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SIMPLE Plans and Recent IRS Guidance

by Pension Publications of Denver Inc.

Since the Small Business Job Protection Act's August 1996 introduction of the SIMPLE plan, ERISA practitioners have awaited Internal Revenue Service guidance on the adoption and administration of the SIMPLE plan. In Rev. Proc. 97-9, 1997-2 I.R.B., the IRS issued a model amendment a plan sponsor may adopt to convert an existing 401(k) plan into a SIMPLE 401(k) plan. More recently, the IRS issued Notice 97-6, 1997-2 I.R.B., which answers questions regarding SIMPLE IRA plan establishment and administration. The IRS also has published two model SIMPLE IRA plans, Form 5305-SIMPLE for an employer that wishes to designate a specific financial institution to receive the employer's SIMPLE IRA contributions and Form 5304-SIMPLE for an employer that does not wish to use a designated financial institution. This article reviews the basic SIMPLE plan requirements, highlighting some of the differences between the SIMPLE 401(k) plan and SIMPLE IRA plan, and discusses the IRS guidance. Note a reference only to a *SIMPLE plan* means both SIMPLE 401(k) *and* SIMPLE IRA.

The primary purpose of the SIMPLE plan is to encourage small employers to adopt a retirement plan for employees. An employer now may adopt a SIMPLE plan effective January 1, 1997. A SIMPLE plan may be in the form of a 401(k) qualified plan or an IRA. Under either type of plan an employer must provide employees with a fixed employer contribution *or* a matching contribution to qualify as a SIMPLE plan. If a plan satisfies the requirements for a SIMPLE plan, the employer need not perform any nondiscrimination testing for the plan year. The SIMPLE plan year must be the calendar year. A SIMPLE plan also is not subject to the top-heavy requirements. An employer adopting a SIMPLE plan may not maintain any other "*active*" qualified plan for its employees.

Eligible employer

An employer must be an *eligible employer* to maintain a SIMPLE plan. An eligible employer is an employer who employed, during the preceding calendar year, not more than 100 employees. To determine the number of employees, the employer disregards any employee

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DOL Addresses Key Issues for 401(k) Plan Market

by Jon W. Breyfogle and Roberta J. Ufford

A number of major issues affecting 401(k) plans are on the "front burner" of key regulators at the Department of Labor. This article covers two important issues recently addressed by the DOL. The first issue relates to potential prohibited transactions that arise when an institution offers asset allocation services in connection with a program of affiliated and unaffiliated mutual funds. The second issue relates to the payment of fees by mutual funds to service providers in connection with a 401(k) program. And, like many DOL efforts, the results are mixed.

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INSIDE

A PUBLICATION OF THE AMERICAN SOCIETY OF PENSION ACTUARIES

Actuaries, Consultants, Administrators and other Benefits Professionals

The *Pension Actuary* is produced by the executive director and the 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, the committee, or the editors of the *Pension Actuary*.

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.

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Focus on Government Affairs

Proposals to Enhance Pension Simplification

The ASPA Government Affairs Committee has devised an extensive list of proposed reforms to the retirement plan provisions of the Internal Revenue Code. These reforms include a simplified defined benefit-style plan, significant 401(k) revisions, simplification of full-funding limitations, provisions to remove confusing disparity between different types of plans and employers, and other reforms designed to make retirement plans more attractive and easier to administer.

This is not the first time GAC has attempted such a task. In 1993, the GAC Legislation Subcommittee, chaired by George J. Taylor, MSPA, devised an extensive set of proposals known as the Pension Expansion and Simplification Amendments (PESAS). These proposals included a call for the repeal of Internal Revenue Code section 415(e), the elimination of section 401(a)(9) minimum distribution requirements, the repeal of family aggregation, and other provisions that ultimately became part of the Small Business Job Protection Act of 1996. Unfortunately, many of the most important recommendations, including the elimination of the top-heavy rules and the establishment of a coherent national retirement income policy, were not adopted.

In the 3½ years since PESAS, many things have happened to strengthen ASPA's ability to influence legislation. Our participation in the legislative and regulatory process has earned us respect on Capitol Hill and appreciation of our technical expertise. The Government Affairs Committee has expanded to included many more members able to assist with important projects. ASPA has also hired a new executive director, Brian H. Graff, Esq., who brings to the Legislation Subcommittee his experience as a member of the staff of the congressional Joint Committee on Taxation.

In October, the GAC Steering Committee decided to bring back a special committee to revise our legislative goals and to make specific proposals to Congress based on the current situation. George Taylor, GAC cochair, once again presides over the new committee. Lawrence C. Starr, CPC, Edward E. Burrows, MSPA, David Gensler, MSPA, and Craig P. Hoffman, APM, all of whom served on the committee that prepared PESAS, returned to work on the new proposal. They were joined by Michael B. Preston, MSPA, David A. Pratt, Esq., Joan A. Gucciardi, MSPA, CPC, Kathryn H. Smith, APM, Cynthia A. Groszkiewicz, MSPA, Brian Graff, and S. Derrin Watson, APM. Among them, this new committee brings a wealth of insight and understanding on all phases of pension law to the task.

The committee held its first meeting January 17-18, 1997, at the ASPA winter committee meetings in Salt Lake City, Utah. In just 11 hours together, they hammered out an exciting set of proposals. At this point, various committee members have been assigned to refine specific proposals and to prepare a draft to go to Congress and to the Retirement Savings Network, an influential conglomerate of organizations interested in retirement savings. They will meet again in March to review the proposal and to begin work on several items on their long-range agenda. However, in the meantime we have been working with congressional staff members on developing a safe harbor defined benefit plan for small businesses that we call a Secure Asset For Employees (SAFE) plan.

SAFE Plan Proposal

The SAFE plan responds to a need felt by members of Congress to expand portable defined benefit-style coverage to small businesses. Lawmakers were concerned with the steep decline in the popularity of defined benefit plans, as well as the fact that pension money seldom stays in the retirement system once a rank-and-file employee changes jobs. They also wanted to provide further incentives to small-business owners to provide retirement benefits.

In developing the SAFE proposal, the committee took the best elements of what Congress was considering and combined it with their understanding of the real-world needs and concerns of business owners and plan administrators. They hope that the resulting fusion will not only be acceptable to Congress but will also benefit many small businesses and be straightforward for ASPA members to administer and promote. To enhance congressional acceptance and understanding, committee members are borrowing many of the best concepts from the recently enacted SIMPLE plans. Because the committee is still working with congressional staffers on the proposal, it would not be appropriate to disclose the details at this time. As this proposal develops we will keep ASPA members posted through ASPA's publications.

Other Proposals

The SAFE plans is only one of the legislative proposals GAC is working on. In brief, here are some of the others:

1. All top-heavy requirements (section 416) would be repealed. These rules have always discriminated against, and hence discouraged, small plans.

2. In the place of the summary annual report, each participant would receive an annual benefit statement, which would include the accrued benefit, the vested accrued benefit, pertinent participant data, and, in a defined contribution plan, the amount of the change attributable to gains and losses and the amount attributable to employer and employee contributions stated separately. The committee hopes that this will be more useful than the information they are currently required to receive.

