A publication of the American Society of Pension Actuaries *Vol.XXX, Number 3* *May-June 2000*

THE Pension Actuary

ASPA
Dedicated to the Private Pension System

WASHINGTON UPDATE

ASPA Survey Confirms that New Comparability Expands Small Business Retirement Plan Coverage

by Brian H. Graff, Esq.

As you all know, on February 24, 2000, Treasury and IRS issued Notice 2000-14 in which they announced that they are reviewing the current nondiscrimination regulations, particularly the rules governing so-called "new comparability plans." New comparability plans are an important plan design option for small businesses, where they provide valuable retirement plan coverage for small business employees who, in many cases, previously had no coverage. Under new comparability plans, an employer makes contributions on behalf of employees whether the employee saves on his or her own. Over 300 firms responded to our survey giving us valuable information on over 10,000 new comparability plans. ASPA's Government Affairs Committee sincerely thanks all of you who made the effort to respond to the survey. Following is a summary of the survey results:

Continued on page 8

Department of Labor Issues Voluntary Fiduciary Correction Program First Proposed by ASPA

by R. Bradford Huss, APM

The Pension and Welfare Benefits Administration (PWBA) of the Department of Labor on March 14, 2000 issued an innovative Voluntary Fiduciary Correction (VFC) program designed to encourage self-correction of certain violations of the Employee Retirement Income Security Act. The release of the VFC program is a major victory for ASPA's Government Affairs Committee, which originated the concept and recommended it to the DOL. The Government Affairs Committee has for the past several years submitted detailed written proposals and engaged in discussions with the DOL with respect to the potential structure of a VFC program.

IN THIS ISSUE

Focus on GAC **3** • Cafeteria Plans – A Refresher Course **4** • New Reporting Requirements for Payments from Insurance Companies **5** Recollections of an Old Timer of ASPA's Early Days, Its Triumphs and Misfortunes **6** • ASPA Benefits Councils' Calendar of Events **16** Welcome New Members **22** • Best of the Business Leadership Conference **30** • Los Angeles Benefits Conference **30** • 2000 ASPA Summer Conference **31** • Nominations Open for ASPA's Board of Directors **31** Focus on ABCs **32** • Focus on CE **33** • Focus on E&E **34** PIX Digest **35** • Bulletin Board **36** • Calendar of Events **36**

Overview of the VFC Program

The VFC program lists thirteen specific types of fiduciary breaches eligible to be corrected under the program and provides a procedure for making a VFC application. The program also sets out the required methods for correcting the specified violations and contains examples of potential violations covered under the program and appropriate corrective action. Anyone who may be liable for fiduciary violations under ERISA, including employee benefit plan sponsors, fiduciaries, plan officials and parties in interest, may apply under the program. An applicant must fully and completely correct violations in accordance with the requirements of the program before submitting an application. Except for two of the specified eligible violations, the program applies to welfare plans as well as retirement plans. The program went into effect on April 14, 2000 and is being administered by the PWBA's regional offices, with each office having a coordinator assigned to the program.

Utilization of the program essentially follows five steps:

1. Identification of a potential or actual fiduciary breach and determination of whether it falls within the thirteen specific types of violations eligible for the program;
2. Implementation of the mandatory methods of correcting the specific violations;
3. Calculation and restoration of any losses to the plan or improper profits by plan fiduciaries, with interest, and distribution of any necessary supplemental benefit payments;
4. Notification to plan participants and beneficiaries; and
5. Filing an application under penalty of perjury with the appropriate PWBA regional office, which includes a written narrative and supporting documents describing the transaction and providing evidence that the corrections have been made.

Only the thirteen specific financial transactions identified in the program are eligible to be corrected under the program. Fiduciary breaches falling outside the specified transactions are not eligible to be processed under the program and a fiduciary that voluntarily corrects such a breach will not receive the benefits of the program. Applicants who comply with the terms of the program will receive a "no action" letter from the PWBA stating that it will not initiate a civil investigation under Title I of ERISA concerning the applicant's responsibility for transactions described in the letter nor assess the 20% ERISA §502(l) penalty. The DOL does reserve the right to conduct investigations to determine the accuracy and completeness of the representations made in the application and whether full correction was made. Correction may not be made under the VFC

Continued on page 10

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.

ASPA members are retirement plan professionals in a highly diversified, technical, and regulated industry. ASPA is made up of individuals who have chosen to be among the most dedicated practicing in the profession, and who view retirement plan work as a career.

Editor in Chief
Brian H. Graff, Esq.

