whether the IRS intends for this same approach to apply to money purchase pension plans since they are also subject to the section 412 funding rules. Revenue Procedure 97-41 makes a specific reference to the deduction and funding rules for defined benefit plans while any actual mention of a money purchase pension plan is conspicuous by its absence. There does not appear to be any reason why the same rule shouldn't apply to money purchase plans, and at the recently held ASPA Annual Conference, IRS officials confirmed that to be the case.

Although the deadline for SBJPA amendments has been extended, it is important to point out

that special rules apply to terminating plans. Since these plans will be going out of existence, they must be amended, in connection with the plan's termination, for any changes in the law that became effective on or before the plan's termination date. However, any amendment that is adopted after the date of plan termination in order to receive a favorable determination letter will be considered as adopted in connection with the plan termination.

Revenue Procedure 97-41 also officially states that until further notice, determination, opinion, or notification letters (other than for terminating plans), will not include consideration of whether the plan complies with the changes made by SBJPA or GATT. The only exceptions are with respect to the SBJPA changes made to the definition of leased employee and to the minimum participation rules (which now only apply to defined benefit plans). The IRS expects to open up the review process for other aspects of the new law as soon as possible after additional guidance is issued. During the interim, plans can be submitted which include language for the new laws, however a determination letter may not be relied upon with respect to the SBJPA and GATT provisions.

For those who work with 403(b) plans, it should be noted that the remedial amendment rules of IRC section 401(b) do not apply to these plans. Consequently, amendments to 403(b) plans, or to annuity contracts purchased under 403(b) plans, are subject to the rules contained in section 1465 of SBJPA. That section of SBJPA provides that if an amendment to an annuity contract or plan is required, it need not be adopted before the first day of the first plan year beginning on or after January 1, 1998, provided the retroactive

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Learning Your ABCDs

by Richard A. Block, MSPA

At the June board meeting, ASPA's directors voted to reprimand one of ASPA's members. The Actuarial Board for Counseling and Discipline forwarded a complaint that alleged the subject actuary had violated precept 2 (failed to perform professional services with integrity, skill and care), precept 3 (performed professional services and/or signed professional communications without the requisite qualifications), precept 4 (failed to ensure actuarial work performed under his direction met applicable standards of practice), and precept 5 (failed to take responsibility for professional communications he signed) of the Code of Professional Conduct for Actuaries.

By voting to reprimand the actuary, the board agreed with the Actuarial Board for Counseling and Discipline that the actuary had not complied with the Code of Professional Conduct for Actuaries.

What is the ABCD?

The Actuarial Board for Counseling and Discipline was established in 1992 by the U.S. actuarial organizations, including ASPA. The mission of the ABCD is to —

- Provide counsel and respond to requests for guidance from actuaries about issues they encounter in day-to-day practice,
- Consider alleged violations of the actuarial profession's Code of Professional Conduct,
- Offer remedial counseling and, when necessary, recommend disciplinary measures to the member organizations, and
- Serve as ombudsman in the resolution of disputes involving actuaries.

The ABCD is jointly administered by ASPA and by the other actuarial organizations. ASPA past president Ruth F. Frew, FSPA, CPC, currently serves on the ABCD board.

What is the ASB?

ASPA also cosponsors another jointly administered organization, the Actuarial Standards Board. The charge of the ASB is to "direct and manage the development of actuarial standards of practice, to expose and promulgate actuarial standards of practice in all areas of actuarial practice and to provide continuous review of existing standards of practice, determining whether there is need for amendment, alteration, expansion or elimination." ASPA past president Alan J. Stonewall, FSPA, currently serves on the ASB board.

For pension actuaries, there are standards of practice for data quality and the selection of economic assumptions. In addition, the ASB has written compliance guides for work involving Financial Accounting Standards Board opinions 87 and 88.

Why should there be standards?

Although actuaries have been practicing for centuries, our profession is late in actually spelling out how an actuary should approach a task. The standards written by the ASB give the actuary a "road map" on his or her approach. Human nature being what it is, standards without enforcement would not be effective. Therefore, the ABCD was established to enforce adherence with the standards.

My actuarial work complies with applicable law.

Shouldn't this be enough?

In years past, compliance with the law was sufficient. *The creation of the ASB and the ABCD is our profession's emphatic statement that compliance with the law is no longer sufficient.*

In recognition that legal requirements allow for practices that are incompatible with a professional approach to actuarial work, the ASB has created standards that are far more rigorous than the law.

Why should I care about these standards?

For years, most pension actuaries were concerned about complying with the requirements of ERISA's funding standards and the Internal Revenue Service's interpretation of reasonable funding methods and assumptions.

Actuaries must still comply with all statutory requirements as well as with the standards published by the ASB. The standards give the actuary some assurance that his or her

work complies with a level of care that is recognized industry wide.

During the small plan actuarial audit program, the Tax Court requested information on published industry standards. At that time, published standards were quite vague. Ultimately, the standards did influence the court. Today, the standards both in final and proposed forms are far more specific in the requirements to which an actuary must adhere.

An actuary who complies with the standards may use compliance as a defense in litigation. Conversely, an actuary who ignores the standards may have to justify to the court why the industry's minimum level of care was not exercised.

It is the actuary's responsibility to understand and comply with the standards. ASPA takes any referral from the ABCD seriously. Depending on the nature and severity of the infraction, the subject actuary may face a private reprimand, a public reprimand, suspension, or even expulsion from ASPA for a breach of the Code of Professional Conduct for Actuaries.

How do I get copies of the standards of practice and qualification standards?

If you are a member of the American Academy of Actuaries you should already be on the mailing list for ASB publications. If you are not on the mailing list, you should contact the Academy office.

If you are not a member of the Academy, you may obtain copies of the standards by calling the Academy office. Full sets cost \$60, but individual standards are also available. Standards and other documents are also available in PDF format from the Academy's new Web site at <http://www.actuary.org/standard.htm>.

Richard A. Block, MSPA, is president of Block Consulting Actuaries Inc., in Manhattan Beach, Calif. Chair of the Principles, Practices and Risk Management Committee, Block also serves on ASPA's board of directors and on ASPA's Government Affairs, Insurance, Membership and Admissions, and Standards committees.

Introducing the C-1 Classroom Kit

The Education and Examination Committee has developed a new tool for instructors and trainers — the C-1 Classroom Kit. The E&E Committee and course coordinators are always looking for qualified instructors. But many professionals who qualify are very busy and have trouble finding the time to prepare lesson plans.

To assist those who teach the C-1 course, we have developed the C-1 Classroom Kit. This kit is split into manageable sections for scheduling classes or training sessions. Each session includes the required reading for the session, instructor preparation suggestions, an outline of the topics to be covered, suggestions for the instructor to wrap-up for the session, homework for the students, and homework solutions.

This training tool is helpful both for C-1 course instructors and as a ready-made training tool for employers to use for in-house training. The C-1 Classroom Kit is available for \$250 for ASPA members and \$350 for non-ASPA members.

There are more classroom kits coming. The C2-DB Classroom Kit will be available early in 1998, and the C2-DC Classroom Kit in the spring of 1998.

Please contact the ASPA E&E Department at (703) 516-9300 for more information.

Congratulations

Congratulations to ASPA member Lawrence A. Johansen, MSPA, who is the incoming president-elect of the American Academy of Actuaries.

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Guidance on SBJPA Amendments

amendment and operational compliance requirements are satisfied. Governmental 403(b) plans and contracts generally have until the 2000 plan year.

