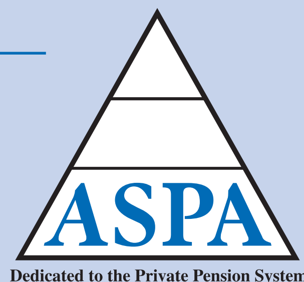
A publication of the American Society of Pension Actuaries

THE PENSION ACTUARY

Vol. XXIX, Number 4 July-August 1999



IN THIS ISSUE

Plan Expenses: What Can Be Paid From the Plan? 3
ASPA Greets Opportunity to Address GUST with "Gusto" 4
Huss Elected to ASPA's Board of Directors 7
ASPA Enhances Website .. 17
Focus on ASPA PERF 20
Focus on E&E 21
Membership Voting Item on New Designations 22
Calendar of Events 23
PIX Digest 24

How Will Kosovo Affect Retirement Plans?

by Steven Oberndorf, Esq. and Richard Hochman, APM

President Clinton's recent call-up of 33,000 reservists for active duty in the Kosovo conflict is a reminder that unanswered questions remain for qualified retirement plan administration since the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1994 (P.L. 103-3530). That Act, commonly referred to as USERRA, became law as the result of confusion over veterans' rights that occurred during 1990-91 at the time of the Gulf War. Subsequently, technical amendments affecting retirement plans were added to the Internal Revenue Code as part of the Small Business Job Protection Act of 1996 (SBJPA); Code provisions governing USERRA are set forth in IRC §414(u). Although admirable in its goal of preserving employment and benefits for those who serve our country, for pension administrators, regrettably, "the devil lies in the details"…or lack thereof.

What USERRA Protects

The Act generally preserves the reemployment rights and employment benefit entitlements of veterans, including reservists, who serve less than five years in active military service. For purposes of the law, service in the National Guard or the Public Health Service is covered military service. The five-year maximum period of military service will be extended in the following four situations:

- if the individual is required to serve beyond five years because of the need to fulfill a period of *obligated* service;

WASHINGTON UPDATE

DOL Expected to Propose New Small Plan Reporting Rules

by Brian H. Graff, Esq.

As previously reported in *The Pension Actuary* (see Nov.-Dec. 1998 issue), the DOL has been working on new small plan reporting rules for some time. Initially, the DOL was considering a regulation which would require that all small plans have a financial institution trustee or custodian in order to avoid a full scope audit. ASPA's

Continued on page 6

- if the individual, due to no fault of his or her own, is unable to obtain release orders before the end of the five-year period;
- if the need for additional professional or skill training is certified by the Secretary of Defense to be required; or
- if the individual is called to active duty as the result of a declared national emergency or a Congressionally declared state of war.

The veteran must apply for reemployment within a specified period after completing military service for USERRA to preserve his or her reemployment and benefit rights. The amount of time to apply depends upon the length of military service. This time period can be as short as the next full regularly-scheduled work period plus eight hours or as long as 90 days. The longest period applies if the individual has been in military service for over 180 days. Individuals who fail to apply for reinstatement or fail to report back to work within the time period set by the Act, do not lose their rights automatically. The law requires that they be treated under the same employer policies as any other employee who is absent from work.

The employer does not have to provide USERRA protections if the individual is discharged for other than honorable conditions. In addition, the employer may deny reemployment where:

- reemployment is impossible or unreasonable because of a change in the employer's business; or
- reemployment would cause the employer undue hardship because the veteran either has certain disabilities or lacks the qualifications for the position; or
- the pre-military service job was intended to be temporary.

Retirement Plans and USERRA

The 1996 amendments to the Code were enacted to resolve inherent conflicts between USERRA and the requirements for qualified plans under the Code. The amendment established two general rules that affect retirement plans directly. The first rule is that an individual whose reemployment right is protected by USERRA will not be considered to have incurred a break-in-service as the result of serving in the military. The second rule is that the individual's military service will be counted for purposes of vesting and accrual of benefits under a qualified plan. Under USERRA, the employer is responsible for funding the benefits that the veteran would have accrued during a period of military service, although it is not responsible for determining and contributing earnings or allocating forfeitures related to

Continued on page 12

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

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

Editor in Chief
Brian H. Graff, Esq.

Pension Actuary Committee Chair
Stephanie D. Katz, CPC, QPA

Pension Actuary Committee
Donald Mackanos
Christine Stroud, MSPA
Daphne M. Weitzel, QPA

Managing Editor
Stephanie D. Katz, CPC, QPA

Associate Editor
Jane S. Grimm

Technical Review Board
Lawrence Deutsch, MSPA
Kevin J. Donovan, APM
David R. Levin, APM
Marjorie R. Martin, MSPA
Duane L. Mayer, MSPA
Nicholas L. Saakvitne, Esq.

Layout and Design
Chip Chabot
Alicia Hood

Copy Editor
Amy E. Emery

ASPA Officers

President
Carol R. Sears, FSPA, CPC

President-elect
John P. Parks, MSPA

Vice Presidents
Craig P. Hoffman, APM
Scott D. Miller, FSPA, CPC
George J. Taylor, MSPA

Secretary
Gwen S. O'Connell, CPC, QPA

Treasurer
Cynthia A. Groszkiewicz, MSPA, QPA

Immediate Past President
Karen A. Jordan, CPC, QPA

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

© ASPA 1999. All rights reserved. ASPA is a non-profit professional society. The materials contained herein are intended for instruction only and are not a substitute for professional advice.

Plan Expenses: What Can Be Paid From the Plan?

by C. Frederick Reish, APM and Bruce L. Ashton, APM

As advisors to plan sponsors, we need to know which expenses can properly be paid from plan assets. Unfortunately, there seems to be considerable confusion about which expenses may be paid from the assets of a retirement plan and which must be paid by the plan sponsor. The purpose of this article is to bring some clarity to that confusion.

The key criteria for analyzing the propriety of payments from plan assets are: (1) What does the plan document say? and (2) Who benefits from payment of the expense? As a starting point, if the plan or trust document does not permit the plan to pay the expense, then the plan cannot pay it and, as a result, the employer should pay it.

On the second issue, if the expense relates to the design, establishment or termination of a plan — which are referred to as "settlor" functions — the expense must be borne by the employer because the decision of whether to have a plan, and the design of the plan, are in the discretion of the employer. On the other hand, if the expense relates to the implementation, operation, or administration of the plan, it can be paid by the plan because these activities are fiduciary ones. Looked at another way, an employer is not held to the ERISA fiduciary standards when it determines whether and what kind of plan to have. As a result, the plan should not pay the expenses related to those decisions. Conversely, to the extent the activity *is* a fiduciary one, the plan should be able to pay for it.

With this as a general framework, we will examine the specific rules.

General Legal Requirements

The general legal requirements governing the payment of expenses by ERISA pension plans and trusts are found in the fiduciary responsibility and prohibited transaction rules of Title I of ERISA. In addition, tax-qualified plans, and their tax-exempt trusts, are subject to similar, but not identical, prohibited transaction rules in the Internal Revenue Code (the Code).

Fiduciary Responsibility Rules

The primary ERISA fiduciary responsibility provisions are in sections 403(c)(1) and 404(a)(1)(A) of Title I. Section 403(c)(1) provides, in relevant part, that the assets of an employee benefit plan must be held for the exclusive purpose of providing benefits to participants and beneficiaries and *defraying reasonable expenses of administering the plan*. That section states as follows:

> "...the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and *defraying reasonable expenses of administering the plan*." [Emphasis added]

Section 404(a)(1)(A) requires that a fiduciary of a plan discharge its duties for the exclusive purpose of providing benefits to participants and beneficiaries and *defraying reasonable expenses of administering the plan — in accordance with the provisions of the plan and trust documents*. That section reads:

> "...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> "(A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) *defraying reasonable expenses of administering the plan;*

Continued on page 8

ASPA Greets Opportunity to Address GUST with "Gusto"

On April 12, 1999 the Internal Revenue Service held a meeting with a small group of practitioners to discuss the impending revision of its Master & Prototype and Regional Prototype Plan Programs in light of the upcoming GUST amendment process. Several mass submitters, document vendors, practitioners and ASPA were invited to attend. The purpose of the meeting was for the IRS to receive input on possible revisions in the prototype programs from experienced industry professionals prior to issuance of a new revenue procedure. Written comments were solicited, and in response, ASPA submitted the following letter:

May 6, 1999

Mr. James P. Flannery
OP:E:EP:P:2 Room 6702
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Jim,

We very much appreciated the opportunity to meet with you on April 12, 1999. As requested, we are following up with written comments on the redesign of the prototype program in light of the upcoming GUST amendment process. These comments are filed on behalf of The American Society of Pension Actuaries ("ASPA"). ASPA is a national organization of approximately 3,700 members who provide actuarial, consulting, administrative, legal and other professional services for about one-third of the qualified retirement plans in the United States, the majority of which are maintained by small businesses. ASPA's mission is to educate pension actuaries, consultants, administrators, and other benefits professionals and to preserve and enhance the private retirement system as part of the development of a cohesive and coherent national retirement income policy.