Pension Actuary Committee
Chris Stroud, MSPA, Chair
Amy L. Cavanaugh, QPA
Constance E. King, CPC, QPA
Robert M. Richter, APM
Daphne M. Weitzel, QPA

Managing Editor
Chris Stroud, MSPA

TPA Consultant
Stephanie D. Katz, CPC, QPA

Associate Editors
Jane S. Grimm and Amy E. Emery

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

Layout and Design
Chip Chabot and Alicia Hood

ASPA Officers

President
John P. Parks, MSPA

President-elect
George J. Taylor, MSPA

Vice Presidents
Joan A. Gucciardi, MSPA, CPC
Craig P. Hoffman, APM
Scott D. Miller, FSPA, CPC

Secretary
Gwen S. O'Connell, CPC, QPA

Treasurer
Cynthia A. Groszkiewicz, MSPA, QPA

Immediate Past President
Carol R. Sears, FSPA, CPC

Ex Officio Member of the EC
Sarah E. Simoneaux, CPC

American Society of Pension Actuaries, 4245 North Fairfax Drive, Suite 750, Arlington, Virginia 22203
Phone: (703) 516-9300, Fax: (703) 516-9308, E-mail: aspa@aspa.org, World-Wide Web: **www.aspa.org**
© ASPA 2000. 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.

Focus on GAC

IRS, Treasury, DOL and PBGC Meetings

In March, members of ASPA's Government Affairs Committee (GAC) met in Washington, D.C., to assess the activities of the past and to set goals for the future. In conjunction with these meetings, teams of GAC members visited the offices of the Internal Revenue Service, Treasury, Department of Labor, and Pension Benefit Guaranty Corporation for face-to-face discussions with top agency officials. These meetings create an effective forum for retirement plan professionals, along with people inside the government, to review how the regulations function in practice. Following are summaries of the meetings prepared by GAC members in attendance.

IRS

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

At the semi-annual meeting of the ASPA Government Affairs Committee (GAC) held in Washington, D.C. in March, members of the Committee met with officials of the IRS to discuss issues which are important to ASPA members.

IRS Restructuring

The old Employee Plans/Exempt Organizations Division has become the Tax Exempt and Governmental Entities Division (TEGE). While much of the restructuring of TEGE has taken place, the IRS officials indicated that we should not see any real changes in operations until late summer or early fall of this year.

Significant changes will occur in the administration of the voluntary remedial programs under the Employee Plans Compliance Resolutions System (EPCRS). Before the restructuring, VCR was handled in the EP Headquarters in Washington, D.C., and Walk-in CAP was administered in the field offices in the various regions by Revenue Agents who coordinated with a Regional CAP coordinator. We understand that TEGE is creating groups of specially-trained agents around the country to handle the voluntary EPCRS programs (that is, VCR, SVP and Walk-in CAP). Audit CAP and audit reviews of APRSC will continue to be handled by the Revenue Agents in the field, with coordination initially through their group managers and ultimately through cooperative efforts between the audit and rulings functions.

On behalf of the membership, we stressed the importance of making sure that there was national coordination of the programs and uniform training of all personnel involved in the EPCRS programs to ensure fair and consistent treatment of all plan sponsors.

GUST Remedial Amendment Period

While we expressed appreciation for the issuance of Rev. Proc. 2000-20, which opened the review process for prototype plans, we also expressed concern about whether it would be possible for all plans to be amended within the current Remedial Amendment Period (RAP). Currently, plans must be amended by the end of the plan year beginning in 2000 – unless they are restated on a prototype plan. Prototype and volume submitter adopters will have 12 months after the date of the IRS approval letter for the lead documents in which to restate the document.

We noted that the determination letter program had not been opened for all plans. The IRS officials were unable to tell us when it would be opened. We also pointed out that,

Continued on page 17

Cafeteria Plans – A Refresher Course

by Amy L. Cavanaugh, QPA

Cafeteria plans offer employers an opportunity to provide their employees with a valuable benefit at little or no cost. As the cost of health benefits continue to skyrocket, many employers have found that offering a cafeteria plan can help soften the blow of insurance rate increases. Cafeteria plans also offer employers an opportunity to provide employees a choice in benefits. This assures that benefit dollars are utilized effectively. Cafeteria plans are generally sold as low cost, low maintenance employee benefits. While the tax savings can generally support a plan's administrative costs, it is important that the plan sponsor be aware of the ongoing obligation to perform annual administration and comply with certain regulatory requirements including nondiscrimination testing. In the past, the nondiscrimination tests have been largely ignored. However, despite a general lack of clarity as to how some of these tests should be applied, a good faith effort to comply with these rules is essential. Most recently the IRS released both proposed and final regulations with respect to the events that can give rise to a mid-year benefit election change. Although these regulations are not effective until plan years beginning on or after January 1, 2001, they are able to be relied upon immediately.