Revenue Procedure 97-41 is good news for plan sponsors and their advisors. It should make the SBJPA amendment process go much smoother. The IRS should be commended for its willingness to listen to the concerns expressed by ASPA's Government Affairs Committee in regard to these issues. Although it is only speculation at this time, many expect the IRS to add the changes

that may be required by the Taxpayer Relief Act of 1997 to the list of "disqualifying provisions" that will be addressed as part of the SBJPA amendment process. The Government Affairs Committee will continue to provide input to government officials in regard to these matters and we'll report back in the future.

Craig P. Hoffman, APM, general counsel of Corbel in Jacksonville, Florida, is a vice president of ASPA and a cochair of ASPA's Government Affairs Committee.

DISCOVER HOW THE INTERNET CAN KEEP YOU ON THE CUTTING EDGE

The Internet and the Employee Benefits Web

by John P. Parks, MSPA

The Web — it's twisted, tangled, weaving, confusing, and sometimes incomprehensible — yes. But it's also useful, efficient, provocative, and downright necessary. If your company doesn't already have a presence on the Internet, you had better blow the dust off your strategic plan and insert the Web at the top of your list of objectives. An organization's analysis of its strengths, weaknesses, opportunities, and threats — or SWOT — that does not consider the Internet and its potential is lacking a critical component.

The graphical face of the Internet — the World Wide Web — has touched the business life of virtually every organization in this country. It is rapidly encircling the globe and, as a communications tool, shrinking the world to the size of a marble. Anywhere, anytime-asynchronous communication, better known as E-mail, is verification of this point. E-mail has already changed the way we conduct business and will continue to do so at an accelerated rate. You send a message to a friend's mailbox (without a stamp) across the street or to another continent. The message waits until they check the mail and the response can be immediate or at a later, more convenient time. You can also attach to that message files of almost any kind — a picture of your family, a spreadsheet, or a complete pension plan document.

Access to, and a presence on, the Internet will undoubtedly become

easier as software and hardware gain friendliness. A recent American Management Association survey of 3,500 executives revealed that 78 percent have individual access to the Internet; by next year the number is expected to rise to 88 percent. When an organization decides to include an Internet presence in its strategic plan, the next step is to plan the timeline for implementing such a presence. Considering the potential of the Internet and the negative impact an organization could experience without access, the logic of sooner versus later is compelling.

The Basics

What is the Internet? It is an easily accessible worldwide network of computer networks containing billions upon billions of bits of information on every imaginable subject. The recent explosive growth occurred when the Web's graphical interface hit the Internet in 1993,

making it much friendlier to use. Not only do Web pages contain text, but they can talk and sing to you while images dance across your screen.

What technology do you need to get to the Internet? It's easy — a computer with a modem, a phone line or a network, browser software such as Netscape Navigator or Microsoft Internet Explorer, and a touch of patience. Your local computer store stocks everything you need and can have you "surfing the 'Net" in no time.

What will I find out there? It would be much simpler to list what's not out there! Internet information ranges from the sublime to the ridiculous, from the Vatican to virtual reality. It is an informational diamond in the rough and, simultaneously, a vast wasteland. You can find anything from the Constitution and the Declaration of Independence to the graphic dissection of a frog, the physiology of a gnat, and it's probably the only place you can find the complete lyrics to "99 Bottles of Beer on the Wall"! A few day care centers can provide, through the Internet, video shots of the day care rooms so that worried parents can view their child throughout the day. The Internet has been instrumental in saving lives, and sadly, it has been cited as responsible for taking a few.

Government forms (IRS, DOL, PBGC, etc.) along with their instructions become accessible with a few

clicks of your mouse. Electronic filing of them also makes great strides each year. It's only a matter of time until you can file your 1040 tax form completely over the 'Net.

It's difficult to find consistent statistics about the real usage of the Internet. Current estimates are that there are around 60 million users. By the turn of the century, the estimates range from 150 million to 500 million. In 1993 there were 130 Web sites; today it is believed there are more than 600,000.

Another recent trend is *push technology* where information is pushed to you as selected. As it develops, the precision of that information becomes more refined. My favorite is Pointcast, where there are about two dozen channels or categories, and within each channel are sub-categories of news from which to select. You select the channels and subcategories and how often you want the information updated. These automatic updates bring you the latest news tailored to your specific interests. It can be as detailed as stock prices for chosen listed companies. And along with current ticker prices at update time come current financial information and recent press releases on those companies. This data then becomes your screen saver as it graphically scrolls across your screen, keeping you current to the minute.

There are many additional advantages for an ASPA employee benefits firm to be on the Internet and have a Web presence. There are a number of benefit-related sites that contain valuable and useful information. (See Web address list on page 12). BenefilsLink.com is the cream of the crop and well worth your time. Try it out, if you haven't already done so. Retirement Planning tools are abundant. Torrid Technologies has created a nice graphical planner that is also easy to use. The site can be

accessed at <http://www.torrid-tech.com>.

Employee benefit outsourcing and, more generically, human resources outsourcing, is becoming a whole new area of opportunity and demand. The ability to provide client services through the Internet is becoming more and more commonplace. To remain competitive in the future, it will be mandatory to offer this service. An example applicable to our business and on the cutting-edge is the use of interactive Web sites, which allows plan participants to view their account balances and actually make trades in their daily valued 401(k) plans. Just a few of the advantages to the participant of using this technology compared to standard VRU approach include these:

- 1.) Seeing the data on screen rather than hearing a digitized voice one number at a time.
- 2.) Ability to download the data or a portion of the data.
- 3.) Just being able to print it on paper for later review. Visit the Larry Johnson & Associates' site at www.lj-c.com for more information and a sample.

Companies are continuously finding creative and innovative ways to use the Internet for everyday business functions. There is no limit to the possibilities. The following list contains some that are general to all businesses and some more related to benefit firms. And, they are only the tip of the iceberg

At the General Level

- Advertising
- Electronic file transfers
- General client broadcasting — E-mail vs. fax and "snail mail"

On a Plan Level

Static

- Valuation report summary
- Government forms: 5500, PBGC, etc.
- Plan document and amendments
- Compliance calendar

Interactive

- Asset statement inquiries

At the Participant Level

Static

- Participant statements
- Summary plan description
- Summary annual report
- Retirement plan administrative forms
- Application for participation
- Application for retirement, etc.

Interactive

- Requests for retirement calculations or optional forms of benefits
- 401(k) participant data

Visit the ASPA site at www.aspa.org. It has been around for a while and contains lots of useful information. It is now the focus of ASPA's Communications and Technology Committee. We are in the process of developing our goals and objectives for 1998. One general objective is to provide more educational information. We would appreciate any thoughts you might have. Send your E-mail to jparks@retirementbenefits.com.