Summary of Comments

1. We support consolidation of the Master and Prototype and Regional Prototype Plan Programs.
2. We believe that mandatory maintenance of a list of adopting employers should not be required. Rather, we believe that sponsors should be required to use diligent efforts to maintain contact with the adopting employers, but should not be held liable for those employers who fail to respond.
3. We believe that multi-tiered benefit structures should be permitted in defined contribution plan prototypes, and cross-testing should also be permitted.
4. Fail-safe provisions should be permitted.
5. With respect to 401(k) plans, we believe that: 1) separate elections with respect to prior year or current year testing should be permitted, at least for the GUST remedial amendment period; and 2) 401(k)(12) safe harbor contributions to another plan should also be permitted in prototypes.
6. It should not be required that in a prototype document, the 417(e) effective date and the Section 415 RPA '94 freeze date must be the same.

Discussion

I. Consolidation of M&P and Regional Prototype Plan Programs

ASPA supports the consolidation of the M&P and Regional Prototype Plan Programs. We believe a single set of rules and reviewers will lead to faster turnarounds, more consistent reviews, and less confusion on the part of sponsors, adopting employers, and practitioners.

II. Issues Arising from Consolidation – Sponsor Duties

The one issue arising from consolidation that would be of great concern to ASPA members is the sponsor's responsibility to adopting employers. Presently, sponsors of regional prototype plans are required to maintain a list of adopting employers who maintain the plan as well as satisfy an annual notification requirement. Sponsors of national office prototypes are not subject to these man-

dates. ASPA believes that whatever rule is adopted, it should be applied equally to all sponsors. We do not believe that the entities eligible to sponsor regional prototypes are any less connected to their clients than the sponsors of national office prototypes. Hence, any reporting, notification, or data collection obligations should be the same.

The problem with the present rules that apply to regional prototypes is that it is often difficult (and sometimes impossible) for the sponsor to know if the adopting employer is still using the sponsor's document as the plan document. Adopting employers change service providers, often without informing the prior provider. As a result, there is often confusion as to which employers should be on the "list" of adopting employers who maintain the plan.

We believe that the revised rules, as applied under the consolidated program, should not mandatorily require the maintenance of a list of adopting employers. Instead, sponsors should be required to use reasonable and diligent efforts to maintain contact, on an annual basis, with those employers who are reasonably believed to be presently adopting employers. In this way, the vast majority of adopting employers will receive the information necessary to keep their plans qualified without holding the plan sponsor liable for those who fail to maintain contact.

III. Issues Regarding General M&P Requirements

A. Multi-Tiered Benefit Structures and Cross-Testing

ASPA believes that multi-tiered benefit structures should be permitted in prototype plan documents. A primary example of where this is needed is when several entities that are part of a controlled group all adopt the same profit sharing plan. However, in recognition of the various profit centers, each entity would like to have the flexibility to contribute at a different rate. Presently, this would not be permissible because of the multi-tiered benefit structure prohibition. We believe that prototype profit sharing plans should be permitted to accommodate this fairly common plan design.

We also feel that cross-testing should be permitted in prototype plans. Presently, cross-testing is permitted, in all its various forms, in the volume submitter program. ASPA applauds this flexibility allowed for volume submitters and believes it should also be accorded to the users of prototype documents.

At the meeting, it appeared that the main concern in permitting cross-testing in prototypes is that unsophisticated employers would be "sold" a plan and left on their own in properly administering the document. The fear was that employers would be unable to properly apply the general test for nondiscrimination on a cross-tested basis.

We would certainly agree that application of the nondiscrimination tests is not a simple task and requires the services of a competent professional. However, we believe that these tests are not significantly more complex than the myriad of other qualification requirements that must also be satisfied. In many respects, the 401(k) testing process is much more complex than cross-testing rules, yet 401(k) prototype documents are regularly adopted by employers of all levels of sophistication.

Perhaps a way to alleviate the concerns expressed at the meeting would be to permit cross-testing in prototypes only through a separate "cross-tested" adoption agreement. The adoption agreement could then be required to include wording which would advise the adopting employer that the plan is not a safe harbor plan, that it is designed to be tested on a cross-tested basis, and that a competent professional should be enlisted to ensure that the plan is in compliance.

Many of ASPA's members who are very experienced in applying the cross-testing rules regularly use prototype documents for their clients. They would like very much to use those documents for their cross-tested plans and don't understand the distinction in treatment between prototype and volume submitter plans. If cross-testing is not permitted in prototypes, they will simply make changes to their approved prototype documents to add cross-testing, and then file for approval as a volume submitter plan. We believe multiple filings such as this should not be necessary, and will only tend to make matters more complex for sponsors, adopting employers, and governmental personnel.

B. Possible Prohibition on Fail-Safe Provisions

Many of ASPA's members make use of fail-safe provisions in their plan documents, par-

Continued on page 16

CONTINUED FROM PAGE 1

Washington Update

government affairs committee argued strenuously that such a requirement would unnecessarily increase small plan administrative costs.

We were also able to persuade several senior members of Congress, including the Chairmen of the House Education and the Workforce, the House Small Business, the Senate Finance, the Senate Health, Education, Labor and Pensions, and the Senate Small Business Committees, to send a letter to the Secretary of Labor stating that any small plan reporting regulations should not require a financial institution trustee or custodian. In January, the DOL responded to this letter stating emphatically that, while they are considering new small plan reporting regulations, such regulations will not require a financial institution trustee or custodian. This letter represented a tremendous victory for ASPA's government affairs committee.

To the credit of the DOL, they have met several times with ASPA, as well as other members of the Retirement Savings Network, to listen to our concerns about the upcoming regulations and their potential impact on small plan administrative costs. At these meetings, ASPA has made several suggestions to address DOL's concerns about inadequate small plan audits without unnecessarily increasing small plan administrative costs. For example, instead of requiring a full scope audit for small plans with so-called "hard-to-value" assets, we have suggested as a possible alternative an increased ERISA bond requirement for such plans.

ASPA's government affairs committee recently had a conference call with the DOL where they summarized details of their new small plan reporting regulations, which are due out by the end of the summer. Following is a summary of what we were told.

Small business retirement plans (i.e., plans with less than 100 participants) would be required to obtain a full scope audit unless the following requirements were satisfied:

- Asset Requirement — At least 95% of plan assets would have to consist of (1) assets held by a qualified financial institution; (2) qualifying employer securities; and (3) participant loans. For this purpose, a qualified financial institution would include a bank or similar institution, an insurance company, an organization registered with the SEC as a broker-dealer, and any other entity authorized under regulations to be an IRA trustee. For employer securities to be qualified they would be subject to an annual independent appraisal requirement similar to the requirements applicable to ESOPs. Plan loans would be defined as defined in ERISA and would include defaulted loans still on the plan's books.
- Alternative Bond Requirement — Plans not satisfying the above asset requirement could still be exempt from a full scope audit if such plans obtain an ERISA bond at least equal to the value of plan assets not counting toward the 95% asset requirement (e.g., hard-to-value assets such as real property). Although the DOL was initially considering a longer discovery period for these bonds — three years instead of the current one-year period — they appear to be rethinking this idea in light of concerns raised by ASPA regarding impact on cost, casualty insurance company comments regarding the necessity of a longer discovery period, and the difficulty of getting these new bonds approved by state insurance commissioners.
- Disclosure Requirements — In the case of plan assets held by a qualified financial institution, such financial institution would have to annually provide the plan administrator with a statement showing the value of plan assets held as of the end of the plan year. In the case of qualifying employer securities, the independent appraiser would have to provide the plan administrator with such a statement. Further, the summary annual report would have to include a summary of these statements, or a description of the bond in case that alternative is exercised, along with language giving participants the right to examine these statements (or the bond).
- Effective Date — The DOL indicated that they were considering making the new rules effective for plan years beginning after the date final regulations are published.

If this description reflects what is actually proposed by the

DOL, it is vastly superior to the original idea of requiring a financial institution trustee or custodian. For most small plans there theoretically should be no extra burden other than some additional language in the SAR. For plans with "hard-to-value" assets there is an alternative ERISA bond option which should be significantly less costly than a full scope audit.

When these proposed regulations are actually issued, there is certain to be a number of technical issues and problems. You can be sure that ASPA's government affairs committee will be actively involved with comments to address those issues and problems. In the end, we are optimistic that we will be able to continue to work with the DOL to develop a reasonable and workable regulation governing small plan reporting requirements.

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

Huss Elected to ASPA's Board of Directors

In January, R. Bradford Huss, APM, was elected to fulfill an unexpired term on ASPA's Board of Directors.

Brad Huss, APM, is a member of the San Francisco law firm of Trucker-Huss, A Professional Corporation, which practices exclusively in the fields of ERISA and employee benefits. Brad's practice is concentrated on ERISA litigation, fiduciary responsibility matters, pension and profit sharing plans, Internal Revenue Service and Department of Labor audits, and representation of plan administrative and consulting firms. Brad has been practicing in the ERISA area since 1977.

In addition to serving on ASPA's Board of Directors, Brad currently serves as chair of ASPA's Administration Relations Committee for the Government Affairs Committee (GAC) and previously was chair of the GAC Department of Labor subcommittee.