3. The age 35 requirement for waiving the qualified preretirement survivor annuity would be repealed. As one committee member put it, the only other item in U.S. law that has a minimum age of 35 is the presidency. Why should a 30-year-old doctor and her husband be limited in their estate planning choices?

4. If neither the plan nor the participant designate otherwise, benefits would be distributable upon a participant's death to the participant's spouse, if any, and otherwise to his or her descendants. Only if there is no spouse or descendants (and, of course, no beneficiary designation) would distributions go to the participant's estate. Currently, many plans do not clearly specify what happens in the event of death absent a beneficiary designation. While the proposal would not override contrary plan language, it would serve as a default clause.

5. There would be a uniform definition of compensation that would apply for all purposes. The current patchwork of definitions of the same term is confusing and an invitation for plan defects.

6. Integration requirements would be revised to make them more coherent. This is particularly focused at defined benefit plans.

7. Projected benefits would be allocated ratably over future service. This would make plan funding more actuarially sound.

8. PBGC premium requirements would be revised to make them more equitable.

9. The full-funding limitations would be revised to repeal the changes made by OBRA '87. This would reduce the complexity of the full-funding calculation. Additional changes would be made to the termination solvency reserve requirements for defined benefit plans.

10. The 401(a)(17) compensation limit and the limitations under 415 would be increased to encourage the use of qualified plans in preference to nonqualified deferred compensation plans. The exact amounts we will recommend have not yet been determined, but we feel a measure like this is crucial for rank-and-file employees, who are left out of nonqualified plans.

11. 401(k) features could be added to any defined contribution plan or defined benefit plan (other than the proposed SAFE plans). Increased employee savings is a pivotal feature of a sound retirement policy. Moreover, expanding 401(k) features to pension plans will enhance the attractiveness of these plans, which typically provide more security for workers.

12. Corrective distributions from 401(k) plans would be taxable in the year actually received.

13. The multiple-use test of section 401(k) would be eliminated.

14. The 401(k) and 403(b) hardship withdrawal rules would be modified to permit withdrawal of interest on 401(k) elective contributions.

15. 401(k) deferrals would be excluded from compensation for purposes of determining limits on deductibility under section 404.

16. S corporation shareholders, partners, sole proprietors, etc., would be allowed to borrow from their plans on the same basis as other participants. The current restriction is one of the last vestiges of the old Keogh rules and serves no useful purpose.

17. An enrolled administrator or compliance specialist, who would be required to sign 5500 series forms, would be provided for. It is hoped that this will reduce the need for plan audits.

18. A remedial correction period for operational defects, similar to the one recently adopted by the IRS, would be allowed by statute. The legislation committee is pleased to see the new, more liberal, APRSC program and believes it is an important step in the right direction. We hope Congress will go further, and will make it permanent.

19. Plans would be allowed to be administered with reasonable, good-faith compliance with statutory changes until the plan year after the publication of final regulations. Most administrators know the difficulties of dealing with retroactively effective regulations which contain major changes from prior guidance.

20. SIMPLEs and SEPs would be required to file an annual form showing compliance with applicable tax code provisions. There is too much potential for mistakes in these plans to allow them to proceed without minimal filing requirements.

21. Minimum distribution requirements under section 401(a)(9) would be eliminated for actively employed 5 percent owners. The SBJPA '96 change to eliminate 401(a)(9) for nonowners was a recommendation of the original PESAS. We want to go a step further.

22. The premature distribution excise tax would be increased to 15 percent. This will further encourage leaving money in the retirement system and will act as a revenue enhancement to offset other proposals.

23. The $3,500 ceiling on cashing out participants under section 417 would be increased to $10,000. Forcing plans to retain small balances for 30 or 40 years is an unfair burden and increases the likelihood of the money ending up in a "lost participant" pool.

24. The missing participants' program would be expanded to include plans not covered by the PBGC.

25. Rollover requirements would be eased to enhance portability. A plan should not be subject to disqualification if it accepts a rollover from a plan which it believed in good faith to be qualified.

26. Once again, we would call for the establishment of a coherent national retirement income policy. The ongoing problems with the Social Security system make such an overall policy more important than ever.

27. The deductibility limit under profit-sharing plans would be increased to 25 percent.

28. The effect of aggregation under 414(b), (c), or (m) would be made uniform between those provisions. The current differences in handling deduction limits and certain other matters has no logical basis.

This is an ambitious set of proposals. They are proposals which, if adopted, will make pension law more comprehensible and sensible. There are other proposals which are on the committee's long-term list, including a complete review of section 417.

As with all GAC committees, input from ASPA members is welcome. If any ASPA members have concerns or suggestions, they should contact the ASPA office or send them by electronic mail to georgetaylor@pixpc.com.

SIMPLE Plans and Recent IRS Guidance

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who earned less than $5,000 during the preceding year. The related employer rules apply to determine whether an employer is an eligible employer and to determine employees eligible to participate in a SIMPLE plan. Any employer, including a tax-exempt employer or a governmental employer, may maintain a SIMPLE IRA plan. Any employer, including a tax-exempt employer, but not a governmental employer (subject to an exception for pre-TRA ’86 plans), may maintain a SIMPLE 401(k) plan. The employer applies the eligible employer test without regard to the *plan’s* eligibility requirements. An employer determines its status as an eligible employer with respect to the calendar year.

Change to ineligible employer status

If an eligible employer maintaining a SIMPLE plan becomes an ineligible employer in a subsequent year, the employer has a two-year grace period during which to continue the SIMPLE plan. If the employer becomes an ineligible employer because of an acquisition, disposition, or similar transaction, the two-year period applies only if the plan satisfies rules “similar to” the coverage transition rule for a change in controlled group members.

Exclusive plan requirement

A SIMPLE plan must satisfy the exclusive plan requirement. A plan satisfies the exclusive plan requirement if the employer does not make any contribution to any other qualified plan on behalf of any SIMPLE-plan-eligible employee for services during a calendar year while the employer maintains the SIMPLE plan. A “qualified plan” includes a plan qualified under Internal Revenue Code section 401(a), an IRC section 403(a) annuity plan, a governmental plan, a 403(b) plan, or a SEP. If an eligible employer maintains another qualified plan which is a fiscal-year plan, presumably the employer may terminate the other plan by the last day of the calendar year that ends within the fiscal year, then establish a SIMPLE plan to be effective for the calendar year after termination of the other plan. The fact an employer has not distributed all the assets of a terminated plan does not prohibit the employer’s adoption of a SIMPLE plan, provided no employee accrues a benefit under the terminated plan for any year in which the employer maintains the SIMPLE plan.

Eligible employee

The qualified plan eligibility requirements that apply to any 401(k) plan apply to a SIMPLE 401(k) plan. Therefore, a SIMPLE 401(k) plan may require an employee to complete one year of service and attain age 21 as conditions to participate under the plan. A self-employed individual may participate in a SIMPLE 401(k) plan. A SIMPLE 401(k) plan may exclude a specified group of employees, such as hourly employees, provided the plan satisfies the coverage requirements. In contrast, a SIMPLE IRA plan must provide plan participation for any employee, including employees under age 21, who (1) received at least $5,000 in compensation from the employer during *any* two preceding years, and (2) whom the employer reasonably expects to receive at least $5,000 in compensation during the year. An employer may provide more liberal eligibility requirements, for example by reducing the compensation requirement to $3,000. A SIMPLE IRA plan may exclude from plan participation union employees whose retirement benefits have been subject to collective bargaining.