John P. Parks, MSPA, is president of MMC&P Retirement Benefit Services Inc., in Pittsburgh. Treasurer of ASPA, Parks also serves on the ASPA board of directors and the Finance and Budget Committee and chairs the Long Range Planning Committee

Web Site Addresses

Actuarial Organizations

ASPA: <http://www.aspa.org>
Canadian Institute of Actuaries: <http://www.actuaries.ca>
Casualty Actuarial Society: <http://www.casact.org>
Conference of Consulting Actuaries: <http://ccactuaries.org>
The Institute of Actuaries of Australia
<http://www.actuaries.asn.au>
The Institute of Actuaries/The Faculty of Actuaries
<http://actuaries.org.uk>

Other Employee Benefit-Related Sites

American Medical Association: www.ama-assn.org/
(Canadian) Benefits Interface: <http://benefits.org/index.htm>
Employee Benefit Research Institute: <http://www.ebri.org>
Federal Web Locator
<http://www.law.vill.edu/fed-agency/fedwebloc.html>
International Foundation of Employee Benefits Plans
<http://www.ifebp.org>
The National Center for Employee Ownership
<http://www.nceo.org>
National Health Information Research Center
<http://www.nhirc.org>
National Institute of Pension Administrators: www.nipa.org
Pension & Investments: <http://www.pionline.com>
TIAA-CREF: <http://www.tiaa-cref.org>

Benefit Job Search Sites

Workforce Online: www.workforceonline.com
The International Foundation for Employee Benefit Plans
www.ifebp.org
The Society for Human Resource Management: www.shrm.org
Training & Development Job Mart: www.tcm.com
TrainingNet's job database: www.trainingnet.com
Robert Grant Associates: www.benefitslink.com

Governmental Sites

Bureau of Labor Statistics: <http://www.bls.gov/blshome.html>
Centers for Disease Control and Prevention
<http://www.cdc.gov>
Code of Federal Regulations: <http://www.law.house.gov/cfr.htm>
Department of Labor: <http://www.dol.gov/dol/welcome.htm>
Edgar Database: <http://www.sec.gov/edgarhp.htm>
FedWorld: <http://www.fedworld.gov>
Federal Reserve Bank — Boston Gopher
gopher://ftp.shsu.edu/11/Economics/FRB-Boston
Federal Reserve Bank — New York
gopher://una.hh.lib.umich.edu/00/ebb/monetary/quotes.txt
Federal Reserve Bank of Philadelphia: <http://www.phil.frb.org>
Federal Reserve Gopher: gopher://town.hall.org/1/other/fed
Government Accounting Office: <http://www.gao.gov>
Pension Benefit Guaranty Corporation: <http://www.pbgc.gov>
Pension and Welfare Benefits Administration
<http://www.dol.gov/dol/pwba>

Small Business Administration: <http://www.sba.gov>
Social Security Administration: <http://www.ssa.gov>
Thomas (bills in Congress): <http://www.thomas.loc.gov>
U.K. Treasury: <http://www.hm-treasury.gov.uk>
U.S. Business Advisor: <http://www.business.gov>
U.S. Federal Deposit Insurance Corporation
<http://www.fdic.gov>
U.S. House of Representatives: <http://www.house.gov/>
U.S. Senate: <http://www.senate.gov/>
World Health Organization: <http://www.who.ch>

Search Engines

Alta Vista: <http://altavista.digital.com>
C/net: <http://www.search.com>
Excite: <http://www.excite.com>
Filez — search 60 million files: <http://www.filez.com>
InfoGuide: <http://guide.infoseek.com>
Internic: <http://ds2.internic.net/tools>
Lycos: <http://www.lycos.com>
Shareware: <http://www.shareware.com>
WebCrawler: <http://www.webcrawler.com>
Yahoo!: <http://yahoo.com>

A Few Curious Sites

Dilbert: <http://www.unitedmedia.com/comics/dilbert>
Eavesdrop on Congress: www.fednet.net
Fly Fishing: www.flyshop.com
Iditarod: <http://www.iditarod.com>
Maps and Directions:
www.mapsonus.com
www.mapquest.com
www.delorme.com/cybermaps/
www.vicinity.com
Myers Briggs: <http://sunsite.unc.edu/jembin/mb.pl>
Nonprofit Information:
www.idealists.org
www.nonprofits.org
Personal Info Manager/Scheduler: www.server.com/PIM
Physics/Math: www.aip.org/history/einstein/einstein
PointCast: www.pointcast.com
Quote of the Day
<http://www.starlingtech.com/quotes/qotd.html>
Real Beer Page: www.realbeer.com/rbp/rbp
Self-Help Medical:
www.mayo.ivy.com/ivy/mayo/comMM/htm/library.htm
www.housecall.com
www.familyinternet.com/mhl/main.htm
www.medaccess.com
Smart Wine Online: www.smartwine.com
U.S. National Park Service: <http://www.nps.gov>
A Word A Day: linguaphile@wordsmith.org

JBEA Advisory Committee Reviews Exam Program

Carl Shalit, MSPA

The Joint Board for the Enrollment of Actuaries has asked its Advisory Committee on Actuarial Examinations (of which the author is the coordinator) to undertake a review of the current enrollment examinations. This request came about as a result of discussions at the public session held in conjunction with the January 7, 1997, meeting of the Advisory Committee.

While the Joint Board believes that the current examinations properly determine if candidates for enrollment have the required actuarial knowledge, it recognizes that the changes in pension law since 1984 (the last time the exams were revised other than annual syllabus updates) are numerous, and therefore the amount of material being tested in each exam may not be appropriate for the currently allocated time. Also, because of the changing environment, we may now have a situation in which some obsolete or nonapplicable topics are being tested while other germane topics are not being adequately tested. There are also changes taking place in the general education process in the United States and within the actuarial profession which perhaps should be recognized in the examinations.

An initial discussion draft has been prepared by the Advisory Committee which is being made available to the general actuarial community. After an introduction and brief background, the discussion draft consists of the following titled sections:

History

A brief history of the Joint Board and its Advisory Committee and the existing legislative and regulatory situation under which they operate.

Examination Preparation Process

A description of the process through which the current enrollment examinations are developed and administered.

Are the Exams Accomplishing What They Are Supposed To?

A brief section which discusses whether a combination of exams and experience is the best way to determine if a candidate has sufficient knowledge for enrollment.

Are the Exams Structured Properly Including the Topics and the Split Among the Exams?

A discussion of the topics currently on the exams with identification of possible deletions and additions.

Open Book Examination(s)

A discussion about the possibility of open book exams.

Elimination of Commutation Functions Requirement

A discussion about whether knowledge of commutation functions is required by an enrolled actuary.

Varying Point Value of Questions

A discussion about weighting questions based on apparent difficulty or expected time to answer.

Other Topics

Brief discussions on several points peripheral to the main topics of the paper.

If possible, the Advisory Committee would like to make its recommendations to the Joint Board prior to the scheduled public session around the end of June 1998.

We welcome the thoughts and opinions not only of those involved in the exam process but also of those in the actuarial community at large, including those in academia. Any restructuring of the enrollment exams affects not only the Joint Board and the two cosponsoring societies (the Society of Actuaries and ASPA) but all actuaries. We therefore believe that, in general, our deliberations should be public and the public should have the ability to comment as we proceed.

Copies of the discussion draft can be obtained by contacting me by fax at (781) 344-4188 or by E-mail at cshalit@juno.com. I urge all who are interested to obtain a copy and comment.

The next public session of the Advisory Committee will be held in Washington, D.C., on January 8, 1998. The exact location and time will be published in the *Federal Register* prior to the meeting as will the procedures to make comments at that session. In addition, comments may be sent directly to me at—

Carl Shalit & Associates Inc.
630 Park Street
Stoughton MA 02072-3659

Carl Shalit, MSPA, is president of Carl Shalit & Associates Inc., an actuarial consulting firm located in Stoughton, Mass. Shalit is coordinator of the Joint Board Advisory Committee on Examinations.

LONGTIME ASPA EXECUTIVE DIRECTOR HONORED AT ANNUAL CONFERENCE

Chet Salkind Wins 1997 Harry T. Eidson Award

At ASPA's 1997 Annual Conference, the 1997 Harry T. Eidson Founders Award was presented to Chester J. Salkind, ASPA's executive director from 1979 through 1996. Salkind's tenacious conviction that plan sponsors should defend actuarial assumptions during the Internal Revenue Service's small plan actuarial audit program was grounded in years of government experience. Salkind worked for the IRS as well as the Department of Labor and Pension Benefit Guaranty Corporation — the first person to work for all three government agencies dealing with retirement plans.