Brad is a frequent speaker to numerous professional groups on ERISA litigation, qualified plan and fiduciary responsibility matters.

Brad is a past President of the San Francisco Chapter of the Western Pension & Benefits Conference and currently serves on the Board of Directors of the San Francisco Chapter of the National Institute of Pension Administrators. Brad is also a member of the Employee Benefits Committee of the Taxation Section of the State Bar of California and the Employee Benefits Committees of the Section of Taxation, the Section of Labor and Employment Law and the Section of Tort and Insurance Practice of the American Bar Association. He is also a member of the Bar Association of San Francisco and the International Foundation of Employee Benefit Plans.

Brad received his Bachelor of Arts degree from the University of California at Berkeley and his Juris Doctor degree from Boalt Hall School of Law at the University of California at Berkeley.

Brad lives in the East Bay area of San Francisco. He has three sons.

Seeking Nominations for the ASPA Board of Directors

For ASPA to continue being an effective pension organization, active participation by all of our credentialed members is essential. Our Board of Directors operates using a team approach, and every designation (FSPA, MSPA, CPC, QPA, and APM) is represented on our Board. We need strong people with differing perspectives to help lead our organization.

In order to be considered for a Board position, a candidate's name must be submitted to the Nominating Committee by two voting members at least 60 days prior to the annual business meeting.

If you think that you or someone you know would be a good addition to our Board, now is the time to get the nomination process started. A form for this purpose is included with this copy of *The Pension Actuary*. Please submit the completed form to:

Karen A. Jordan, CPC, QPA, Nominating Committee Chair
Alaska Pension Services, Ltd.
601 West Fifth Avenue
Key Bank Plaza, Suite 320
Anchorage, AK 99501-6301

The form is also available in the Members' Only section of our web site, **www.aspa.org**.

CONTINUED FROM PAGE 3

Plan Expenses

> ....“(D) *in accordance with the documents and instruments governing the plan* insofar as such documents and instruments are consistent with the provisions of this title and Title IV.” [Emphasis added]

Thus, a payment (other than a distribution of benefits) would violate ERISA sections 403(c)(1) and 404(a)(1)(A) unless it were to defray the reasonable expenses of administering the plan in accordance with the plan documents.

Prohibited Transaction Rules

The prohibited transaction rules also regulate the payment of expenses from a plan. Those rules are found in sections 406 and 408 of Title I of ERISA (as they apply to “Title I plans”) and in section 4975 of the Code (as they apply to tax-qualified plans). While the Title I and Code prohibited transaction rules are similar, they are not identical. To avoid undue complexity, we will focus primarily on the Title I prohibited transaction rules.

Expenses for settlor functions — as opposed to fiduciary or plan administrative functions — may not be paid with plan assets.

Sections 406(a)(1)(C) and (D) of Title I of ERISA prohibit a plan from engaging in a transaction that constitutes (i) a direct or indirect furnishing of goods, services or facilities between a plan and a party-in-interest, or (ii) the transfer to, or use by or for the benefit of, a party-in-interest of any assets of a plan. Section 406(a) states:

> “Except as provided in section 408:
>
> (1) A fiduciary...shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> ....“(C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; ....”

In effect, ERISA creates the untenable position that a person (for example, a third party administrator or an ERISA attorney) cannot provide goods, services, or facilities to a plan on an ongoing basis—because, after the first service is provided, the attorney or TPA becomes a party-in-interest subject to the prohibited transaction rules. However, that difficulty is resolved by a statutory exception in section 408(b)(2), which permits any reasonable arrangement with a party-in-interest (including a fiduciary) for legal, accounting, or other services *necessary* for the establishment or operation of a plan, if no more than reasonable compensation is paid. While the statute requires that the services be *necessary*, the governing regulations apply a less stringent standard, requiring only that the service be “appropriate and helpful” to the plan. (See DOL Reg. section 2550.408b-2(b))

Assuming that the payment of the expense is not a prohibited transaction and does not violate the terms of the plan, we next need to consider whether the expense is a permissible one for the plan to bear or whether the employer must pay it.

Payments from Plan Assets

Settlor (or Employer) Expenses vs. Plan Expenses

Expenses for settlor (*i.e.*, employer) functions — as opposed to fiduciary or plan administrative functions — may not be paid with plan assets. In a letter dated March 2, 1987, the DOL stated:

> “For example, the use of plan assets to pay fees and expenses incurred in connection with the provision of services would not be a reasonable expense of administering a plan if the payments are made for the employer’s benefit or involve services for which an employer could reasonably be expected to bear the cost in the normal course of such employer’s business or operations. In this regard, certain services provided in conjunction with the establishment, termination and design of plans, so called ‘settlor’ functions, relate to the business activities of an employer and, therefore, generally would not be the proper subject of payment by an employee benefit plan. It is the responsibility of appropriate plan fiduciaries to determine whether a particular expense

is a reasonable administrative expense under sections 403(c)(1) and 404(a)(1)(A) of ERISA [as opposed to a settlor expense]." DOL Letter, March 2, 1987, commonly known as The Maldonado Letter.

Expenses for Terminating a Plan

In a 1986 letter to John Erlenborn, the DOL summarized its views on several activities as either being settlor (*i.e.*, employer) or fiduciary functions in the context of a plan termination. To the extent that decisions regarding plan termination are settlor functions, their cost cannot be paid from plan assets. However, generally, the implementation of those decisions, and the associated costs, are fiduciary activities. The DOL said:

> "First, in light of the voluntary nature of the private pension system governed by ERISA, the Department has concluded that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called "settlor" functions include decisions relating to the establishment, termination, and design of plans, and are not fiduciary activities subject to Title I of ERISA. In Congressional testimony, the Department has consistently taken the position that the decision to terminate a pension plan is such a settlor, or business activity, and is therefore not subject to ERISA's fiduciary duty requirements. Courts have agreed with the Department's analysis in light of the voluntary nature of the private pension system and ERISA's overall statutory scheme....
>
> "Although the decision to terminate is generally not subject to the fiduciary responsibility provisions of ERISA, the Department has emphasized that activities undertaken to implement the termination decision are generally fiduciary in nature." DOL Letter to John Erlenborn dated March 13, 1986.

In the Erlenborn letter, the DOL examined five specific activities but found only one of them to be a settlor function. It stated:

> "Successor Plans. Many termination/reversion situations also involve decisions relating to the establishment and design of successor plans after a valid termination. Although such decisions may be made as part of the initial decision to terminate the current plan, we believe that the decision of whether to establish a successor plan, and if so, the type of such a plan, are clearly business decisions not subject to Title I of ERISA. As in the case of the decision to terminate, the decision to establish a successor plan involves the exercise of wholly voluntary settlor functions. Similarly, decisions about the design and provisions of any successor plan are not subject to Title I."

(An analogous position has been upheld in at least one court case, *Corcoran v. Bell Atlantic* [3rd Cir 1998], where the court held that the employer was not acting as a fiduciary in connection with its decision to convert its defined benefit pension plan into a cash balance plan.)

In 1996, the California Insurance Commissioner requested an advisory opinion from the DOL on the propriety of paying certain expenses in connection with the termination of ERISA-covered qualified plans. Specifically, the Commissioner indicated that it would be engaging outside legal and pension administration firms to assist it with the following:

> "(i) amend the plan to comply with legislative, case law and regulatory developments;
>
> (ii) audit the plan where applicable;
>
> (iii) prepare and file annual statements;
>
> (iv) prepare benefit statements and calculate accrued benefits;
>
> (v) notify participants and beneficiaries of their benefits under the plan; and
>
> (vi) seek a determination letter from the Internal Revenue Service (IRS) concerning the status of the plan in connection with its termination."

The DOL's response is instructive in terms of the need for plan and trust document provisions permitting the payment of such expenses, the ability to amend a plan to include acceptable provisions, and the distinction between settlor and plan administration expenses.

Plan Document Language

In discussing the requirement for appropriate language in the plan or trust document, concerning the payment of expenses by the plan, the DOL said:

> "...with respect to certain plans administered by the Commissioner, the plan documents specifically permit the plan administrator to pay expenses incurred in connection with the administration of the plan. In other cases, the Commissioner proposes to amend the plans to include a provi-

sion which permits such payments.

"At the outset, it should be noted that it is a fiduciary determination as to whether to pay particular expenses out of Plan assets. Accordingly, in making such determinations, the Commissioner must act prudently and solely in the interest of the plan participants and beneficiaries, and in accordance with the documents and instruments governing the plan insofar as they are consistent with the provisions of ERISA. See ERISA sections 403(c)(1), 404(a)(1)(A), (B), and (D). In this regard, the Commissioner must assure that payment of the expenses by the plan is authorized by the plan, and is in the interest of the plan participants and beneficiaries; and that the amount of the expense is reasonable."

Where the plan documents are silent on the payment of the particular expense, the DOL concluded:

"With regard to ERISA section 404(a)(1)(D), relating to the documents and instruments governing the plan, if the plan document is silent as to the payment of administrative expenses, the Department takes the position that the plan may pay reasonable administrative expenses."