Deferral limitation

An employee participating in a SIMPLE plan may make elective deferrals, expressed as a percentage of compensation, in an amount not exceeding $6,000 per calendar year. Notice 97-6 clarifies an employer may permit an employee to express the level of elective deferrals as a specific dollar amount. Furthermore, the employer may not restrict the amount of an employee’s elective deferrals to a SIMPLE IRA plan, for example by limiting the contribution percentage, except to comply with the $6,000 deferral limitation. A SIMPLE 401(k) plan is subject to the IRC section 415 limitation on annual additions. Therefore, an employee’s elective deferrals, when added to any employer contribution or matching contribution, may not exceed the lesser of 25 percent of the employee’s compensation or $30,000. The IRS informally has indicated a SIMPLE 401(k) plan may limit an employee’s deferrals to the extent necessary to satisfy the annual additions limitation but may not impose any other limitation on the amount of an employee’s deferrals (except the $6,000 limitation). An employer therefore could incur a 10 percent excise tax on nondeductible contributions with respect to a portion of the SIMPLE 401(k) plan contribution. The deduction issue generally should not present a practical problem because of the SIMPLE plan deferral limitation. The IRS may provide further guidance on this issue. A SIMPLE IRA plan is *not* subject to the annual additions limitation. An employee therefore may defer in a SIMPLE IRA plan an amount of compensation not exceeding $6,000, even if the deferral amount exceeds 25 percent of the employee’s compensation.

Required contribution — SIMPLE 401(k)

A SIMPLE 401(k) plan must satisfy one of two employer contribution options: (1) a 100 percent matching contribution on all of an employee’s deferrals not exceeding 3 percent of the employee’s compensation, or (2) a nonelective employer contribution of 2 percent of compensation for any eligible employee with at least $5,000 of compensation during the calendar year. The plan may permit the employer to choose from year to year, subject to a notice requirement, which option it will use for a particular year. If an employer chooses the matching contribution option, the employer does not have the discretion, under any circumstance, to limit the matching contribution to deferrals of less than 3 percent of compensation. However, under the matching contribution alternative, the employer does *not* make a contribution on behalf of an employee who elects not to defer any compensation. The idea of providing an employer contribution as a reward to employees who elect to defer compensation may make the matching contribution the most popular employer contribution alternative. If the employer elects the nonelective contribution alternative, the employer must provide a 2 percent nonelective contribution to any eligible employee who meets the $5,000 compensation threshold, without regard to whether the employee actually defers any compensation under the plan. To fulfill the 2 percent nonelective contribution requirement, the employer also must notify its employees of the election within a reasonable period of time before the 60th day before the beginning of the year.

The compensation limitation ($160,000 for 1997) limits the maximum matching contribution an employee may receive for 1997 to $4,800 (3% × $160,000) and limits the maximum nonelective contribution an employee may receive for 1997 to $3,200 (2% × $160,000).

Required contribution — SIMPLE IRA

The contribution formula for the SIMPLE IRA plan is similar but not identical to the SIMPLE 401(k) plan contribution formula. Like the SIMPLE 401(k) plan, the SIMPLE IRA plan must satisfy one of two employer contribution options. Unlike the SIMPLE 401(k) plan, an employer may elect to match a percentage of compensation *less than 3 percent*, but not less than 1 percent of compensation, for each employee who defers under the SIMPLE IRA plan. However, the employer may not elect to match less than 3 percent of compensation in more than two years during any five-year period. Furthermore, if the employer elects to match less than 3 percent of compensation, the employer must notify the eligible employees of the lower percentage within a reasonable period of time before the 60-day employee deferral election period. If the employer elects the nonelective contribution alternative, the employer must provide the 2 percent nonelective contribution to any eligible employee, without regard to whether the employee actually defers any compensation under the plan. Like the SIMPLE 401(k) plan, the SIMPLE IRA plan employer electing the 2 percent nonelective contribution alternative must provide notice of the election to its employees.

The compensation limitation applies to the 2 percent nonelective contribution alternative but ***not*** to the 3 percent matching contribution alternative. The effect of this partial application of the compensation limitation is an employee may receive a larger matching contribution under the SIMPLE IRA plan than under a SIMPLE 401(k) plan. For example, assume for 1997 the employer elects the 3 percent matching contribution alternative for its SIMPLE IRA plan. Assume further Employee P earns $200,000 in compensation for 1997 and defers $6,000 under the SIMPLE IRA plan. P is entitled to a matching contribution of $6,000, for a total of $12,000 in 1997 contributions to the SIMPLE IRA plan. In contrast, if the employer maintained a SIMPLE 401(k) plan, P's matching contribution would be $4,800 (3% × $160,000), for a total of $10,800 in 1997 contributions to the SIMPLE 401(k) plan, because the compensation limitation applies to the SIMPLE 401(k) plan.

Treatment of partners' matching contributions

The Treasury regulations treat a partner's 401(k) plan matching contributions as elective deferrals by the partner. The IRS informally has indicated it will apply the same treatment to a partner's (or other self-employed individual's) *SIMPLE plan* matching contributions. Under this interpretation, the maximum elective deferrals and matching contributions a partner could receive would be $6,000. In contrast, as discussed above, other employees could receive maximum 1997 deferral and matching contributions which total $10,800 ($6,000 + $4,800) in a SIMPLE 401(k) plan or $12,000 ($6,000 + $6,000) in a SIMPLE IRA plan. This treatment of a partner's SIMPLE plan matching contributions is consistent with the regulations but may dissuade a partnership from adopting a SIMPLE plan or may encourage the partnership to select every year the 2 percent nonelective contribution alternative in order to maximize each partner's SIMPLE plan contributions. The characterization of a partner's *matching* contributions does not affect the maximum *nonelective* contributions a partner may receive under a SIMPLE plan. The IRS likely will clarify these issues in the near future.

Compensation definition

Compensation for purposes of the SIMPLE 401(k) rules means W-2 wages *plus elective deferrals*. For a self-employed individual, compensation means net earnings from self-employment, without regard to the self-employed individual's SIMPLE plan contributions. "Net earnings" includes the reduction for the one-half of the individual's self-employment tax.

Exclusive contribution requirement

A SIMPLE 401(k) plan may not permit, and a SIMPLE IRA account may not receive, any contributions other than the employees' elective deferrals and the employer nonelective or matching contributions required under the SIMPLE plan.

100 percent vesting requirement

All contributions to the SIMPLE 401(k) plan or SIMPLE IRA accounts must be 100 percent vested.

SIMPLE 401(k) plan qualification requirements

Except to the extent the SIMPLE 401(k) plan rules apply, a SIMPLE 401(k) plan must satisfy the qualification requirements of any other 401(k) plan. For example, in addition to the eligibility requirements and the annual additions requirements discussed above, the SIMPLE 401(k) plan must satisfy the IRC section 401(k) distribution restrictions and the age 70½ required distribution rules.