Humorously self-effacing and forward-looking, Salkind preferred talking about what has happened since his retirement rather than about his career.

Were you surprised by the fact that the recently enacted Taxpayer Relief Act of 1997 included a number of provisions favorable to the private pension system?

This statute included an increase in the full-funding limit, clarified the treatment of matching contributions for self-employed individuals, provided a complete repeal of the 15 percent excise tax on excess distributions and accumulations, and increased the permissible cash-out amount. Prior to the passage of this statute, the common wisdom was that Congress would not deal with pensions in any substantial way because in 1996 the Small Business Job Protection Act included a number of significant pension items. The

expectation was that Congress would not want to deal with pension matters two years in a row. I shared that expectation. However, I was mistaken. I believe there are two reasons why Congress did take up pension matters in 1997. First, because of the aging of our population, there is a growing recognition on the part of lawmakers of the need to promote the private pension system. Second, there was a substantial effort by the pension community, led by ASPA, to seek the enactment of favorable pension legislation. Particular credit should go to the Government Affairs Committee and to ASPA's current executive director, Brian Graff, whose contacts and efforts on the Hill proved very valuable.

What lessons do you think the experience of 1997 demonstrates for future pension legislation?

I think the answer is that persistent effort is required by ASPA and

its members to assure that legislation favorable to the private system will continue to be enacted, particularly legislation providing a better environment for small plans. Clearly there is a growing awareness on the part of members of Congress and the Hill staff of the importance of the private pension system. However that awareness alone will not assure the enactment of favorable legislation. Congress has many concerns, and it's vital to legislative success that the retirement plan community aggressively promote favorable legislation.

What do you see as the most important matters that should be addressed next by Congress?

The enactment of ASPA's simplified defined benefit plan proposal, the SAFE plan, would be high on my list. The decline in the number of defined benefit plans during the last 15 years, particularly in the small business area, has been well documented. The repeal of the top-heavy rules is another important change that would significantly reduce administrative costs for small plans. Reverting to the maximum compensation limits that existed before the Tax Reform Act of 1986 and changing the 10-years-of-participation requirement to a 10-years-of-service requirement would also be high on my list.

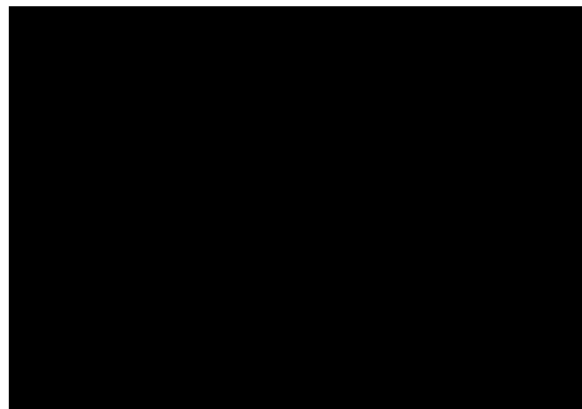
One of the legacies of ASPA's battle with the IRS over the small plan actuarial audit program

seems to be better relations between ASPA and the IRS. How does ASPA improve relations with the agencies without having to wage a major battle?

I think the same approach is applicable to improving relations with the administrative agencies as it is with improving the prospects for favorable legislation from Congress — that is a persistent, determined effort to seek regulations or policies that would be practical and would reduce the administrative burden that plan administrators must face. If the issue is significant, and persuasion fails, then congressional relief should be sought. I do not envision any judicial battles in the immediate future, such as occurred during the IRS small plan actuarial audit program. But if significant judicial battles should develop, then ASPA should participate through the filing of friend-of-the-court briefs.

One activity of the Department of Labor does strike me as particularly unfair and burdensome to ben-

efits professionals — the service provider audits. I have never believed that the DOL has the legal authority to conduct such audits, although obviously that agency doesn't share my



1997 Harry T. Eidson Award winner Chester J. Salkind, Esq., (left) with ASPA past president G. Patrick Brynes, MSPA.

opinion. I do not think a legal challenge is practical — the case would drag on for several years and be a substantial burden to the service provider seeking relief from a DOL subpoena to provide plan records. I think

the only realistic course of action here is to pursue legislative relief. I think a substantial effort should be made to educate Congress to the fact that the DOL is asserting virtually unlimited authority to conduct service provider audits. If Congress is made aware of the situation, then a basic sense of fairness should move them to pass legislation expressly precluding service provider audits except where there is substantial evidence that the service provider is guilty of wrongdoing. And in such cases, the DOL subpoena authority should be limited to documents related to that wrongdoing.

From your years of experience in pension matters, both in the government and private sector, what basic message would you send to current benefits professionals?

The private pension system plays a vital role in our country in providing needed capital and substantial benefits to millions of people. However, the fact that the system does incredible good is not sufficient to ensure a favorable legislative and regulatory environment. What's necessary is to aggressively pursue the interests of the private pension system and not rely on the inherent value of that system. I think ASPA and its members are doing just that.

In the 19th century, there was an agrarian reformer who told farmers they should "raise less corn and more hell." While I would not advocate that ASPA and its members do less technical work, I do believe that raising a little hell with Congress and the administrative agencies when all else fails is appropriate.

1998 One-Day Workshops

Cosponsored by ASPA and the ASPA Benefits Councils

Orlando — May 8 or 15

New Orleans — June 8

Philadelphia — May 1 or June 19

Atlanta — June 24

Cleveland — May 11

Seattle — July 10

These workshops will cover a half-day on 401(k) testing rules and a half-day on cross testing, as well as current developments. Earn as many as eight credits of core and noncore JBEA continuing education.

Three "Best of Midstates" Workshops in 1998

New this year! ASPA will offer three one-day workshops comprised of the best of the Midstates Benefits Conference.

Kansas City, Mo. — September 21

Minneapolis — September 25

Milwaukee — September 28

For information call Ken Morton, meetings assistant, at (703) 516-9300.

PWBA Investigations — Pitfalls and Opportunities

book value. Unbeknownst to the owner of the company (who was also the trustee of the plan), the value of the underlying real estate had depreciated significantly in value.

In 1996, the PWBA opened an investigation of the plan. The investigator examined all of the plan records and conducted interviews of the trustee and members of the board of directors. Based on that information, the PWBA concluded that the trustee and the company's board of directors had breached their fiduciary duties by failing to diversify investments, by making imprudent investments in high-risk limited partnerships, by failing to monitor the investments over time, and by failing to properly value the assets on an annual basis.

The PWBA sent the company a voluntary compliance notice letter (VC notice letter). The PWBA enforcement manual provides that a VC notice letter is sent to fiduciaries where the PWBA finds that there has been a fiduciary breach or other ERISA violation (except where the PWBA has determined that a civil or criminal action should be pursued regardless of whether the fiduciary is prepared to make restitution).

At this point, we were hired to analyze the case. We conducted our own inquiry and found out that the trustee had not investigated whether the investments were prudent. The trustee had purchased the partnership interests on the representations of the salesperson marketing the investments. The trustee had not done any independent investigation of those

representations and had not sought independent expert advice. Needless to say, this information was discouraging. This is because the determination of whether a fiduciary has acted imprudently under ERISA generally is not based on whether the investments did well or poorly, but rather on whether the fiduciary can demonstrate that a prudent investigation was done before investing ("procedural prudence").