Where the plan and trust documents provide that the employer will pay the particular expense, but the documents permit their amendment, the DOL concluded that the plan documents could be amended to prospectively permit the payment of such expenses:

"If the plan document provides that the employer will pay any of such expenses, and if the employer has reserved the right to amend the plan document, ERISA would not prevent the employer (or in this instance, the Commissioner) from amending the plan to require, prospectively, that the relevant expenses be paid by the plan. However, the prohibition on self-dealing in section 406(b)(1) of ERISA would preclude an employer (or the Commissioner) from exercising fiduciary authority to use plan assets to pay for an amendment to that plan that acquits the employer of an obligation to pay plan expenses."

Settlor versus Fiduciary/ Administrative Expenses

The DOL also considered the issue of whether certain expenses relate to settlor functions, which must be borne by the sponsor, or fiduciary and administrative functions, which can be paid out of plan assets. It said:

"Concerning sections 403 and 404 of ERISA, as a general rule, reasonable expenses of administering a plan include expenses properly and actually incurred in the performance of a fiduciary's duties to the plan. On the other hand, the Department has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called 'settlor' functions include decisions relating to the establishment, design, and termination of plans, and, except in the context of multi-employer plans, generally are not fiduciary activities subject to Title I of ERISA. (See letter to John N. Erlenborn from Dennis M. Kass [March 13, 1986]). Expenses incurred in connection with the performance of settlor functions would not be reasonable plan expenses, as they would be incurred for the benefit of the employer and would involve services for which an employer could reasonably be expected to bear the cost in the normal course of its business or operations. (See letter to Kirk F. Maldonado from Elliot I. Daniel [March 2, 1987]). However, while the decision to terminate a plan is such a settlor or business function, activities undertaken to implement the plan termination decision are generally fiduciary in nature. *Accordingly, reasonable expenses incurred in implementing a plan termination would generally be payable by the plan. This would include expenses incurred in auditing the plan, preparing and filing annual reports, preparing benefit statements and calculating accrued benefits, notifying participants and beneficiaries of their benefits under the plan, and, in certain circumstances, amend-*

An independent fiduciary must determine the expense allocation between the plan and the employer if benefit is derived by the employer and the plan participants.

ing the plan to effectuate an orderly termination that benefits the participants and beneficiaries." [Emphasis added] ERISA Opinion Letter No. 97-03A.

Expenses for Amending Plan Documents to Retain Tax Qualified Status

The DOL also analyzed whether plan assets could be used to pay the expenses for amending the plan document to maintain its qualified status and for obtaining an IRS determination that the plan's termination did not adversely affect its qualified status:

> "With regard to expenses attendant to amending a plan to maintain its tax-qualified status and to obtaining a determination from the Internal Revenue Service concerning the status of the plan in connection with termination, we note that, while ensuring the tax-qualified status of a plan confers significant benefits on the plan sponsor, or in the case of a liquidation, the estate of the plan sponsor, maintenance of tax-qualified status may also be in the interest of plan participants. In the case of a plan that was intended to be maintained as a tax-qualified plan and that permits the payment of reasonable expenses from the assets of the plan, *it is the view of the Department that a portion of the expenses attendant to these activities may constitute reasonable expenses of the plan. Where, as here, there are benefits to be derived by both the plan sponsor (or the estate of the plan sponsor) and the plan, and where one party appears to be acting in both a settlor capacity on behalf of the plan sponsor (or the estate of the plan sponsor), and in a fiduciary capacity on behalf of the plan's participants and beneficiaries, it would generally be necessary, in order to avoid violations of ERISA sections 406(b)(1) and 406(b)(2), to have an independent fiduciary determine how to allocate the expenses attributable to those benefits."*

Because the California Insurance Commissioner was acting in his official capacity on behalf of the State of California, the DOL concluded that the Commissioner was able to allocate these expenses without the need to appoint an independent fiduciary.

> "However, because the State of California, as liquidator, does not stand to benefit in its own interest or for its own account within the meaning of section 406(b)(1), and in view of the State's broader interest in protecting all of its citizenry, the Department will not seek to enforce any requirement for the State to engage an independent fiduciary to allocate expenses incurred in connection with plan terminations where the Commissioner has determined that an amount payable by a plan is in proportion to the benefit conferred on the plan relative to the benefit conferred on the estate of the plan sponsor."

This portion of the opinion may be the most interesting. In essence, the DOL says that whether the plan remains qualified upon termination affects the interests of both the plan sponsor and the plan participants. Therefore, the costs incurred in connection with amending the plan and obtaining a final determination letter from the IRS should be split between the settlor (or employer) and the plan. Since the determination of what share of the costs each should pay is both a settlor and fiduciary function, the plan sponsor cannot make the allocation and must engage an independent fiduciary to do so. As a practical matter, it would seem that for most smaller plans, the cost of paying an independent fiduciary to make this determination would outweigh any cost savings to the employer and that in most instances the employer would, as a practical matter, pay the entire expense itself.

Conclusion

The critical issues in determining whether the employer must pay an expense or whether the plan can bear it are (1) the terms of the plan or trust document and (2) whether the expense arises out of a settlor function or a fiduciary one. If the expense is for an employer function, such as the adoption, design, or termination of a plan, then the employer must bear that expense. For example, this would include the analysis and decision for converting a defined benefit pension plan into a cash balance plan. Where there is benefit derived by both the employer and the plan participants, such as maintaining the qualified status of the plan under the Code, the expense can be shared, but the DOL has taken the position that an independent fiduciary (and not the employer) must determine the allocation of the expense between the plan and the employer.

C. Frederick Reish, Esq., 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 and currently chairs the GAC Long Range Planning Committee. Bruce L. Ashton, APM, a partner with Reish & Luftman, is cochair of the Government Affairs Committee, and serves on ASPA's Board of Directors.

CONTINUED FROM PAGE 2

How Will Kosovo Affect Retirement Plans?

the plan years in which the military service occurred.

Compliance Issues

Defined benefit plans generally have few problems complying with USERRA because of the way in which they credit service, fund the plan, and calculate benefits. Compliance for defined contribution plans with employee pre-tax deferrals or after-tax contributions is more complicated because of timing and compensation-related issues. Those plans that also provide matching contributions will encounter the most difficult administrative and operational complications. Affected plans include 401(k), 403(b), 457, SARSEP, and SIMPLE plans. These problems are not helped by the lack of clarity contained in the Act, combined with the lack of detailed guidance provided by the IRS since enactment.

Profit-Sharing and Money Purchase Plans

The rules for typical profit-sharing and money purchase plans are relatively uncomplicated. The employer is obligated to make a contribution, defined as a "make-up contribution", for a participant who returns to employment from military leave within the statutory time period. The law is silent on when the employer must make this contribution; however, a reasonable interpretation is that it should be made not later than the end of the plan year in which the individual returns to employment, or, if later, by the time the employer makes the regular contribution for the year the employee returns. The contribution is based upon the individual's imputed compensation for the applicable plan year(s) while he or she was on active duty and the contribution rate for the other participants during the same time period(s). The individual's imputed compensation is determined based upon what he or she would have received (annualized) from the employer, had military leave not occurred. This determination is relatively straightforward for salaried employees, but may become complicated for those paid on an hourly basis because of compensation elements such as overtime. Therefore, if imputed compensation cannot be determined in the normal manner, the law provides a default that requires the employer to use the average compensation received by the individual in the previous 12 months or actual period of employment, if less. The Act states that the make-up contribution is not counted for purposes of determining limitations and deductions in the year it is made; however, the annual additions and deduction limits for the year(s) to which the contribution relates must not be exceeded. Further, the make-up contribution is disregarded for purposes of the nondiscrimination and top-heavy requirements in both the year that it is made and the year to which it relates.

The rapid growth of plans with pre-tax employee contributions and associated employer matching contributions became one of the principal reasons for the enactment of USERRA.

Plans with Employee Contributions and Matching Contributions

Since the 1980s, the rapid growth of plans with pre-tax employee contributions and associated employer matching contributions became one of the principal reasons for the enactment of USERRA. The increasing substitution of 401(k) plans for traditional defined benefit plans posed an issue of fundamental fairness in the minds of Congressional supporters of the armed services. This arose because the tax requirements for valid salary reduction elections provide no opportunity to make up for deferrals and matching contributions lost because the participant was not drawing salary from the employer while on active duty. The inability to make up for the lost retirement savings opportunity presented a hardship, especially for reservists called for active duty, and might discourage individuals from enlisting or re-enlisting in the reserves. The same problem was faced by individuals in 403(b), 457, SARSEP, and SIMPLE plans. On the other hand, a defined benefit plan can make the necessary adjustments so not to penalize a participant for his or her military service. An assurance of reemployment alone is not enough to make the veteran whole if his or her retirement benefit, including the employer's contribution, is dependent upon the amount of employee contributions. Consequently, a further step was required. The 1994 Act supplied this step by creating the concept of make-up contributions and extending this concept to elective deferrals and corre-

sponding employer matching contributions. Since the original Act only amended veterans' law, the 1996 amendments were necessary to legitimize make-up contributions under the Code.