Employer's deduction

The deduction limitation that applies to a 401(k) plan also applies to the SIMPLE 401(k) plan. An employer generally may not deduct an amount in excess of 15 percent of the compensation of employees participating in the plan. An employer may deduct all of the deferral, matching, and nonelective contributions to the SIMPLE IRA plan. The SIMPLE IRA contributions are not subject to the general 15 percent-of-compensation limitation that applies to a SEP or to the 15 percent-of-aggregate-compensation limitation that applies to a profit-sharing plan. The employer may deduct the contributions in the employer's taxable year within which ends the calendar year for which the employer makes the contributions. The employer may deduct matching or nonelective contributions the employer makes not later than the due date, including extensions, of the employer's tax return for the taxable year for which the employer makes the contributions. See new IRC section 404(m)(2)(B) with respect to SIMPLE IRA contributions.

The SIMPLE IRA contributions are not subject to the general 15 percent-of-compensation limitation that applies to a SEP or to the 15 percent-of-aggregate-compensation limitation that applies to a profit-sharing plan.

Timing of deposit of employees' deferrals

In addition to the timing rules discussed in the preceding paragraph with respect to the timing of employer contributions, special rules apply to the timing of the employer's depositing employees' deferrals. Under the Department of Labor's plan asset regulations, employees' deferrals become plan assets on the earliest date the employer reasonably can segregate the deferrals from the employer's own assets, but not later than the 15th business day of the month following the month of the deferral. An employer's failure to transmit timely the plan assets subjects the employer to potential fiduciary liability and prohibited transaction sanctions. Under the SIMPLE IRA provisions, an employer must deposit an employee's elective deferrals not later than *30 days* following the last day of the month to which the deferrals relate. The DOL has indicated it will amend the plan asset regulations to extend the *latest* date for deposit of SIMPLE IRA plan deferrals to the 30th day following the month of deferral to conform with the statutory provision for timing of deposit. However, the "earliest reasonable segregation" date still will apply and may require an employer to deposit employees' deferrals earlier than the 30th day following the month of deferral.

Other SIMPLE IRA administrative requirements

An employee may elect to participate in a SIMPLE IRA plan or may modify a prior election during the 60-day period before the beginning of any year. The employer, immediately before the 60-day period, must notify the employees of their right to defer. According to Notice 97-6, an employee has the right to modify a salary reduction agreement without restriction during the 60-day period. An employee who becomes eligible to participate in the plan other than at the beginning of the year may elect to participate during the 60-day period which includes either the date the employee is eligible to participate or the day before that date. Notice 97-6 clarifies, however, the employee must be able to commence deferral contributions as soon as the employee becomes eligible, regardless of whether the 60-day period has ended. The employer also may provide additional or longer election periods, such as quarterly election periods during the 30 days before each calendar quarter. An employee may terminate a salary reduction agreement at any time, but the plan may provide that an employee who terminates a salary reduction agreement during the year is not eligible to resume participation until the beginning of the next calendar year.

Reporting and disclosure

The qualified plan reporting and disclosure requirements generally apply to a SIMPLE 401(k) plan. Simplified requirements, including an annual trustee notice to the employer and an annual summary description and annual account statements to participants, apply to a SIMPLE IRA plan in addition to the deferral election notice discussed in the preceding paragraph.

Taxation of distributions/early distribution penalty

SIMPLE 401(k) plan distributions generally are taxable like other qualified plan distributions. SIMPLE IRA account distributions generally are taxable like other IRA distributions. With limited exceptions, a 10 percent early distribution penalty applies to IRA or qualified plan distributions to an individual who has not attained age 59½. However, the early distribution penalty is 25 percent, rather than 10 percent, for any early distribution during the first two years of an employee's participation in the SIMPLE IRA plan.

Rollover of distributions

The qualified plan distribution rules apply to a SIMPLE 401(k) plan. In contrast, an employee at any time may withdraw all or a portion of his or her SIMPLE IRA account. A SIMPLE IRA participant may avoid taxation with respect to a SIMPLE IRA distribution by making a rollover contribution to another IRA. After the first two years of an employee's participation in a SIMPLE IRA plan, the employee may rollover the SIMPLE IRA distribution to *any* IRA

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DOL Addresses Key Issues for 401(k) Plan Market

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Issue 1: Proposed DOL Exemption for Asset Allocation Program Involving Affiliated and Unaffiliated Mutual Funds

Asset allocation services raise issues under the Employee Retirement Income Security Act's prohibited transaction rules if the person providing mutual fund asset allocation services becomes an ERISA fiduciary by, for example, providing "investment advice" and at the same time receives (or its affiliate receives) fees from mutual funds under the program, such as investment management fees, 12b-1 fees, or administrative fees. In particular, a fiduciary's receipt of fees may raise issues under the "antikickback" prohibition of ERISA section 406(b)(3). In addition, if the fiduciary's fees vary based on the asset allocation advice, issues are raised under the fiduciary self-dealing rule of ERISA section 406(b)(1). One means of dealing with the prohibited transaction issues is to seek an exemption for the program or eliminate any conflicts of interest associated with the payment of fees under the program. Alternatively, under the DOL's interpretive bulletin covering participant education programs (IB 96-1), most asset allocation programs can be structured to avoid fiduciary status altogether, which eliminates the prohibited transactions concerns.

One approach — that of seeking an individual exemption for asset allocation advice — is highlighted by the DOL's recently proposed prohibited transaction exemption for the Wells Fargo Portfolio Advisor Program. The Wells Fargo program is a defined contribution plan program under which individual account assets are allocated among a combination of "proprietary" mutual funds advised by Wells Fargo, and "nonproprietary" mutual funds advised by unrelated persons. (61 Fed. Reg. 64150 (Dec. 3, 1996).) The DOL has issued a number of exemptions for asset allocation programs involving only proprietary mutual funds. (*See*, *e.g.*, PTE 96-59, 61 Fed. Reg. 40000 (July 31, 1996) (Paine Webber) and PTE 93-59, 58 Fed. Reg. 47290 (Sept. 8, 1993) (Prudential Mutual Fund Management).) This is the first one covering asset allocation among a combination of proprietary and nonproprietary funds.

The Wells Fargo Program

The Portfolio Advisor Program will be available to tax-favored plans, including IRAs, Keogh plans, SEP-IRAs and SARSEPs, as well as participant-directed defined contribution pension plans (*e.g.*, 401(k) plans) designed to be covered by ERISA section 404(c) and regulations thereunder (section 404(c) plans). Wells Fargo proposes to offer the asset allocation services through a selection of nine asset allocation models, each designed to satisfy different risk tolerances and investment horizons. Each model will have three asset classes (stock, bond, money market), and nine asset subclasses, each represented by a single proprietary or a nonproprietary mutual fund selected by Wells Fargo. Wells Fargo will specify an "investment mix," *(i.e.*, a proportionate allocation of account assets among the various asset subclasses) for each model.