In this case, we concluded that the trustee had a significant enough risk that the PWBA could prevail. However, there were two limited partnerships that were substantially less risky than the others and which had performed reasonably well, including paying annual distributions.

One other aspect of the case that worked in the trustee's favor was that some of the partnership interests had been purchased so long ago that arguably the breach of fiduciary duty was beyond ERISA's six-year statute of limitations. Moreover, because there was no market for these investments after the initial purchase, the breach of duty caused by the failure to monitor, which was still open under the statute, did not cause any damage to the plan.

Fortunately, the company had purchased fiduciary liability insurance. (Note: This is different from a "fiduciary bond," which covers theft of assets.) This type of policy insures the fiduciary against claims for damages resulting from fiduciary breaches. While policy terms differ, normally these policies require that a notice of the claim be made within

a fixed period, such as 30 days from the date of the claim. Moreover, generally, the policies exclude or except claims if the fiduciary responds to the claim (particularly by acknowledging wrongdoing) without approval from representatives of the insurance company. Fortunately, the company was able to timely notify the carrier of the PWBA claim and the trustee did not respond to the VC notice letter until after the carrier agreed.

The VC notice letter outlined the facts discovered in the investigation, listed the violations of ERISA committed by the fiduciaries (that is, the trustee and the members of the board of directors), and concluded by demanding that the fiduciaries correct the losses of approximately \$1 million. It stated that the PWBA would impose the 20 percent section 502(l) penalty if there was a settlement agreement or a court order enforcing correction of the ERISA violation. However, it did not explain that the PWBA takes the view that, for a settlement to occur, a civil action need not be instituted nor is a formal written settlement agreement necessary. If the fiduciaries had acknowledged the fiduciary breach and offered to make correction in response to the VC notice letter, the PWBA would have treated that as a settlement and imposed the section 502(l) penalty.

Once we explained the section 502(l) penalty to the fiduciaries, they were in the awkward position of wanting to settle with the PWBA, but realizing that if they did so, it would cost an additional 20 percent of the settlement as a penalty. (This was particularly difficult since the carrier insured only against the losses caused by the breach and not penalties.) The insurance company initially balked at the idea of a voluntary, "nonsettlement" correction. However, they were ultimately persuaded

Continued on page 18

IRS-DOL Coordination Summary

Both the Internal Revenue Service and the Department of Labor have responsibilities which basically grew out of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, the IRS has jurisdiction for those items contained in the Internal Revenue Code, and the DOL has jurisdiction for those items contained in ERISA. ERISA citations are shown as *Act* sections. Either the IRS or the DOL, or both jointly, can initiate original review of records and, if appropriate, coordinate with the other. IRC section 6103 permits the IRS to notify the DOL, and Act sections 3002 and 3003 permit the DOL to notify the IRS. The following includes, but is not necessarily limited to, the issues coordinated between the IRS and DOL.

IRS to DOL

1. Plan/Trust Assets

Are they: prudent, diversified, paying reasonable compensation for services rendered to the plan, fairly valued at current market value, containing loans or fixed income in default, and containing any nonexempt prohibited transactions? (IRC section 4975.)

2. Minimum Funding Standards

Has the plan sponsor paid the required contribution to the plan? (IRC sections 412, 415, 4971, and 4975.)

3. Participation

Rank-and-file employees must be in the plan if they meet the requirements. (IRC sections 401(a)(26), 401(a)(4), and 410.)

4. Vesting

The amount of a benefit that is nonforfeitable. (IRC sections 401(a)(4) and 411.)

5. Form 5500 Series Returns

Have they been filed with appropriate schedules?

6. "Other" Matters

Any other matters or issues requiring referral. This is the "catch-all" between the IRS and the DOL.

7. Exclusive Benefit Violation

The trust instrument must make the corpus and/or its income exclusively for the benefit of the employees or their beneficiaries until their liabilities are satisfied. (IRC section 401(a)(2).)

8. Final Adverse or Withdrawal

Where an application for a determination letter asks the IRS to rule on a plan's qualification as to "form" and the IRS issues a letter stating the plan is not qualified; also, when the application is withdrawn.

9. Final Revocation and/or Disqualification

This is for a plan under IRC sections 401(a) "Qualified;" or 404(a)(2) "Employees' Annuities."

10. Other Filings for DOL

Were the summary plan description, summary annual report, and summary of material modifications prepared and/or filed?

11. Fidelity Bond

Is there an adequate fidelity bond on personnel handling plan funds? (Act section 412.)

DOL to IRS

1. Plan/Trust Assets

Are they: prudent, diversified, paying reasonable compensation for services rendered to the plan, fairly valued at current market value, containing loans or fixed income in default, and containing any nonexempt prohibited transactions plus fiduciary activities? (Act sections 103, 404, 406, and 408.)

2. Minimum Funding Standards

Has the plan sponsor paid the required contribution to the plan? (Act section 302.)

3. Participation

Rank-and-file employees must be in the plan if they meet the requirements. (Act section 3002.)

4. Vesting

The amount of a benefit that is nonforfeitable. (Act section 3002.)

5. Form 5500 Series Returns

Have they been filed with appropriate schedules?

6. "Other" Matters

Any other matters or issues requiring referral. This is the "catch-all" between the DOL and the IRS.

7. Other than Cash Contribution

If the plan contribution was made in other than cash, was it at fair market value?

8. Determination Letter

Did IRS issue the plan a favorable determination letter on qualification?

9. TEFRA, DEFRA, REA

Was the plan amended for these laws?

10. Plan Termination

Did the IRS issue the plan a favorable determination letter on termination? Was there any revision to the sponsor? Was there any spin-off, plan merger or transfer of assets/liabilities? Was a Form 5310 filed with the IRS?

that the only viable solution was to voluntarily make correction of the portion of the loss that was caused by the negligence of the fiduciaries (\$100,000).

Once the insurance company funded the partial correction, the fiduciaries responded to the PWBA that they had voluntarily returned \$100,000 to the plan and that they were not admitting that any of the allegations in the VC notice were true. Moreover, the letter explained why some of the asserted breaches were beyond the statute of limitations. The letter concluded by advising the PWBA that the fiduciaries were not entering into a settlement agreement.

After verifying that payment had been made to the plan, the PWBA closed the case. It is important to point out that there was no agreement between the PWBA and the fiduciaries that the \$100,000 would be acceptable. The PWBA could have brought an action against the fiduciaries despite the payment to the plan of the \$100,000. Accordingly, it was critically important that the amount restored to the plan represented a fair assessment of the potential liability. This could only be done with a detailed knowledge of the law and insight into the likely reaction of the PWBA.

The \$100,000 paid into the plan by the fiduciary liability insurance carrier was allocated to the accounts of the participants for each of the years during which losses occurred as a result of the breaches — and that were opened under the statute of limitations.

Although the PWBA investigation was resolved, the plan continued to have “disqualifying defects” because it had not annually revalued the partnership interests. This meant that participants who terminated service had received more than the true

value of their accounts — since some of the plan assets, the partnership interests, were overvalued. As a result, the remaining participants had suffered cutbacks in the value of their accounts due to the overpayment to the terminated employees. This cutback in accrued benefits to the remaining participants constituted a violation of, among other things, the requirement that a plan be administered according to its terms. This meant that the plan was subject to disqualification. To avoid a potential audit by the IRS concerning this issue (resulting possibly in a PWBA referral to the IRS), we filed an application under the Voluntary Compliance Resolution Program.