The law requires that an eligible employee must be given the opportunity to make up elective deferrals (and after-tax contributions, if applicable) that he or she could have made to the plan if it were not for the period of military service. The amount that may be contributed appears to be based upon the employee's imputed compensation as described earlier. The entitlement to the employer matching contribution, if provided under the plan, remains contingent upon making up the missing employee contributions and is limited to that which would have been required had the employee contributed and not been on military leave. Make-up contributions:

- are not included in determining the annual additions or maximum deferral limits of the individual for the current year; and
- are not included in nondiscrimination testing or top-heavy determinations in either the current plan year or the plan year to which they relate.

Regular contributions that the employee makes after they return to employment are included in that year's testing. Only the make-up contributions are excluded, including make-up contributions for the current year, as indicated above.

The employee does not have an unlimited time in which to make up the contribution. The required contributions must be completed during a period that begins on the date of reemployment and ends on the date which is the earlier of three times the length of military service, or five years, measured from the date of reemployment. In addition, the maximum make-up contribution is limited by any plan or legal limits that were in effect during the period of military leave. Thus, the ability to contribute will be determined by the elective deferral, annual additions, and deductible contribution limits in effect during those years.

Open Issues

If the period of military service is completed within one plan year, administration should be relatively straightforward. Where the period of military leave crosses plan years, it is not so simple. For example, there is no authority on whether the employee has the right to designate the year to which the contribution relates. This could become a critical issue in situations where the employee is unable to make contributions equal to the maximum amount that he or she could have deferred for those years, where the employer may have made changes in the matching formula, or where the employer has a discretionary matching contribution formula.

Example: Paula Nimitz is recalled to active naval aviation duty on January 1, 1999, and returns to employment on January 1, 2001. Her employer's 401(k) plan is a calendar year plan that limits deferrals to 8% of compensation and provides a dollar-for-dollar match up to 6%. Her imputed compensation for 1999 and 2000 is $65,000 per year. The maximum deferral and match she could have made and received annually were $5,200 and $3,900, respectively. Paula can only afford to contribute $6,000 in make-up contributions. If she can designate $3,900 for 1999 and $2,100 for 2000, she can maximize the employer match at $6,000. However, if the first $5,200 is required to be related to 1999, her maximum matching contribution will be $4,700 ($3,900 for 1999 and $800 for 2000), representing a $1,300 potential decrease in total matching contributions. Similar issues could arise, for example, if the employer match was fifty cents on-the-dollar in 1999 and dollar-for-dollar in 2000. Obviously, the IRS needs to provide guidance to resolve such issues.

In the absence of IRS guidance, the employer (in conjunction with the plan's recordkeeper) needs to establish a reasonable policy on how much flexibility will be given to the affected employees. There is little equity in allowing certain employees the right to use 20/20 hindsight to receive an enhanced benefit to which they would not have been entitled had a period of military leave not occurred.

As previously mentioned, another issue not covered in the statute is the timing of when the employer's contribution is required. As with other employer contributions, logic appears to dictate that the employer's contribution is not due earlier than the time when employer contributions are due for the plan year in which the employee remits his or her make-up contribution. This issue also requires input from the IRS.

A final issue arises in conjunction with plans that permit participant loans. A plan has the option to suspend required loan payments during a period of military service. This can be done without violating the "at least quarterly" amortized repayment and prohibited transactions rules, and it effectively defers the maturity date of the note. Such a suspension of loan payments conflicts with the IRS loan regulation which only authorizes

a one-year suspension. The next question that arises is whether the old payment schedule is merely resumed as if the employee never left. Under that approach, no interest would be charged for the years that the employee's loan was suspended. This also is at variance with the regulations regarding loan repayments in other circumstances. Coordination of the USERRA provision with current loan regulations is desperately needed.

Conclusion

As noted above, "the devil is in the details." The decreased size of our regular military forces, coupled with increased involvement in the Kosovo conflict and other potential crises, will no doubt require protracted active duty assignments for reservists now and in the future. The government is doing both its reservists and public and private employers a great disservice by neglecting regulatory projects on USERRA. In the absence of formal guidance, employers should establish military leave policies, based upon their understanding of the law's requirements, before the first employee departs for military duty. This way there will be a consistent procedure to be followed when employees depart for and later return from military duty.

Richard Hochman, APM, is President of McKay Hochman Company, Inc., a Butler, New Jersey, employee benefits consulting firm. Steven R. Oberndorf, Esq., is an Attorney with McKay Hochman Company, Inc.

ASPA Communicates with the Government

In May, ASPA's Government Affairs Committee (GAC) sent several letters to government agencies regarding ASPA concerns. The text of each of these letters is posted on the ASPA web site. (**www.aspa.org**)

On May 17, GAC wrote to the IRS to bring certain issues to the IRS's attention regarding the Group Walk-In Cap proposal discussed in Revenue Procedure 98-22. ASPA expressed its support of some type of "Group Walk-In CAP" program as a complement to a "Group VCR" program established by the IRS. The letter highlights some particular systemic errors that could give rise to multiple plan defects, which would best be corrected as part of a Group Walk-In CAP submission.

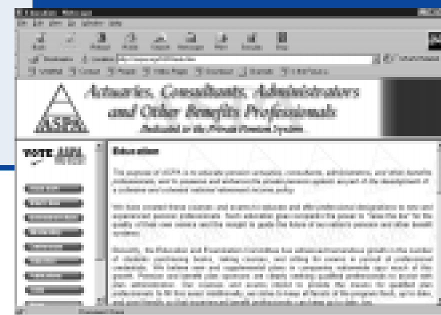
On May 6, GAC sent a letter to the IRS disagreeing with the IRS' position on the deductibility of compliance correction fees under the Walk-In CAP Program in light of the issuance of Revenue Procedure 98-22. The letter argues that the goals of the Walk-In CAP Program would be furthered by allowing plan sponsors to deduct voluntary compliance correction fees. Further, such an allowance would make good sense from a tax policy perspective.

Also on May 6, GAC sent a letter to the Department of Labor (DOL) expressing support of the use of electronic media to distribute summary plan descriptions, summaries of material modifications, and summary annual reports, and to maintain plan records. The letter also encouraged the DOL to further expand the availability of information technologies to other ERISA notice requirements, which were detailed in the letter.

ASPA Exam Results Posted Online

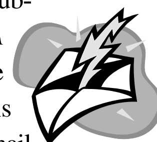
Exam results for the June 1999 C-1, C-2(DB), C-2(DC), C-3, and C-4 exams are now posted by candidate ID number at **www.aspa.org/aspaedu.htm**.

A list of candidates who earned the Pension Administrator's Certificate effective August 31, 1998 is also available at the site.



ASPA via ASAP

ASPA is pleased to announce that the *ASPA ASAP* is now available via e-mail.



If you are currently subscribing to the *ASPA ASAP* and would like to begin receiving this publication at your e-mail address, please send a request, along with your e-mail address, to asap@aspa.org.

If you receive the *ASAP* via e-mail, you will no longer receive it via facsimile. There will be no change in the cost of the *ASPA ASAP*.

Welcome New Members

Welcome and congratulations to ASPA's new members and recent designees. May — June 1999.

MSPA

Patrick J. Kendall
Dennis M. Reddington

CPC

M. Mustafa Faizani
Rebecca L. Hummer
Eric G. Nickerson
John Michael Shamy

QPA

James M. Abrams
Edwin O. Akwenuke
Sandra L. Aldrich
Elisabeth H. Amend
Emily Karst Appel
Neal J. Bransford
Jennifer L. Bufe
Victoria A. Butterfield
Daniel R. Casella
Robert F. Clark
Noelle E. Conant
J. Timothy Corle
Melissa Cowan
Tami M. Delaney
Douglas M. Dluzyn
Kevin T. Gallagher
Jill A. Hermansader
Annette Hilton
Jill M. Hodas
Gregg S. Ingersoll
Kelly Jones
Milton A. Keanini, Jr.
Veronica L. Ketchum
Puamana Catherine Koerlin
Matthew J. Kolenich
James C. LaMancusa
James J. Lemon
Edward R. Lenahan
Laura J. Macchietto
Thomas L. Marx
Jennifer Mendicki
Ken C. Nhan
Jonathan William Nikolis
Patricia A. Rivellino
Patricia E. Sanders
Deanna M. Semple
Russell D. Smith
Dan K. Szajko
Kristine L. Thomas
David R. Tooley
Jennifer L. Van Himbergen
Adam R. Weiss
Mary C. Weiss
Brenda W. Wren
Matthew T. Zwaanstra

APM

Maria A. DiPippo
Jeffrey M. Koltun
Howard L. Simon

Affiliate

Daniel G. Aceti
Robert Bailow
Theresa S. Conti
Shane D. Feiman
James D. Folbre, Jr.
Donal K. Ford
Jean-Marie B. Graham
Mary Ann Hammonds
J. Jeffrey Knapp
Bruce Lee
Nancy D. Magnet
Ian D. Millen
Juanita J. Miller
Stephen N. Mueller
Julia Norton
Barbara L. Provus
Dencil L. Rolle
Emily Urbano
David Vickers
Amy Vukovitz

Mark These Dates…

October 24-27, 1999
1999 ASPA Annual Conference, Washington, D.C.
ERISA – The First 25 Years And Into The New Millennium

Register before September 27, 1999 to take advantage of the early registration rates. Also, contact the ASPA headquarters hotel, the Grand Hyatt, at (202) 582-1234 by October 1, 1999 to make your hotel reservations at ASPA's special conference room rates.