Under the program, Wells Fargo recommends that participants invest in one of the models based on their responses to a questionnaire. Participants do not have to elect the recommended model but must choose from one of the nine available models. Participants may elect to have Wells Fargo rebalance their accounts that drift from the investment mix in the selected model as a result of investment experience. More importantly, Wells Fargo has discretionary authority to adjust a model's investment mix within specific limits, based on its analysis of market conditions, without the approval of the participant. In addition, after providing notice and an opportunity to terminate the arrangement, Wells Fargo may adjust a model's investment mix outside of the specific limits, replace one mutual fund with another (except that Wells Fargo may not replace a nonproprietary fund with a proprietary fund), or further divide subasset classes.

Required Fee Offsets

Under the proposed exemption, plans will pay Wells Fargo a "wrap fee" based on total assets invested in the models by each plan. However, Wells Fargo must offset or reduce the wrap fee by virtually every fee paid by proprietary and nonproprietary funds in connection with the purchase of mutual fund shares under the program, regardless of to whom the fees are paid. Specifically, a plan's fee will equal the investment fee (from 1.50 percent to 1.95 percent of total assets under management, depending on account size) minus —

- Any 12b-1 or other fees received by Wells Fargo from nonproprietary funds, which vary from .05 to .50 percent of assets invested in the nonproprietary funds through the program;
- Advisory fees (from .05 to .70 annually, depending on the fund) paid by proprietary funds to Wells Fargo, even though Wells Fargo may pay a portion of these fees for subadvisory services provided by Wells Fargo Nikko Investment Advisors (WFNIA), which (though formerly a joint venture between Wells Fargo and Nikko) is not affiliated with Wells Fargo;
- "Administrative fees" for, for example, portfolio custody and administration, transfer agency, and shareholder services (up to .30 percent annually) received by Wells Fargo from proprietary funds; and
- Administrative or distribution fees, including 12b-1 fees (ranging from .05 to .50 percent annually) that proprietary funds may pay to Stephens Inc., the sponsor and distributor of the

proprietary funds, which is unaffiliated with Wells Fargo.

The purpose of the proposed fee formula is to eliminate any conflict that Wells Fargo may have (by virtue of receiving fees and fees payable at different rates) in allocating assets among the proprietary and nonproprietary funds included in each model. According to representations in the exemption, Wells Fargo is "revenue neutral" with respect to funds selected by plan participants under the program. (The formulas required in the Paine Webber and Prudential exemptions had a similar purpose.) Ironically, the effect of this fee formula is that plans will pay more for the purchase of shares in the nonproprietary funds under the program than for the proprietary funds.

Other Conditions

In addition to the fee offset, the proposed exemption would require extensive disclosure to a plan fiduciary (or the individual covered by a participating IRA or Keogh plan) and similar disclosure to participants in section 404(c) plans. Among other items, advisory agreements between Wells Fargo and proprietary funds and distribution agreements between Wells Fargo and the nonproprietary funds must be provided on request. Wells Fargo would have to provide plan fiduciaries and directing participants with a "termination form" at least annually and whenever it adjusts the investment mix outside of permissible ranges, replaces a mutual fund with another, or further divides asset subclasses. This form reminds plan fiduciaries and participants that participation in the Portfolio Advisory Program may be terminated at any time without penalty and may be used as notice to Wells Fargo to terminate continued participation in the program.

Observations

We do not believe that this proposed exemption will be a model for asset allocation programs or for future DOL asset allocation exemptions. As noted above, in light of IB 96-1, service providers and mutual fund sponsors can offer asset allocation services without becoming fiduciaries, making exemptive relief for receiving fees unnecessary. In this regard, identifying which model is suitable to a participant could be covered by the safe harbors for asset allocation models and interactive materials in IB 96-1 under certain conditions. Indeed, under IB 96-1, Wells Fargo would be permitted to identify the specific funds offered in connection with each asset class under the program. Moreover, Wells Fargo should not be deemed to be a fiduciary by virtue of its automatic (nondiscretionary) "rebalancing" of accounts that drift from a specified investment mix.

As a result, virtually all of the services offered under the program could be structured to be nonfiduciary in nature. In our view, it is only Wells Fargo's limited discretion to change the investment mix and to replace funds under a model that would appear to make Wells Fargo an ERISA fiduciary in offering the program. Obviously, if Wells Fargo were not a fiduciary, no exemption would be required. We question whether the discretion to change investment mixes is an important enough element of the program to warrant the offset of all of the mutual fund fees paid under the program and the significant disclosure burden.

In addition, assuming that the fee offset structure eliminates any conflicts Wells Fargo may have in allocating plan assets among proprietary and nonproprietary funds, an exemption may not be necessary at all because there do not appear to be any prohibited transactions under ERISA section 406(b)(1) and (b)(3) which require exemptive relief. If Wells Fargo's exercise of discretion over the models would not result in a change to Wells Fargo's total fees, there would not appear to be a violation of the prohibition against self-dealing under ERISA section 406(b)(1). In addition, as discussed below, the DOL is in the process of changing its approach to analyzing issues under the ERISA section 406(b)(3) antikickback rule so that a fiduciary should not be deemed to violate ERISA section 406(b)(3) merely by receiving fees from a party dealing with a plan (*e.g.*, proprietary and nonproprietary funds) where the fees received are fully disclosed to and approved by an independent plan fiduciary.

Finally, the fee offset formula in the proposed exemption appears more onerous than the DOL has required in other similar situations in at least two respects. First, Wells Fargo does not appear to have a self-interest (for purposes of ERISA section 406(b)(1)) in whether Stephens Inc. or WFNIA receives fees from the proprietary funds because they are unaffiliated with Wells Fargo. Indeed, because Wells Fargo is offsetting fees paid by its proprietary funds to Stephens Inc. and fees paid for subadvisory services to WFNIA, the fees it receives under the program will be lower with respect to assets invested in proprietary funds than nonproprietary funds. As a result, the program will not be revenue-neutral for Wells Fargo as the exemption represents and Wells Fargo actually has a financial incentive to recommend nonproprietary funds. Second, it is possible that administrative fees and fees paid to an unaffiliated subadviser would not have to be included in an offset formula. In this regard, in the Paine Webber exemption, the DOL did not require an offset of administrative fees paid from proprietary funds to the fiduciary's affiliate. And, in the Prudential exemption, the offset formula required by the exemption took into account (as a reduction to the amount required to be offset) fees paid to unaffiliated subadvisers rendering services to the proprietary mutual funds.

Issue 2: DOL Changes Position on Key "Antikickback" Issue For 12b-1 Fees in Connection with Mutual Fund Program

It appears that the DOL recently reversed its approach to analyzing the receipt of 12b-1 and other fees from mutual funds by banks and other 401(k) plan service providers under the "antikickback" rule of ERISA section 406(b)(3). Specifically, it appears that the DOL will take the position that a fiduciary will not violate ERISA section 406(b)(3) by receiving a fee or other consideration from a party dealing with a plan (including, *e.g.*, 12b-1 or other fees from mutual funds in which plans invest) **unless** the fiduciary "causes" itself to receive the fee by exercising discretion as a fiduciary in connection with a related plan transaction. For example, a directed trustee will not violate ERISA section 406(b)(3) by receiving fees from mutual funds in connection with plan investments as long as the directed trustee does not have or exercise any fiduciary authority, or provide investment advice, in connection with the plan investments in the mutual fund.