Revenue Procedure 96-29 permits the filing of a VCR if the employer has not received either oral or written notification from the IRS Employee Plans and Exempt Organizations Division of an impending audit. The fact that the plan has been the subject of a PWBA investigation does not preclude the filing of a VCR.

The most difficult part of the VCR process was the time and expense of redoing all of the account valuations for all years, some of which were beyond the statute of limitations. Once the potential loss to each account was determined, the company repaid all such amounts, plus interest, as part of the VCR. (Of course, much of the correction had been accomplished through the deposit of the \$100,000 correction amount in the plan in connection with the PWBA investigation.)

Conclusion

The current structure of ERISA section 502(l) requires the imposition of the 20 percent penalty in every case where there is a breach of fiduciary duty or violation of ERISA if an investigation results in a settle-

ment with the PWBA. Until this rule is changed, every PWBA investigation must be carefully handled by the fiduciary and its advisors to minimize the likelihood of the imposition of that penalty. (The PWBA is on record as favoring a discretionary 502(l) penalty, and it is likely that legislation will convert the penalty from mandatory to discretionary in the future. Moreover, on August 20, 1997, ASPA proposed to the Department of Labor that it establish a voluntary correction program that would make it possible to avoid the 502(l) penalty.) Moreover, PWBA investigations involve many other issues, such as fiduciary insurance, correction methodology, and the deduction rules concerning restoration payments. In addition, each PWBA investigation must be analyzed to determine if the plan has any defects that can be corrected under the IRS voluntary programs, including Walk-in CAP, VCR, APRSC, and Delegation Order 97. (Delegation Order 97 is currently being offered only in the Western Region on an experimental basis. Under this program, if a plan voluntarily walks in and pays an excise tax reportable on a Form 5330, such as for a prohibited transaction or a funding deficiency, then the amount of the excise tax is reduced by 25 percent and the interest and penalties are waived.)

Martin M. Heming, APM, is an attorney with the Los Angeles law firm Reish & Luftman. Heming practices exclusively in the area of employee benefits, emphasizing resolution of controversies with the IRS, DOL, and PBGC. C. Frederick Reish, APM, is a founder of and partner with the Los Angeles law firm Reish & Luftman. He is a former cochair of ASPA's Government Affairs Committee.

IRS Restructuring Bill Provides Actuary-Client Privilege

the Senate was also under tremendous pressure to pass the bill this year. However, Senator William V. Roth (R-Del.), chairman of the Finance Committee, successfully delayed a vote on the bill until next year so that he and other Finance Committee members can put their own "stamp" on the legislation.

A less prominent provision in the IRS restructuring bill should be of particular interest to enrolled actuaries. The bill as approved by the House Ways and Means Committee includes a provision extending the present law attorney-client privilege of confidentiality to tax advice furnished by individuals authorized to practice before the IRS in noncriminal proceedings with the IRS. However, as originally drafted, the provision arguably did not apply to enrolled actuaries (or enrolled agents) because the original legislation referred to individuals licensed under state law.

ASPAs contacted congressional staff regarding this issue and after several conversations they agreed to modify the legislative language so that it applies to enrolled actuaries (and enrolled agents). Further, clarifying language was added to the legislative history indicating that the provision is clearly intended to apply to enrolled actuaries. Special thanks to Michael E. Callahan, FSPA, CPC, and Marjorie R. Martin, MSPA, for their assistance on this issue.

Assuming this provision is passed by the Senate intact and signed by President Clinton, enrolled actuaries will have a valuable new tool in their dealings with the IRS. However, Treasury has indicated that

they have concerns about extending the attorney-client privilege to nonlawyers.

TRA '97 Technical Corrections

Given the pace of tax legislation these days, it is not surprising that Congress is already working on technical corrections for the Taxpayer Relief Act of 1997, which was enacted just last summer. In fact, the House's version of technical corrections was attached to the IRS restructuring bill, which passed on

ASPAs contacted congressional staff ... and they agreed to modify the legislative language so that it applies to enrolled actuaries (and enrolled agents).

November 5. As some of you may know, the technical corrections bill contains a provision closing the "loophole" which would permit individuals to avoid the 10 percent penalty on premature distributions by first rolling over the money to the newly created Roth IRA.

A less well-known provision in the technical corrections bill affects hardship distributions from 401(k) plans. Under this provision, hardship distributions would no longer be "eligible rollover distributions," and thus would not be subject to 20 percent mandatory withholding. According to congressional staff, the reason for this change is to prevent individuals from rolling over hardship distributions to an IRA in order to take ad-

vantage of the new early withdrawal penalty exceptions which apply to IRAs. It is the opinion of congressional staff that Congress clearly intended to delineate between qualified plan and IRA distributions when enacting the new early withdrawal penalty exceptions.

A number of ASPA members have raised concerns as to how this change in law would affect the competitive balance between 401(k) plans and IRAs. These members are concerned that availability of these exceptions for only IRA distributions will make IRAs more attractive to business owners and their employees. ASPA's Government Affairs Committee is reviewing this issue, including evaluating whether ASPA should pursue legislation extending the early withdrawal exceptions to qualified plan distributions.

In the meantime, ASPA has already communicated with congressional and Treasury staff that if this change in law were enacted, the effective date of this provision must provide for sufficient lead time to allow plan administrators to change their systems. Typically, technical corrections are effective retroactive to the date of the original legislation — in this case August 1997. As you can imagine, such an effective date would be disastrous for plan administrators since they would have in the meantime been treating hardship distributions as eligible rollover distributions. Congressional and Treasury staff have told ASPA that they will keep plan administration issues in mind when setting a prospective effective date.

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.

ABC Subcommittee Formed

ASPA's Membership Committee has formed a new subcommittee dedicated solely to ASPA Benefits Council issues. The subcommittee will develop a long-range plan for regional affiliates to address issues such as determining the optimum number of regional affiliate organizations, oversight of the application process for ABC status, and evaluation of national office support resources.

The ABC Subcommittee will be cochaired by former ASPA president Michael E. Callahan, FSPA, CPC, of Pen Tec Inc., in Cheshire, Conn., who made the formation of regional affiliate organizations a central project of his presidency, and Cynthia A. Groszkiewicz, MSPA, QPA, of Altman, Kritzer & Levick, PC, of Atlanta, who is involved with ASPA's first ABC in Atlanta. Other subcommittee members include: Stephen H. Rosen, MSPA, CPC, of Stephen H. Rosen & Associates, in Haddonfield, N.J.; Leslie A. Klein, APM, of Sonnenschein, Nath & Rosenthal, in Chicago; Stephanie D. Katz, CPC, QPA, of CETA Benefit Consulting Group, in Bethesda, Md.; and Cathy M. Green, CPC, QPA, of CMC, in Glendale, Calif.

Cleveland

The ABC of Cleveland will hold its first informational meeting on Thursday, January 8, 1998. Ken Mayland, the chief economist of KeyCorp, in Cleveland, will address the luncheon. ASPA's executive director, Brian H. Graff, Esq., will attend and make introductory remarks. The ABC of Cleveland plans to hold informational sessions on the second

Thursday of February, March, and April.

Atlanta

The ABC of Atlanta is preparing for its first informational session of 1998. The breakfast meeting, to be held January 20, will be a round table discussion entitled "ABCD-Ethics." The discussion, addressing ethical considerations for actuaries, will be moderated by Henry Knowlton. Atlanta is planning another breakfast meeting February 10 on Form 5500 changes. It will be presented by Lewis Siegal.