Legislative and Regulatory History

Section 125 was added to the Internal Revenue Code as a part of the Revenue Act of 1978. Proposed Regulations were issued in May of 1984 and in February of 1986. To date, neither set of regulations have been finalized. These regulations should be relied upon in absence of final guidance.

Section 89 was added to the Internal Revenue Code as part of the Tax Reform Act of 1986 (TRA 86). Section 89 was intended to provide a comprehensive set of guidelines with respect to the operation of welfare benefit plans. Compliance with Section 89 was deemed to be administratively onerous, and, as a result, the statute was repealed in its entirety. This resulted in a return to the pre-TRA 86 nondiscrimination rules-these rules are discussed later within this article.

Since that time, the Family and Medical Leave Act (FMLA) was passed in 1992. Several years later the IRS issued proposed regulations that coordinate the cafeteria plan election rules with the requirements of the FMLA. Generally, these regulations permit a participant to revoke benefit coverage while on a FMLA covered leave of absence and have coverage reinstated upon returning to work. Alternatively, for a participant who elects to continue coverage during a FMLA leave, the participant can generally elect to pay for coverage on a pre-paid basis before going on leave, on a pay-as-you-go basis while on leave, or pay the premiums after returning to work.

In addition, in 1997 proposed regulations were released with respect to when cafeteria plan election changes may be made with respect to accident and health coverage and group-term life insurance. Also, recently released proposed regulations offer some guidance with respect to the coordination of cafeteria plans that include medical reimbursement accounts, or "health FSAs" with COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985) and HIPAA (Health Insurance Portability and Accountability Act of 1996). Medical reimbursement

Continued on page 23

New Reporting Requirements for Payments from Insurance Companies

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

The Schedule A to the newly released Form 5500 has changes affecting third party administrators and others who receive payments from insurance companies. The revised Schedule A now requires disclosure of "fees" paid to "other persons," in addition to the question on prior versions of the Schedule A asking for information on commissions paid to brokers and agents. (The new Schedule A requires disclosure of payments for plan years beginning after 1998.) Because the terms "other persons" and "fees" are not defined in either the instructions to Schedule A (or in Section 103(e) of ERISA, from which this disclosure obligation is derived) and because of the wide variety of arrangements prevalent in the insurance industry for paying service providers who assist in the establishment and administration of the plans, these terms take on special significance.

Identification of the Issue

Section 103(e) of ERISA provides as follows:

> "**Section 103(e)** If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company …, a report under this section shall include a statement from such insurance company … covering the plan year and enumerating ...
>
> (2)…commissions, and administrative service or other fees or other specific acquisition costs paid by such company …;… and the names and addresses of the brokers, agents, or **other persons** to whom commissions or **fees** were paid, the amount paid to each, and for what purpose....." [Emphasis added]

The revised question on the Schedule A (asking for the names of agents, brokers, and other persons to whom insurance fees and commissions were paid) reflects the language of the statute. In the absence of a statutory or regulatory interpretation of the terms "other persons" and "fees", and in light of the evolving relationships within the insurance and benefits industries, a large number of previously unreported transactions may now be required to be reported on Schedule A.

In the preamble to the newly released 5500 package, the DOL noted that several commentators had:

> "…questioned the proposed requirement to report fees and commissions paid to "other persons" noting that the current Schedule A requests this information only for "agents and brokers." Section 103(e) of ERISA includes "other persons" with agents and brokers in defining the requirement to report insurance contract fees and commissions. Further, the current Schedule A instructions provide that fees paid by insurance carriers to persons other than agents and brokers should be reported on the Schedule A as acquisition costs, administrative expenses, etc., as appropriate, and note that for large plan filers these fees paid to "other persons" are subject to separate reporting on the Schedule C. In light of the above, the requirement to report fees and commissions paid to "other persons" has been retained in the Schedule A *because the Department believes it serves important enforcement targeting and disclosure purposes to require individual identification of all persons who are paid insurance fees and commissions.*" [Emphasis added]

The italicized language in the preamble confirms the DOL's interest in knowing, through reporting on Schedule A, payments by insurance companies to the plan service providers. In addition, it appears that the DOL is considering investigatory and enforcement activities for undisclosed fees.