Until recently, DOL officials have taken the position that a person who is a fiduciary for ERISA purposes may violate the "antikickback" rule under ERISA section 406(b)(3) by "receiving" a fee or other consideration from a party dealing with a plan, whether or not the fiduciary causes the payment. This position was based on the language of section 406(b)(3), which prohibits a fiduciary from "receiving" a fee or other consideration from a party dealing with a plan in connection with a plan transaction. DOL officials had compared this "passive" language to the language of ERISA sections 406(b)(1) and 406(b)(2), both of which expressly prohibit fiduciaries from "acting" in certain situations. However, the new "common sense" approach to analyzing whether the receipt of fees from mutual funds is permissible under ERISA's prohibited transaction rules will better serve everyone participating in the 401(k) bundled services market, including plan participants.

Unfortunately, the DOL's enlightened approach to ERISA section 406(b)(3) raises some new issues. Specifically, DOL officials are closely examining the circumstances in which a plan service provider could be deemed to be "exercising discretion as a fiduciary" in connection with its receipt of fees from mutual funds. For example, DOL officials have suggested that —

- A 401(k) product sponsor's right to change the menu of mutual funds available to a plan may result in the product sponsor exercising control over a plan's investments (and, in that event, the product sponsor's receipt of fees might violate ERISA section 406(b)(3));
- If fees paid by mutual funds are not fully disclosed to an appropriate plan fiduciary (*i.e.*, the named fiduciary or a plan administrator), the plan fiduciary may not have information that it requires to exercise control over plan investments; in such cases, a directed trustee receiving the fees (who has failed to make adequate disclosures) could be deemed to be a fiduciary in connection with the plan's investment transactions and its receipt of fees from mutual funds might violate ERISA section 406(b)(3).

In addition, even if a fiduciary must "act" in connection with a plan transaction involving the receipt of fees from a third party, this approach does not resolve issues raised when a plan service provider receiving fees from mutual funds offers investment advice in connection with the selection of plan investment options or offers discretionary asset management services to plans. In these situations, the plan service provider generally would be acting as a fiduciary in connection with plan investment transactions that result in the fiduciary receiving a fee, again raising issues under ERISA section 406(b)(3).

A number of advisory opinion requests concerning fees paid by mutual funds are pending with the DOL, including a joint request by the Investment Company Institute and the American Bankers Association. We expect that the DOL's revised approach to ERISA section 406(b)(3) to be explained when it ultimately responds in writing to these requests.

Jon W. Breyfogle and Roberta J. Ufford are attorneys with Groom and Nordberg, Chartered, a Washington, D.C., law firm that specializes in employee benefit law.

SIMPLE Plans and Recent IRS Guidance

Continued from page 7

the employee maintains. During the first two years of the employee's participation, the employee only may rollover the SIMPLE IRA distribution to another *SIMPLE* IRA account.

Employer's SIMPLE IRA trustee designation

The employer may designate a trustee to maintain the SIMPLE IRA accounts and to receive the employer's SIMPLE IRA contributions. The IRS has issued Form 5305-SIMPLE as a model plan document with a designated financial institution (or DFI). However, the employer must provide written notice (DFI notice) to each participant stating the participant may transfer the account balance, *without cost or penalty*, to another account. In Notice 97-6, the IRS relaxed the definition of "without cost or penalty" by permitting the DFI to limit the time and manner a participant may transfer freely his or her account balance. A DFI does not violate the without-cost-or-penalty requirement because it provides a participant only a reasonable period of time each year in which to transfer his or her balance without cost or penalty. A reasonable period is the 60-day deferral election period. During that period the participant may request to transfer his or her balance attributable to SIMPLE IRA contributions for the calendar year following the 60-day period (or for the balance of the year in the case of a new participant who commences participation during the year). The DFI notice must specify any withdrawal limitation. If a participant requests a transfer of his or her balance to another financial institution, Notice 97-6 states the DFI must transfer the balance on a reasonably frequent basis. Monthly transfer satisfies the reasonably-frequent-basis requirement. Finally, a DFI does not violate the "without cost or penalty" requirement because it charges *an employer* an amount which takes into account the DFI's responsibility to transfer or otherwise charges the employer for requested transfers, provided the employer does not pass the charge through to the participants requesting transfer of their balances.

Establishing a SIMPLE 401(k) plan for 1997

Rev. Proc. 97-9 permits an employer with an existing 401(k) plan to create a SIMPLE 401(k) plan by adopting a model amendment. The model amendment is available only to 401(k) plans which have received a current notification, opinion, advisory, or determination letter. Under a transition rule, an employer that has maintained a non-SIMPLE 401(k) plan in 1997 may adopt the model amendment for 1997 if the employer meets certain conditions. Specifically, the employer must adopt the model amendment by July 1, 1997, effective as of January 1, 1997. Furthermore, 1997 elective deferrals before and after adoption of the model amendment may not exceed $6,000 for any employee. Finally, the matching or nonelective contributions to the SIMPLE 401(k) plan must have a value equal to or greater than the contributions required under the plan prior to the amendment. The employer also must satisfy the notice requirement which applies to a SIMPLE 401(k) plan.

Pension Publications of Denver Inc. is a leading provider of ERISA publications, ERISA-related seminars, and qualified plan documentation. Each of PPD's primary staff attorneys has an LL.M. degree in taxation.

ASPA Professional Liability Insurance Program Enters 10th Year with Continued Improvement

Now beginning its 10th year, the ASPA Professional Liability Insurance Program continues to improve, as it has each year since it was started, to offer ASPA members by far the best combination of broad coverage, competitive cost, and stability of any professional liability insurance contract available.

The 1997 improvements, like those in past years, are made possible because of the program's good claims experience and continuing professional education. Here are the key improvements for this year:

- The definition of professional services clearly shows that coverage is provided for the sale of 401(k) plans and mutual funds.
- The definition also clearly shows that coverage is provided for investment counseling when no fee is charged for this service.
- You now have the option of purchasing a two-year or three-year policy, subject to certain underwriting requirements. This relieves you of the task of completing a renewal application annually. The full limits are reinstated annually, and the premium is payable in annual installments.

In addition to these new 1997 features, the ASPA program — and only the ASPA program — includes the following:

- Unlimited defense costs. Your defense expenses do not reduce the amounts available to pay a claim.
- Automatic 30-day "tail coverage," for no additional premium.

Also, if the only costs incurred for a claim are defense costs, your entire deductible is reimbursed. This is an unusual provision in professional liability coverage.

Whether or not you have coverage now, why not obtain a proposal through the ASPA program?

For a full description of the program's features, or for answers to any questions, please call Tracy Denman or Laurie Coleman at the CIMA Companies, (800) 468-4200. CIMA has been the administrator of the ASPA program since the program began.