Central Florida

The Employee Benefits Council of Central Florida will feature Janice M. Wegesin, CPC, QPA, at its January 13 meeting. Wegesin, of JMW Consulting in Palatine, Ill., will discuss Form 5500s. On November 11, the EBCCF hosted Craig P. Hoffman, APM, of Corbel in Jacksonville, Fla. Hoffman presented "Current Regulatory Developments Under SBJPA '96."

Chicago

On December 2, the ABC of Chicago held a meeting entitled "Review of 1996-1997 Legislation and Re-

lated IRS Pronouncements — Planning for Year-End and Beyond." Susan J. Daley, Esq., of Altheimer & Gray, and Leslie A. Klein, Esq., of Sonnenschein Nath & Rosenthal, president of the ABC of Chicago, were the speakers.

Joan Sweeney Appears at Delaware Valley and New York ABC Meetings

Joan M. Sweeney, chief of the IRS Northeast Key District Employee Plans and Exempt Organizations Division, has addressed two ASPA Benefits Councils in recent weeks. Sweeney addressed the ABC of Delaware Valley on November 18. The meeting was attended by 118 pension professionals. On December 9, Sweeney and Cathy Jones, chief of the review staff and CAP coordinator for the IRS Northeast Key District, addressed the ABC of New York. The issues discussed included CAP and walk-in CAP, compliance with APRSC, current practitioner concerns, and plan filing issues. Sixty area pension professionals attended.

ERISA Outline Book Donated to ABCs

The Education and Examination Committee has donated to each ABC a copy of Sal Tripodi's recent hit publication *The ERISA Outline Book, Volumes I & II*. The publication has been praised as the best resource available on the issue. All ABCs should receive their copies in time for their January 1998 meetings.

WELCOME NEW MEMBERS

Please welcome and congratulate ASPA's new members and recent designees, August - December 1997

FSPA

Victoria C. Pelletiere

MSPA

Sheri Alsguth
Martin Burger
Keith Hartsough
Joseph A. Nichols
James E. Norris
Richard J. Rocco
Francis A. Tharsius
Stephen R. Thomas
Nachman Yaakov Ziskind

CPC

George Anastasakos
Brian G. Cheney
Elizabeth Drake
Kellie Dean Elder
Debra J. Enderson
Paul R. Erickson
Tina Marie Fisher
Nancy G. Gerseny
Jeffrey J. Heemstra
Lisa S. Hoover
Lisa M. Keckler
Daniel Gordon Kelly
Jennifer Tracey Kirby
Wylmina E. Loumena
John E. Lucas
Thomas W. Reese
Mark N. Schneider
Jared K. Scott
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Helga J. Towler
Andrew J. Treece
William E. Wagnon
Edwin C. Walker

QPA

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Alan E. Ashley
Natalie L. Bachman
Katharina E. Beal
Jay H. Beltz
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Natalie L. Cerniglia
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A. Linn Christensen
Carolyn R. Cohen
Charles W. Coldwell Jr.
Steven D. Cooper
Teresa J. Crancer
George H. Curry

Tammy A. DeHaai
Kathryn Duke
Karen L. Dunn
Teresa G. Encarnacion
John A. Feldt
Holly M. Flinn
Nancy G. Gerseny
Mona L. Gooden
Suzanne Gounaris
William J. Grace
Debby H. Gray
Cynthia A. Groszkiewicz
Andrew W. Hamilton III

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Maureen M. Hayburn
Penni S. James
Carla L. Johns
Monika A. Jones
Debra L. Jonigian-Fox
Erin S. Kagoro
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Lori A. Koerber
Daniel G. Kravitz
Philip M. Lamers
Robin M. Louthen
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Richard G. Martin
Jeannette Maw
William H. Mayer
Melinda L. McKendry
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Kelly J. Moen
Jeffrey N. Molin
Janet E. Neal
Kevin P. O'Connor
Joanne R. O'Donnell
Kellianne C. O'Donnell
Mary Faith E. O'Neill
Merlene K. O'Neill
Carole J. Paulson
Timothy F. Pegler
Joel J. Radakovitz
Thomas W. Reese
David C. Ryding
Marilyn Ryding
Marc D. Salvatore
Bei Sheng
Jeanette M. Shipley
Abigail M. Stanton
Chris Stencil
Bonita J. Szymanski
Tiffany Ward
Reginald S. Warner
Robert S. Wilder
Joyce E. Yaccarino

Andrew J. Zollman

APM

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Lyn K. Berkebile
Christine Burns-Fazzi
Alan H. Campbell
Kristi Cook
Amy Coy
Alisa Crabbs
Fernando Delmendo
Michael J. Gardyas
Andrew R. McCorkle
Robert E. Mitchell
George M. Morrison
George Patterson
Paul Harrison
Jo Ann Petroziello
Barbara Rand
Richard Sakofsky
Howard A. Simon
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Elizabeth Walsh
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Jean R. Webster
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Veronica Heffernan Gunn
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M. Diann Johnson
Jeri Jolley
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Paul Lau
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Ronald Madura
Ken Maher
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Michelle M. Mangino
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Susan Miner
Robert Miotto
Grey C. Mitchell
Marcus E. Morandi
Jeff R. Mower
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Kory Ngo
Anita O'Connor
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David A. Panella
Robert Parmely
Kimberly S. Penny
Fabio M. Perla
Dennis Pindiak
Gus A. Platas
Michael D. Popp
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William F. Porter
Victoria J. Prenger
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Gina M. Rosso
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Paul Thomson
Marcia J. Thorp
Kathleen Tompkins
Michele T.D. Tran
Ted J. Triska
Dorthy M. Tzumas
Brett Walker
Kara E. Walsh
David C. Walters
Leslie Walters
Brian Wildman
Evan W. Woollacott
Tim Wright
Earlene L. Young
Fredric H. Youngstrand

Martin Rosenberg Academic Achievement Award

by Scott D. Miller, FSPA, CPC

Each year, the ASPA Pension Education and Research Foundation (ASPA PERF) proudly presents the Martin Rosenberg Academic Achievement Award to recognize the achievements of exceptional examination candidates. The award is presented to honor the memory of the late Martin Rosenberg, FSPA. Rosenberg was a valued member of ASPA, serving as an officer and a member of the board of directors. In addition, he served on the Education and Examination Committee for nearly 10 years.

In order to be considered for the award, a candidate must receive a score of 9 on one of the following examinations: C-1, C-2(DB), C-2(DC), C-3, C-4, or A-4. Recipients of the award are selected based upon their total examination score as well as their examination performance, as it compares to other candidates' scores. All award winners receive a plaque, a letter of congratulations from the committee, and announcement of their achievement in

their local papers as well as in a number of ASPA publications.

For the 1997-98 examination cycle, ASPA PERF has decided to provide an added benefit to the top award winners for each examination. In addition to receiving the above stated benefits, top award winners are invited to attend the 1998 ASPA Annual Conference where they will be recognized for their outstanding achievements. Hotel costs for the conference will be paid by ASPA



Martin Rosenberg Academic Achievement Award winner Amy Wicker, (right) with Carol R. Sears, FSPA, CPC, general chair of ASPA's Education and Examination Committee

PERF, and the ASPA Conference Committee has agreed to waive the annual conference fee for those honored individuals.

Congratulations to Amy Wicker, who was presented with the Martin Rosenberg Academic Achievement Award at the 1997 ASPA Annual Conference for her performance on the C-1 examination for the 1996-97 examination cycle. We look forward to seeing this year's winners at the Annual Conference in October 1998 — Good luck!