For more information on the 1999 ASPA Annual Conference, contact ASPA by phone at (703) 516-9300, or by e-mail at **meetings@aspa.org**. During the last week of August, watch your mailbox for a complete brochure or access our web site at **www.aspa.org** for an earlier glimpse at the details.

We'll see you there!

A Special Thanks…

… to Karen A. Jordan, CPC, QPA, ASPA's immediate past president, Alaska Pension Services, Ltd., Anchorage, Alaska, who helped put this issue of *The Pension Actuary* to bed.

CONTINUED FROM PAGE 5

ASPA Addresses GUST with "Gusto"

ticularly for purposes of the coverage rules. At the meeting, it appeared that the concern was that fail-safe provisions may be written too broadly and that plan sponsors won't know to apply the rule. Needless to say, there are many complex rules included in the language of a prototype document that sponsors are expected to be cognizant of and apply when appropriate. We don't believe fail-safe provisions to be any more difficult to apply than the corrective options for ADP or ACP test failures. We also believe that fail-safe provisions can be written to comply with the "definitely determinable" requirements. For these reasons, we believe that fail-safe provisions should be permissible in prototype documents.

C. 401(k) Plan Issues

1. ADP/ACP Testing

Presently, the LRMs require in a prototype plan that the employer make a consistent election with respect to current year or prior year testing for the ADP and ACP tests. We believe that a prohibition on disparate elections will force a significant number of employers out of the prototype program because of operational decisions made during the GUST remedial amendment period.

The LRM reference has been the only warning that this practice would be prohibited in prototypes. For some, the warning came too late after the 1997 testing was complete. For others, they are still unaware of the prohibition in prototypes because the LRMs are not widely read by practitioners and plan sponsors. For this reason, ASPA believes that at the very least, transitional relief should be provided for the GUST remedial amendment period so that if independent elections were made, the employer will not be forced to update by using an individually drafted document.

2. 401(k)(12) Safe Harbor Contributions

Although 401(k)(12) safe harbor plans are barely four months old, interest appears to be increasing among employers who already have either a 401(k) plan or traditional profit sharing plan. However, a problem for employers who want to make profit sharing and matching contributions in addition to employee elective contributions is the 15% of compensation deduction limit. Many employers solve this problem by sponsoring a money purchase pension plan. As a result, they would like to satisfy the safe harbor contribution obligation through the contribution to the money purchase pension plan. ASPA believes that sufficient safeguards can be included in the prototype documents to permit this approach without fear that the safe harbor contribution will not be made, or that the rules will not otherwise be satisfied. We believe the separate plan option will be popular and its prohibition in a prototype document unnecessary.

D. Requirement that 417(e) Effective Date and 415 RPA Freeze Date be the Same

ASPA believes that requiring the 417(e) effective date to be the same as the 415 freeze date is an unnecessary limitation on the prototype program. It appears that a fair number of employers are making independent elections and hence will be forced to use individually drafted documents to accommodate this approach.

Thank you for the opportunity to provide our comments on these issues. We believe that plan sponsors, participants and practitioners are all benefited by an "open door" policy. We have greatly appreciated the willingness of the Service to listen to the concerns of the ASPA membership, and we look forward to working together in the future.

Sincerely,

Brian Graff, Esq.
ASPA Executive Director

Craig Hoffman, APM, Co-Chair
ASPA Government Affairs Committee

R. Bradford Huss, APM, Chair
ASPA Administration Relations Committee

George Taylor, MSPA, Co-Chair
ASPA Government Affairs Committee

Bruce L. Ashton, APM, Co-Chair
ASPA Government Affairs Committee

HTTP://WWW.ASPA.ORG

Check out ASPA's New and Improved Web site!

You will find all of the following information at **www.aspa.org**:

About ASPA

Provides general information about ASPA's mission, membership composition, committees and board of directors, ASPA Benefits Councils (ABCs), and the national office staff is provided in this section.

What's New

Use this section to submit questions for our panel of experts at the 1999 Annual Conference, vote on Top-Heavy proposals, view the most recent issue of *The Pension Actuary*, and find information on upcoming conferences and workshops. "What's New" also provides recently released government affairs news on issues such as Safe Harbor, IRS reform, and Y2K. You can also find out about recent Government Affairs Committee activities, view recent DOL and IRS letters, and compare House and Senate major pension reform bills.

Government Affairs

This section has the latest information on ASPA's efforts to improve the private pension system. You can vote for a Top-Heavy proposal, read testimony given by ASPA's President, Carol R. Sears, FSPA, CPC, to the Ways and Means Committee, and read recent DOL, IRS, and Treasury letters and comments.

Membership

Detailed information on each of ASPA's professional designations and membership categories is outlined. In this section you will also find detailed information about ASPA's membership benefits and discount programs. You can download membership applications and view a sample of *The Pension Actuary*.

Conferences

This section includes a schedule of events for current and future years and information on each upcoming ASPA conference and/or workshop. You can also submit questions for our panel of experts at the 1999 Annual Conference.

Education

This section contains continuing education information, CE quizzes from *The Pension Actuary*, exam pass lists, and Sylvan Technology Center exam site information. In this section you can also find information on study groups, an education Calendar of Events, and you can view the most recent program catalog and *Information Resources Catalog*.

Publications

You can access a publications order form, the most recent program catalog and *Information Resources Catalog*, sample *ASPA ASAPs*, and an order form for Sal Tripodi's *ERISA Outline Book.*

Members Only

This section of the web site can be accessed by ASPA members only. See your membership card for your Web User Name and your Web Password to help you access this special members-only section. It includes a board nomination form, recent issues of *The Pension Actuary*, EA announcements, and issues of the *ASPA ASAP*. You will also find membership discount information and a complete membership list that includes each ASPA member's name, designation, company, city, state, phone, and e-mail address.

Links

This section will allow you to access the web sites of other organizations as detailed below:

- Actuarial organizations (includes but is not limited to: JBEA, ASB, AAA, CIA, CAS, CCA, SOA)
- Benefits Job Search Sites (includes but is not limited to: Benefits link, Training Net, Workforce On-line, Employee Benefits Job)
- Government Sites (includes but is not limited to: Bureau of Labor Statistics, DOL, GATT Rates, Federal Reserve Bank, IRS, PBGC, PWBA, House, Senate)
- Internet Search Engines (includes but is not limited to: Alta Vista, Excite, Lycos, Yahoo!)

ASPA welcomes your comments and suggestions! To submit your comments regarding our web site, please e-mail us at webmaster@aspa.org.

Los Angeles Benefits Conference

Hilton Universal City and Towers, Universal City, California · September 16-17, 1999

Save $100 by registering before August 31, 1999!

New this year! Breakout sessions and exhibitors!

The eighth annual Los Angeles Benefits Conference (formally known as the Western Region IRS/ Practitioners Conference) will be held at the Hilton Universal City and Towers in Universal City on September 16-17, 1999. The conference is cosponsored by the Western Key District of the IRS, ASPA, and major pension organizations in the western United States. This conference provides a great opportunity for practitioners, plan sponsors, plan administrators, and government representatives to meet and discuss employee benefit issues, benefits regulation, litigation, enforcement efforts, and voluntary compliance initiatives.

A number of prominent speakers have been assembled including: Evelyn A. Petschek, Commissioner, Tax Exempt, EP Division, IRS; Terry A. Franklin, Chief, EP/EO Division, Western Key District, IRS; Carol D. Gold, Director, Employee Plans Division, IRS; Richard J. Wickersham Sr., Chief, Projects Branch, IRS; Virginia Smith, Director of Enforcement, PWBA, DOL; and David M. Strauss, Executive Director, PBGC. These and many other government agency and private industry representatives will participate.

Some of the topics covered at the conference include: *Plan Documents and Remedial Amendment Period; Defined Benefit and Cash Balance Plans; DOL Investigations and Litigation; Qualified Plans in Merger and Acquisitions Settings; IRS Correction Examples;* and much more.

In an effort to make this conference as valuable to participants as possible, registrants are encouraged to submit questions and topics for discussion with their registration forms.

The conference provides up to 16 hours of continuing education credit for ASPA designations, as well as for the CLU, CPE, EA, and CRSP designations.

Registration Fees:

Early (on or before August 31) $375
*Additional Registrant $325
Late (after August 31) $475
Government .... $ 95

*To qualify for the additional registrant discount: additional registrants must be from the same location of the same firm, and all registration forms must be submitted "together" by the "early" registration deadline.

The Hilton Universal City and Towers is located at the entrance to the action-filled fantasy world of Universal Studios Hollywood and the incredible Universal City Walk. To make your hotel reservations, call the Hilton directly at (800) HILTONS or (812) 509-2058. A limited number of rooms has been reserved at the special rate of $133 for a single or double room. The cut-off date is August 16, 1999. Be sure to mention the ASPA conference to receive this special rate.