Actuaries Almanac

July 1, 1996-December 31, 1996

Internal Revenue Service

Announcements

96-92 Where to file Employee Plans and Exempt Organization applications for certain Eastern and Southern states, August 29

96-122 Transition relief for SIMPLE plans, October 21

96-133 Where to file for Employee Plans and Exempt Organizations determination and other letters, December 13

Field Directives

Requirement for definite predetermined allocation formula — recision of prior memorandum, August 1

Information and News Releases

IR 96-43 Cost-of-living adjustments for dollar limits on benefits provided under qualified plans, October 24

IR 96-44 Safe harbor requirements under Internal Revenue Code section 530 to classify workers as independent contractors, October 30

Notices

96-53 IRS permission not needed to establish medical savings accounts, November 29

96-64 Nondiscrimination rules for plans maintained by governments and tax-exempt organizations, December 3

96-67 Minimum distribution requirements of IRC section 401(a)(9), as amended by section 1404 of the Small Business Job Protection Act, December 13

97-2 Guidance and transition relief to revised nondiscrimination rules under IRC sections 401(k) and 401(m), December 20

97-6 Guidance on SIMPLE plan provisions in the form of questions and answers, December 23

97-10 Sample language for a spouse's waiver of a QJSA or a QPSA, December 30

97-11 Sample language for a QDRO, December 30

Regulations

62 FR 25,84 Proposed rule making and final and temporary regulations on requirement to file Form 4720 by disqualified persons and organization managers liable for section 4958 excise taxes, January 3

Revenue Procedures

96-49 Model amendment for plan sponsors to amend their plans to comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, October 7

96-55 Model amendment for rollovers from a money purchase plan to a profit-sharing or stock bonus plan, December 9

96-56 The IRS will not issue rulings or determination letters on the tax effect of provisions under the Small Business Job Protection Act affecting plans described in IRC section 457, December 16

97-9 Model amendment for 401(k) SIMPLE provisions, December 20

Department of Labor

DOL writes to Treasury and the IRS concerning the department's position regarding the time limits for depositing salary reduction elective contributions for SIMPLE plans, October 31

Pension Benefit Guaranty Corporation

Regulations

61 FR 34002 PBGC renumbers all agency regulations, July 1; 61 FR 67942, corrections, December 26

61 FR 63988 PBGC final rule on reportable events, December 2

Statements of Policy

61 FR 63874 Policy on penalties for late payment of premiums for 1996 and later years, December 2

61 FR 66338 Assessment of penalties for failure to submit premium related information, December 17

C-1, C-2(DB), C-2(DC) Course Sites and Coordinators

Locations and meeting times for the QPA and CPC courses can be obtained from the coordinator listed in your area. Course offerings vary based on interest and instructor availability. Please contact the course coordinator to verify availability. If you are interested in having a course set up in an area not listed below, please call the ASPA Education and Examination Department at (703) 516-9300. Course sites and coordinators are subject to change.

Alaska

Anchorage
Shirleen Noble
(907) 276-3090

Arizona

Phoenix
Kerry Boyce
(602) 948-8879

California

Los Angeles
Bob Eastwood
(310) 316-1334

Monterey
Sharon Baca
(408) 422-0651

Orange County
Douglas Van Galder
(714) 260-1880

Pasadena
Gerald Sullivan
(213) 688-3381

Sacramento
Pamela Constantino
(916) 773-3480

San Francisco
Maribel Zaballero
(415) 984-2384

San Jose
Catherine Peery
(408) 422-0651

Santa Barbara
Theresa Lensander
(805) 962-9334

Connecticut

Hartford
George Revoir
(203) 561-3010

Norwalk
Robert Grathwohl
(203) 838-0535

Florida

Jacksonville
Lorraine Dorsa
(904) 249-9171

Miami
Marc Schoen
(305) 461-0033

Orlando
Sandra Turner
(407) 425-5036

Tampa
Marissa Pietschker
(813) 932-1211

Idaho

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Julie Brown
(208) 344-2111

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(312) 427-9140

Rockford
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(815) 961-7465

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(219) 455-2223

Indianapolis
Rusty Lawhorn
(317) 849-4333

Iowa

Davenport
James Spring
(319) 326-3292

Des Moines
Donna Schecher
(515) 248-8260

Kansas

Wichita
Scott Slagle
(316) 265-2811

Louisiana

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Beverly Haslauer
(504) 837-9546

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Allen Cairns
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Baltimore
Donna Welsh
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(617) 542-0101

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Jeff Roberts
(206) 545-6061

Wisconsin

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Kevin Fliege
(608) 274-9546

Milwaukee
Ginny Gribble
(414) 961-5470

32nd Actuarial Research Conference

The Actuarial Research Conference, which provides a central meeting for academics and researchers interested in all aspects of actuarial science, will be held Wednesday, August 6, through Friday, August 8, 1997, at the University of Calgary in Calgary, Alberta, Canada.

Presentations on all topics of interest to actuaries are welcome.

For more information, contact Dr. David P.M. Scollnik, Department of Mathematics and Statistics, University of Calgary, 2500 University Drive NW, Calgary, Alberta, Canada T2N 1N4; phone: (403) 220-7677, fax: (403) 282-5150.

Additional information about the conference can be found on the World Wide Web:

http://balducci.math.ucalgary.ca/32ndarc.html.

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 that we sell in the *Information Resources Catalog*. This catalog provides a quick and easy way to determine what material is available through ASPA.

There are numerous texts and reference books that every pension practitioner needs on his or her shelves. A number of these texts are available through ASPA. The catalog is organized by subject matter to make it easy to find the material you need. 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 some money, but your order also helps to support the services ASPA provides to its membership.

Calendar of Events

		ASPA CE Credit
February 1 - March 10	Registration for spring courses. (After the registration date, contact the local course coordinator or instructor or the ASPA office for enrollment information.)	
February 21	Pension Simplification One Day Workshop — New York City	7 credits
February 28	Pension Simplification One Day Workshop — Los Angeles	7 credits
March 10	C-1, C-2(DB), C-2(DC), and HW-1 spring courses begin (Beginning dates of courses may vary from location to location. Please contact the local course coordinator or instructor for details.)	20 credits
March 17-19	Enrolled Actuaries Meeting — Washington, D.C.	
March 20	Early deadline for filing applications for jointly sponsored examinations A-1 [EA-1(A)] and A-2 [EA-1(B)]	
April 15	Final deadline for filing applications for jointly sponsored examinations A-1 [EA-1(A)] and A-2 [EA-1(B)]	
April 17-18	ASPA/IRS Midstates Benefits Conference — Chicago	15 credits
April 18-19	A-1 [EA-1(A)] course — Chicago†	15 credits
April 20-21	A-2 [EA-1(B)] course — Chicago†	15 credits
April 25	401(k) One Day Workshop — San Francisco	7 credits
April 25-26	A-1 [EA-1(A)] course — Los Angeles†	15 credits
April 27-28	A-2 [EA-1(B)] course — Los Angeles†	15 credits
April 28	401(k) One Day Workshops — Houston and Columbus, Ohio	7 credits
May 1	Early registration deadline for ASPA June examinations	
May 2-3	A-1 [EA-1(A)] course — Washington, D.C.†	15 credits
May 3-4	C-1 course — Philadelphia	15 credits
May 3-4	C-2(DB) course — Chicago	15 credits
May 3-4	C-2(DC) and C-4 courses — Los Angeles	15 credits
May 4-5	A-2 [EA-1(B)] course — Washington, D.C.†	15 credits
May 4-7	Business Leadership Conference — Miami	10 credits
May 10	Final registration deadline for ASPA June examinations	
May 16	401(k) One Day Workshops — Atlanta and St. Louis	7 credits
May 17-18	C-2(DB) course — Jacksonville, Fla.	15 credits
May 17-18	C-3 and C-4 courses — Philadelphia	15 credits
May 19	401(k) One Day Workshop — Tampa, Fla.	7 credits
May 20	Jointly sponsored examinations [A-1 EA-1(A)] and A-2 [EA-1(B)]	*