Information Resources Catalog

As part of ASPA's desire to provide meaningful benefits for our membership, we have compiled a list of the books and reference material important to every pension professional. 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 pension practitioner needs on his or her shelves. The catalog is organized by subject matter to make the material you need easy to find. Also, check out our prices!

Please take a minute to look at the catalog enclosed for ASPA members and order the reference books that you need. Not only may it save you money, but your order also helps to support the services ASPA provides to its membership.

Scott D. Miller, FSPA, CPC, is president of Actuarial Consulting Group Inc. in South Salem, N.Y. Miller is vice chairman of ASPA PERF, a member of ASPA's board of directors, and serves as the examination chair of ASPA's Education and Examination Committee.

CALENDAR OF EVENTS

1998 Business

Leadership Conference

ASPA
CE Credit

1998

April 17-18	A-1[EA-1(A)] course — Washington, D.C.†	15 credits
April 19-20	A-2[EA-1(B)] course — Washington, D.C.†	15 credits
April 25-26	A-1[EA-1(A)] course — Chicago†	15 credits
April 27-28	A-2[EA-1(B)] course — Chicago†	15 credits
April 27-28	Midstates Benefits Conference — Chicago	15 credits
May 1-2	A-1[EA-1(A)] course — Los Angeles†	15 credits
May 3-4	A-2[EA-1(B)] course — Los Angeles†	15 credits
May 1 or June 19	401(k) Testing Rules/Cross-Testing Workshop — Philadelphia	8 credits
May 3-6	Business Leadership Conference. — Colorado Springs, Colo.	
May 8 or 15	401(k) Testing Rules/ Cross Testing Workshop — Orlando, Fla.	8 credits
May 11	401(k) Testing Rules/ Cross Testing Workshop — Cleveland	8 credits
May 18	Jointly sponsored examinations A-1[EA-1(A)] and A-2[EA-1(B)]	
June 3	C-1, C-3, and C-4 examinations	*
June 4	C-2(DC) examination	*
June 5	C-2(DB) and HW-1 examinations	*
June 8	401(k) Testing Rules/ Cross Testing Workshop — New Orleans	8 credits
June 12	Northeast Key District Employee Benefits Conference — White Plains, N.Y.	7 credits

† ASPA offers these courses as an educational service for students who wish to sit for examinations which ASPA cosponsors with the Society of Actuaries and the Joint Board for the Enrollment of Actuaries. In order to preserve the integrity of the examination process, measures are taken by ASPA to prevent the course instructors from having any access to information which is not available to the general public. Accordingly, the students should understand that there is no advantage to participation in these courses by reason that they are offered by a cosponsor of the examinations.

* 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.

The 1998 **Business Leadership Conference**, for ASPA members only, will be held May 3-6, 1998, at the Broadmoor hotel in Colorado Springs, Colo.

Winning customers through quality

The 1998 BLC theme is *Winning Customers through Quality*. Featured presentations that embody that theme include “How to Implement the Malcolm Baldrige Techniques and Self-Testing Methods,” “Measuring and Managing Customer Satisfaction,” “CEO Workshop and Technical Took Kit,” and “How to Hire Great People Every Time with Performance-Based Hiring — The New Competitive Advantage.”

Highest rated peer networking groups

Attendees share management information in interactive peer networking groups that match participants by size of their firm, the number of plans they administer, and by their revenue bases. These sessions give participants the chance to talk honestly and openly with others in similar situations. The peer groups were chosen by the majority of respondents as the best overall part of the 1997 conference.

The Broadmoor, a grand resort hotel

The Broadmoor has old-world charm with sculpture grounds, luminous buildings, and lavish accommodations. Participants will delight in the moderate climate. Sunny days and clear nights are the spring norm, with flawless blue skies and the clarity of Colorado air. The Broadmoor and Colorado Springs are conveniently located in the center of the United States.

Excess Profit-Sharing Contributions and APRSC

This thread discusses various options for handling a contribution to a profit-sharing plan in excess of the Internal Revenue Code section 404 deductible limit.

The plan involved included language that limits the contribution to that which is deductible under IRC 404. So, what happens when a contribution that exceeds that amount is made to the plan prior to the end of the year? What, if any, effect does the Internal Revenue Service APRSC program have in determining how to deal with the excess contribution?

Some of the participants in the thread believe that since the plan language limits the contribution to the deductible amount, then making a contribution in excess of that amount is a violation of the terms of the plan. Since the APRSC program is supposed to let plan administrators correct operational violations, it can be argued that the excess contribution should be returned to the employer.

Other participants were adamant that the plan language limiting the contribution to the deductible limit is meaningless and that any contribution made to the plan during the year must be allocated to the participants, the limitation notwithstanding.

There was no final resolution of the discussion. It generated enough interest that the question was posed to the IRS during the Q&A session at the 1997 ASPA Annual Conference. The IRS personnel gave their answer, saying that they believed the contribution should be allocated. However, the specific issue about whether the excess contribution violated the terms of the plan and the application of APRSC was not discussed due to a lack of time.

To read the entire 87-message discussion, download the thread [xsp2.fsg](#).

Combined DB-DC Plans and the 25 Percent Deduction Limit

This thread discusses the possibility of breaking up the coverage of an existing defined benefit-profit-sharing plan combination into two mutually exclusive groups in order to avoid the 25 percent of compensation combined deduction limit.

The case discussed involved a father-and-son-owned business. The idea is to amend the defined benefit plan to cover the father and one other employee, while the profit-sharing plan covers the son and the other employee. Consideration must be given to the new 401(a)(26) rules applicable to defined benefit plans, 410(b) coverage (either aggregating the plans or not), and, of course, nondiscrimination.

The unresolved issue is what constitutes overlapping coverage of the plans and invokes the 25 percent limit. The son has an accrued benefit in the plan, and though it may be amended to exclude him in the future, his previously accrued benefit is still in the plan and not distributable unless the plan terminates. Conversations with the IRS in preparation for the Annual Conference indicate that they don't think this is overlapping coverage, hence the 25 percent limit would not apply. However, most participants of the thread are uncomfortable without written IRS guidance.

Download the thread [2plans.fsg](#) for the whole discussion.

TRA '97 and Roth IRAs

New legislation begets new message threads. The new Roth IRAs are getting a lot of attention. Should your clients consider converting their IRAs to Roth IRAs? What about taking a distribution from a qualified plan, rolling it to an IRA, then electing to convert?

Roth IRAs are "backloaded," with no current tax deduction, but no taxation of distributions if certain requirements are met. Like much of TRA '97 however, Roth IRAs are "means-tested." To be eligible to contribute or elect to convert an existing IRA, adjusted gross income must be below designated amounts.

To see what PIXers are saying about Roth IRAs, download the file [roth1.fsg](#).

New PIX Windows Version Released

The exclusive PIX software system, WOD, is now available for Windows. Affectionately known as WODWin, it is a fully Windows-based message reader that provides all the functionality of the DOS-based system, plus all the Windows features you have come to depend on, and new features as well. WODWin is available on CD-ROM, floppy disks, or available for download from the Internet.

Along with the rollout of WODWin, PIX is also pleased to announce that PIX is available via Internet E-mail. Have a file of each day's messages E-mailed right to your E-mail box. Using PIX has never been easier. Call today!

PIX BBS support and registration information
voice : (805) 683-4334 • fax: (805) 683-0369

Please strip these in on the new generic masthead. Match the position on prior issues.

Vol. XXVII, Number 6

November-December 1997