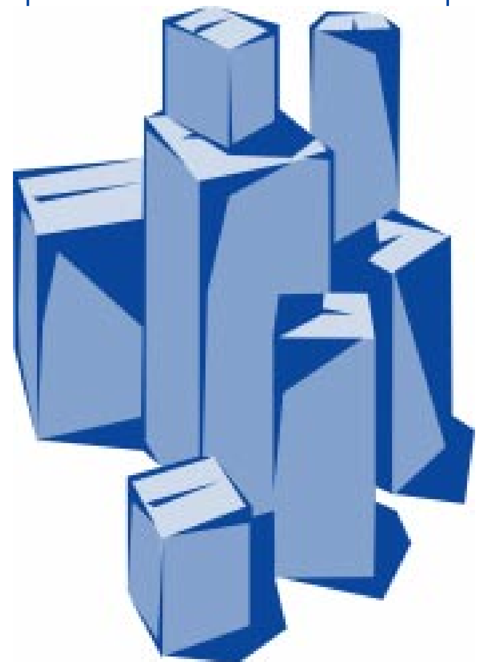
If you live in one of the Western Region states, a brochure will be in your mailbox in mid July. For more information, call Janet A. Kamvar in the ASPA Meetings Department at (703) 516-9300.

We're on the Move

ASPA's National Office will be moving across the street effective September 13,1999. Our new address will be:

4245 North Fairfax Drive,
Suite 750
Arlington, VA 22203-1606

Our phone number, fax number, e-mail, and website address will remain the same.



Ideas? Comments? Questions? Want to write an article?

The Pension Actuary welcomes your views! Send to:

The Pension Actuary
ASPA, Suite 820
4350 North Fairfax Drive
Arlington, VA 22203-1619
(703) 516-9300
or fax (703) 516-9308
or e-mail aspa@aspa.org

ASPA's 31st Annual Conference in the Nation's Capitol

by Stephen L. Dobrow, QPA, CPC, Annual Conference Chair

The best conference in the industry just got better!

- More Government: DOL/PBGC Q&A time added!
- More variety: more than 50 total break-out sessions without repeats
- More rooms: more comfortable, less crowded
- More vendors/exhibits: more new things to see and evaluate
- More fun: expanded March on the Hill, sightseeing time, or networking time
- More entertainment: Capitol Steps tapdance to Sal Tripodi's ERISA musical
- More diverse: business leaders' discussion added
- More freshness: nearly one third of the speakers are "new"
- More Techno: improved AV
- More humor: S. Derrin Watson, APM, bringing new jokes

- More controversy: provocative sessions like "404(c) on Trial: You Be the Jury" and "The Unauthorized Practice of Law"
- More basics: "Cross-Testing for Dummies (and Others); Loan-a-Rama; Intermediate DB Administration"
- More Credit: JBEA credit for Q&A's

www.aspa.org

Check out the Meetings Webpage to download information, brochures, and registration forms for upcoming conferences, including the Los Angeles Benefits Conference and the 1999 ASPA Annual Conference.

Get your copy of *The Pension Actuary* early... before it is even mailed out!

How?

Download it from the Members Only section at **www.aspa.org**!

Visit the Hill and Speak Out

At the 1998 ASPA Annual Conference, more than 80 ASPA members visited Capitol Hill to meet their Congressperson or Senator and deliver ASPA's views on important legislative issues.

Here is what they had to say about the experience:

> "[The staffer] was knowledgeable, attentive, and took notes. He related personally to the issues we addressed."

> "Staffer was very interested in what we had to say….I plan to follow-up with her on the ASPA issues."

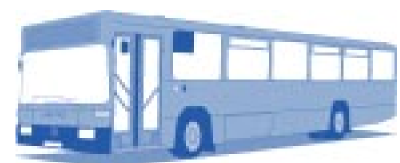
> "Staffer seemed well receptive to our meeting. She took extensive notes and had prepared questions for discussion."

> "This was an interesting and enjoyable experience. They are eager to learn from us and it is encouraging to be listened to."

> "It was just great!"

This year there are more reasons for an even larger group to take ASPA's views to the Hill! For the first time, ASPA will devote conference time to Visits to the Hill. For three hours during lunch, ASPA will arrange to have participating members bussed to the Hill. Lunch will be provided. Let ASPA take care of the details while you take care of the message!

Take advantage of the fact that the 1999 ASPA Annual Conference is in the Nation's Capitol and plan now to visit your federal legislators! More details to come!



Focus on ASPA PERF

PERF Supports the 28th Math Olympiad

by Scott D. Miller, FSPA, CPC

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

The top eight winners of the USA Mathematical Olympiad were honored at the 28th Awards Ceremony at the National Academy of Sciences and were guests of Dr. Neal Lane, Assistant to the President for Science and Technology, at a gala reception and dinner in the Diplomatic Reception Rooms of the U.S. Department of State. Members of the mathematical community, private industry, and the federal government gathered to celebrate the outstanding achievement of these young people. Six of them will comprise the team that travels to Romania for the 40th International Mathematical Olympiad (IMO) this summer. In 2001, the U.S. will host the IMO in Washington, D.C.

A series of challenging mathematical competitions is used to select the top winners of the USA Mathematical Olympiad (USAMO). In March, more than 350,000 students participated in the American High School Mathematics Exam, the first of the competitions. Two exams and dozens of challenging problems later, the six members of the IMO team emerged as the top mathematics students in the U.S. The examinations are administered by the American Mathematics Competitions, a program of the Mathematical Association of America, and jointly sponsored by 12 other mathematical organizations.

Eight top math students, along with 16 other young students, attended the four-week Mathematical Olympiad Summer Program (MOSP), which was held at the University of Nebraska-Lincoln between June 9 and July 8, 1999. The MOSP is a mathematics program for very promising students who have risen to the top in mathematics contests. It broadens students' views of mathematics and better prepares them for possible participation on our International Mathematical Olympiad team.

ASPA PERF is pleased, once again, to support this very worthwhile program.

Scott D. Miller, FSPA, CPC, is president of Actuarial Consulting Group Inc. in South Salem, N.Y. Mr. Miller is chairman of ASPA PERF, is one of ASPA's vice presidents, and serves on ASPA's Board of Directors and Executive Committee.

Photo © Robert Allen Strawn 1999

From left to right: Stephen E. Haas, Reid W. Barton, Po-Shen Loh, Lawrence O. Detlor, Gabriel D. Carroll, Paul A. Valiant, and Melanie Eggers Wood pose with Curtis E. Huntington, APM, secretary/treasurer of ASPA PERF, for the photo in front of the Einstein statue at the National Academy of Sciences building.

FOCUS ON E&E

The Exam Process – Big Changes on the Horizon

by Gwen S. O'Connell, CPC, QPA

ASPA's Education and Examination Committee (E&E) is making some very big changes in the way we give exams. Starting with the December 1999 exam administration, ASPA will no longer be distributing or selling the more recent exam booklets. Instead, we will be compiling a bank of questions which, hopefully by the year 2001, will be used to randomly deliver questions for the C-1, C-2(DC), and C-2(DB) exams on-demand at Sylvan Centers.

In response to candidates' demands, the grading process has been accelerated and ASPA plans to begin posting results of the C-1, C-2(DC), and C-2(DB) as early as July 30 this year – a short eight weeks after the exams were administered. The web site is **www.aspa.org**. All candidates will be notified of their marks, in writing, no later than 12 weeks after the exams were given.

The grading process itself has not changed, however, and includes the same rigorous review of the candidate field that has been a benchmark of ASPA's exam process. A detailed explanation of the process can be found on the web site.

Also, for the December 1999, June 2000, and December 2000 exam cycles, the same textbooks will be used. This is an effort to move the E&E cycle from a "school year" to a "calendar year" and will give the candidates an entire year and a half to prepare for ASPA exams without needing to purchase new texts.

The 1999-2000 program catalog will be available early August. It will be mailed to all ASPA members and current exam candidates before August 15.

Gwen S. O'Connell, CPC, QPA, is Principal of Summit Benefit & Actuarial Services, Inc. in Eugene, Oregon. Ms. O'Connell currently serves on ASPA's Executive Committee as its secretary, is a member of the Board of Directors, and is the general chair of the Education and Examination Committee.

New Release from the PBGC

The Pension Benefit Guaranty Corporation recently announced the availability of a compact disc for benefit advisors interested in reproducing multiple copies of the publication, "A Predictable, Secure Pension for Life: Defined Benefit Pensions."

This CD provides easy-to-understand information on defined benefit pension plans and the PBGC. It helps workers understand what defined benefit plans are, how they operate, and some of the rules governing them.

The CD is available free of charge from PBGC's Communications and Public Affairs Department, 1200 K Street, NW, Washington, DC 20005. The information will also remain available as a free booklet from the Consumer Information Center (CIC), Dept. 639E, Pueblo, CO 81009. The booklet is also available electronically on PBGC's Internet site, **www.pbgc.gov**.