June 1	Plan Design One Day Workshop — New Orleans	7 credits
June 1-4	Eastern Regional Seminar — New Orleans	20 credits
June 4	C-1, C-3, and C-4 exams	*
June 5	C-2(DC) exam	*
June 6	C-2(DB) and HW-1 exams	*
June 20	401(k) One Day Workshops — Philadelphia and Chicago	7 credits
July 13	Business Issues One Day Workshop — Seattle	7 credits
July 13-16	Western Regional Seminar — Seattle	20 credits
Sept. 18-19	Western Region IRS/Practitioners Benefits Conference — Los Angeles	15 credits
Nov. 2-5	Pension Actuaries and Consultants Conference — Washington, D.C.	20 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 greater than 5), and no credit for failing with a score of 5 or lower.

1997 Midstates Benefits Conference

April 17-19 in Chicago

The ASPA 1997 Midstates Benefits Conference, which is cosponsored by the Internal Revenue Service, will be held April 17-18, 1997, at the Rosemont Convention Center in Rosemont, Ill.

Some of the feature presentations at the conference include these: IRS Regulatory and Legislative Developments; New APRSC Procedures; New 401(k) Rules; IRS and U.S. Department of Labor Litigation; Welfare and Cafeteria Plan Issues; 401 (k) Plan Issues in Mergers, Acquisitions and Dispositions; and many more important topics.

The 1997 Midstates Benefits Conference will provide 16 hours of ASPA continuing education credit, and approval from various state organizations is pending. The conference is designed to offer enrolled actuaries 16 hours of continuing education credit; however, the final decision rests with the Joint Board for the Enrollment of Actuaries. The early registration fee is $305 if postmarked before March 29. After March 29, the registration fee is $350. Registration includes a binder of conference materials. Additional binders are available for $60. For more information, please call the ASPA Meetings Department at (703) 516-9300.

ASPA Seeks Director of Technical Education for National Office

The American Society of Pension Actuaries is seeking an individual for the position of director of technical education. The director will provide technical educational services to ASPA's national office staff, Education and Examination Committee, and ASPA members.

A primary duty of the director will be to review materials prepared by the Education and Examination Committee for consistency and technical accuracy. In addition, the individual will evaluate and catalog textbooks and assist in course development and promotions. The director will also attend committee meetings and seminars and conferences when appropriate. Various technical support for other committees and ASPA events will also be required.

A candidate for this position should be a credentialed ASPA member with five to 10 years of consulting experience and expertise in both defined benefit and defined contribution plans. It is also necessary to demonstrate good writing and teaching skills. Please send resumes by March 15, 1997, to —

ASPA
Attention: DOTE
Suite 820
4350 North Fairfax Drive
Arlington VA 22203-1619

PIX Digest

PIX Thread of the Month— Elimination of Family Aggregation

Pension simplification continues to be a hot topic on PIX as users begin to look at their 1997 plan years and the plan design implications of the changes.

One of the most significant changes, of course, is the elimination of the family aggregation rules. In the thread entitled *Elimination of Family Aggregation*, PIX users discuss the implications of this change in the context of a defined benefit plan and the average compensation to be used for participants who were formerly part of an aggregated family group.

Some of the issues discuss how this change can apply retroactively, the differences between what the law permits and how the plan language may act to limit the average compensation of these participants, and what the average compensation might be absent any changes to the plan. Additional concerns were also discussed. Consideration must be given to the proximity of the affected participants to normal retirement and how a sudden jump in benefits could affect the funding of the plan. Also, does this increase in benefits constitute an accrual granted due to past service that might in some way be discriminatory? In cases where it is advantageous, is it possible to retain family aggregation?

To read the entire discussion, download the thread nofamag2.fsg from library 3 of forum 1.

Other PIX Threads of Interest

Association Plans

How many times has one of your referral sources called you about setting up a master plan for a business or trade association or franchise operation? They assume a plan can be established that can easily and inexpensively be adopted by all the members of the association, with great economies of scale, resulting in very low administrative costs for each member.

Can it be done? Yes. Should it be done? Maybe not. Are there economies of scale? What are the pros and cons of such a plan? In the thread *Association Plans*, a user asks about setting up such a plan and what the administrative issues are. The discussion points out that as a multiple employer plan, each employer will be required to file 5500 forms, and each employer will have to have separate testing for 401(a)(4), 401(a)(26), 410(b), 416, and ADP/ACP. In addition, though each participating employer may be well under 100 employees, the plan overall may easily exceed this threshold, requiring an audit of the plan at additional cost.

Further comment discussed the loss of flexibility among each employer and the risk of plan disqualification to all adopting employers due to an error made by one employer.

For the whole story, download assnpl2.fsg from library 3 of forum 1.

Cross-Tested Plans and Age Discrimination

While cross-tested plans are rightfully becoming more and more popular, consideration must be given to designing plans that do not violate the Age Discrimination in Employment Act.

What if a cross-tested plan fails 401(a)(4), and a corrective amendment is adopted that allocates an additional contribution to the youngest two non-highly compensated employees? Does such an amendment violate the ADEA? Keep in mind, even though your plan may have a favorable determination letter, the Internal Revenue Service is not reviewing the plan for ADEA compliance.

A PIX user who participated in this thread was concerned about a plan that provides a higher allocation rate for those born after a certain date. He was working with an IRS reviewer on the determination letter and relayed some of the comments the reviewer had. Of course, the Equal Employment Opportunity Commission administers the ADEA, so his comments are not conclusive. One user wondered if ERISA would preempt the ADEA, but another user showed pretty conclusively that it does not.

For those of us who design and administer cross-tested plans, reading this thread is essential. We have to be reminded to look outside the box of 401(a) of the Internal Revenue Code to avoid violating other statutes. The entire thread can be obtained by downloading ADEA2.fsg from forum 1, library 3.

How to Value and Divide Plan Benefits in Divorce

For actuaries and other experts who are hired to value community property interests in qualified plans, this thread compares and contrasts two common methods of valuation — the application of time and service to defined contribution plan account balances and the method of directly tracing the contributions and earnings allocated during the marriage.

The discussion points out some case law, and discusses the problems with each method, as well as the potential for abuse by the participant spouse.

Download this thread, named comprop2.fsg, from library 3 in forum 1.

PIX BBS support and registration information

voice : (805) 683-4334 • fax: (805) 683-0369