CONTINUED FROM PAGE 24

Pix Digest

tion was dissolved. At the time, an account balance for a missing participant was forfeited, and now the participant is back making a claim. The thread discusses whether or not the participant is due a benefit now, what responsibilities both the employer and the participant had to keep in touch, how such a benefit could be paid now, what, if any "interest" should be accrued, and what the income tax effects are for the payer and the recipient.

In cases like this, a plan consultant might advise the client to seek advice of an attorney specializing in ERISA matters. However, in this particular case, the account balance, when forfeited was just $670. The cost of ERISA counsel is difficult to justify for such a small amount.

One user made a very strong case that the participant is not due any benefit at all, having failed to leave any way for the employer to contact him. While this might be true, and in this case the benefit is small, the thread points out the potential future problems that can arise from forfeiting a benefit on plan termination. While is may seem a simple and reasonable decision at the time of termination, the client should be advised to consider "what if" the missing participant returns many years later to claim a benefit. What costs could the sponsor incur defending such a claim, what liability might a trustee have personally, especially if the employer is no longer around.

To read the entire thread, download hesback2.fsg.

Membership Voting Item on New Designations

The ASPA Board of Directors voted at their July 1999 meeting to expand membership designations. Specifically, we voted to offer two new designations: Defined Contribution Specialist (DCS) and Defined Benefit Specialist (DBS). This issue will be voted upon by the full ASPA membership at our annual meeting on October 25, 1999. If you are a voting ASPA member, you have already received notification of this upcoming vote via postcard. If approved, the new designations will be immediately obtainable by those current examination candidates who have two years of applicable experience and have passed PA-1A, PA-1B, C-1 and either C-2(DC), (for DCS), or C-2(DB), (for DBS). These two new designations will carry with them the full membership rights of any other voting ASPA member.

Some of the comments by supporting board members included:

- A change is necessary to properly reflect the specialization of many professionals working in our industry today.
- Offering designations to specialists appropriately reflects the needs and wants of our future members.
- Having specialists as members will result in a larger and more diverse volunteer bank to help guide our organization into the future while also encouraging professional growth through our continuing education program.
- Expanding our designations conforms to ASPA's mission statement, which is The purpose of the American Society of Pension Actuaries 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.

We are looking forward to the membership vote to give feedback about the fulfillment of members needs through these designations. We strongly encourage ASPA members to attend the business meeting on October 25, 1999 at 8:15 a.m. during our Annual Conference.

You can obtain information about our annual meeting and this voting item by visiting the Members Only section of www.aspa.org or calling the ASPA office at 703-516-9300.

We know our industry, retirement in our country, and your education needs are growing and changing. ASPA is here to serve you in accordance with its mission. Please participate!

Notice of Annual Meeting and Membership Voting Items

ASPA's Annual Meeting will be held during the 1999 ASPA Annual Conference on Monday, October 25 from 8:15 a.m. to 9:00 a.m. All credentialed ASPA members are encouraged to attend and to vote on the following proposed amendments to ASPA's bylaws.

- Article 2, paragraph B, Membership, shall be amended by adding "Defined Contributions Specialist, Defined Benefit Specialist" after Qualified Pension Administrators.
- Article 2, paragraph D, Membership, shall be amended by adding "DCS, DBS" after QPA.

If approved, these proposed amendments shall be effective immediately upon adoption.

There will also be an election of ASPA officers for 2000.

Another Successful BLC!

The 1999 Business Leadership Conference (BLC) was presented to an enthusiastic and larger than ever group of attendees this past May 2-5, at The Boca Raton Resort and Club, Boca Raton, Florida.

New this year were interactive workshops with facilitated discussions on topics including human resources, Y2K issues, revenue sharing, and daily administrative issues.

Back by popular demand were the Peer Networking Groups, which match participants by size of firm and geographic location. These networking groups were cited as one of the highlights of the conference.

The BLC's attendees had the opportunity to hear these nationally recognized speakers: Dr. Mark Blazey, Quantum Performance Group; Thomas Martin, FBD Consulting, Inc.; Brendan O'Farrell, HCM International LLC; Thomas Rutledge, Systems Consortia International; Jeb Britton, Spectrem Group; Ian Kopelman, Alheimer & Gray; and Tom Fefer, The Center for Customer Focus.

This is what the attendees had to say when asked what they like best about the conference: "Camaraderie and sharing of pension business ideas. No other conference offers this level of focus;" "Attendees! Quality people;" "Casual time to talk about business;" "The important ideas I can bring back to my company. Try to make a difference;" "The opportunity to connect with other business owners and discuss major business issues."

Next year's BLC will be the first week of May in San Diego, California. Mark your calendar now and plan to attend.

1999 Calendar of Events

		ASPA CE Credit
Aug. 26	Final deadline for board nominations	
Aug. 31	Final deadline for 10th edition PA-1A and B examinations	**
Sept. 16-17	LA Benefits Conference, Universal City, CA	15
Oct. 7-10	EA-2 Class, Denver, CO †	20
Oct. 15	Early registration deadline for ASPA's fall exams	
Oct. 16-19	EA-2 Class, Chicago, IL †	20
Oct. 21-24	EA-2 Class, Washington DC †	20
Oct. 24-27	1999 ASPA Annual Conference, Washington, DC	20
Oct. 25	ASPA Annual Meeting and Vote on Bylaws Changes/ New Officers	
Nov. 1	Late registration deadline for ASPA's fall exams	
Nov. 6-7	ASPA Weekend Courses, Denver, CO C-2(DB), C-2(DC), C-3, and C-4	15
Dec. 1	C-1, C-3, C-4, and A-4 examinations	*
Dec. 2	C-2(DC) examination	*
Dec. 3	C-2(DB) examination	*

2000 Calendar of Events

May 7-10	Business Leadership Conference, San Diego, CA	10
May 8-9	Midstates Conference, Chicago, IL	15
July 16-19	2000 ASPA Summer Conference, San Francisco, CA	20

* 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.

** PA-1A and B exams earn 5 ASPA continuing education credits each for a passing grade.

† 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.

PBGC Definitions of "Majority" and "Substantial" Owners

[Thread #76908]

This thread examines the differences between the definitions of Substantial Owners, used to determine PBGC coverage of a defined benefit plan, and Majority Owners, used to determine who can "waive" benefits in order to qualify an underfunded plan for a standard termination.

The case at hand involves an underfunded plan, where the participant who was previously the majority owner had transferred his ownership to his two sons and an unrelated person. For purposes of determining PBGC coverage of a plan, Section 4022 of ERISA includes in its definition of substantial owner a 5-year lookback rule in determining ownership.

However, PBGC regulations provide that only a majority owner, (i.e.: one who owns at least 50% of a company), can elect to receive reduced benefits upon plan termination. The regulations define a majority owner, the definition does not include the 5-year lookback.

The thread goes on to discuss various strategies to consider in dealing with a significantly underfunded plan at plan termination. One user posted a sample form that can be used by majority owners to make the election to receive reduced benefits. In addition to having majority owners voluntarily agree to take less than their full benefits, an amendment to the plan was recommended which put the majority owners as last in line for an allocation of funds upon plan termination. The thread discusses why such an amendment would not be an IRC Section 411(d)(6) prohibited cutback. The thread points out very clearly that even if a majority owner is not receiving a full benefit, they are not actually waiving their benefit under the plan. They are, however, electing to put themselves at the end of the line for benefit distributions. Since virtually all well-drafted defined benefit plans have language providing that benefits are payable only to the extent funded, a cutback can be avoided. However, it was pointed out that such an amendment should be in place prior to the plan termination date, because as of the plan termination, the plan's termination allocation language is activated.

To read the entire discussion on this topic, download the file majown2.fsg.

Return of 401(k) Deferrals in Excess of 402(g) Limit

[Thread #75942]

The complexities of 401(k) plan administration continue to give practitioners difficulties in determining how best to advise clients to correct plan administration errors.

This thread discusses the all-too-common occurrence of a plan participant deferring in excess of the 402(g) limit in a single plan of one employer. What is the consequence to the plan and what correction should be made, if any, if such excess deferrals are not refunded by April 15 following the close of the plan year? What effect does the IRS Administrative Policy Regarding Self Correction (APRSC) have on this situation.

The participants in this thread analyzed the 402(g) regulations, APRSC, and IRC Section 401(a)(30). It was pointed out that a plan need not provide for the return of excess deferrals, but that excess deferrals that are not distributed cause the plan to violate 401(a)(30). The participants agreed that APRSC probably allows this type of error to be corrected during the two-year APRSC correction period. However, it was then pointed out that if a plan did not provide for the return of excess deferrals, such a correction would not be permitted. Another participant pointed out that APRSC allows plan amendments for the purpose of accommodating an operational correction.

To read the entire thread, download the file xs402g2.fsg.

Lost Participants & Terminated Plan

[Thread #75751]

Some problems just refuse to go away. What does an employer do when, trying to terminate a plan, some participants due benefits cannot be located?

This thread started with a discussion about a plan that was terminated 10 years ago. Not only was the plan terminated, but the corpora-

Continued on page 22