On April 6, the Pension and Welfare Benefits Administration (PWBA)

Continued on page 26

Recollections of an Old Timer of ASPA's Early Days, Its Triumphs and Misfortunes

by R. William Dozier, Jr., FSPA, CPC, 1987 ASPA President

MILLENNIUM FEATURE

I suppose the story of ASPA's beginnings should start with our founder, Col. Harry Eidson, FSPA, CPC, who, at the time of Pearl Harbor, was the only qualified P-40 pilot in Washington, D.C. The Japanese were successful in decimating our Air Force at Nichols Field in Manila and Hickham in Honolulu, but never tried to get Harry in Washington, D.C. The enemy would not have had too much trouble with Harry, because his P-40 was not outfitted with machine guns. As a matter of fact, the story is told that it was several weeks after Pearl Harbor before Harry's plane was armed; then several more weeks before the Air Corps got around to issuing him bullets. The Colonel returned from active duty early in 1946 and became active in the sale and servicing of insured pension plans.

This became a very lucrative pursuit, particularly for fully insured plans servicing large expanding companies during the late forties and early fifties. My father was also an early pioneer, beginning in the late thirties, and when I joined him in 1952, his renewal income from pension business was quite substantial and it appeared that it would accelerate at a never ending pace.

Two events, however, occasioned an abrupt halt. The first was the court's recognition of the "prudent man rule" and the second was the continual rise in the stock market which over shadowed the small return in fixed dollar investments. Remember, this was before insurance companies established the "separate account," variable life, universal life and variable annuity contracts. The consulting actuaries in league with bank trust companies ripped apart and replaced the previous lucrative (to the agent) fully insured plans.

I mention this background because this was the motivating reason that Harry Eidson, FSPA, CPC; Carl Duncan, FSPA; and Bill White, MSPA, attempted to attend the Consulting Actuaries meeting in New Orleans. They wanted to learn how to protect their insured plans, but were turned away because they had not passed any Society of Actuary exams, nor had they been admitted to the Conference of Consulting Actuaries due to their background experience.

The Beginning of ASPA

The first ASPA meeting was held in 1966 at Purdue University with approximately 60 in attendance. The meeting followed a "how to" seminar specifically designed for life insurance agents. By this time, most of us had protected our relationship with prior fully insured plans by converting to a combination method (split-funding) of funding pension benefits with ordinary life contracts and a separate trust fund (side fund) to be sufficient together with the cash values to provide the promised pension at normal retirement date.

I did not attend this first meeting, but did attend the second which was held in the fall of 1967 in Philadelphia. Carl Duncan was elected President of ASPA, following Harry Eidson. This meeting really stimulated us. I met people like Bill Hand, MSPA; Jim Kirkpatrick, FSPA; and Howard Johnson, MSPA. Harry had even calculated a service table which could be used with the old roller calculators to determine the side fund deposit for a small plan. The calculation only took a couple of hours - revolutionary! Bill Hand outlined an administrative manual for use of the plan administrator to provide the necessary data to us "actuaries" to calculate the costs and complete governmental forms.

We were off and running, although never really sure that defined benefit pension plans were quite legal under the 1952 code.

Membership Requirement

Since we were an actuarial society, it was necessary for new members to prove some actuarial adeptness and they were required to answer and show their computation of the present value of an annuity due derived by an interest rate and published mortality table. In addition, they had to calculate the premium for the same attained age. This was the "one question" answer required to become a member of ASPA, an MSPA, which so infuriated members of the Society of Actuaries against ASPA. Society members had to pass six four-hour exams just to become "Associates", and two more exams to become "Fellows".

Many of ASPA's original members probably did not have the slightest idea what they were doing when they copied a formula someone knowledgeable derived. However, some, like me, were sincerely interested in the derivation of a service table, and with the help of a life insurance actuary, I learned to calculate a complete service table for the functions Dx and Nx, as well as Cx and Mx. Using an old roll-top calculator, this took an entire weekend of repetitious calculations.

After several years, the designation MSPA required completion of three written exams, one of which involved some basic knowledge of actuarial skills and derivations of formulae. To receive the designation FSPA, two more exams were required; one of which involved knowledge of pension laws and regulations, and the other advanced actuarial skills including multiple functions, joint and survivor variations, and others. This was all developed before ERISA, primarily with the help of Jim Kirkpatrick and Professor Knowler of the University of Iowa.

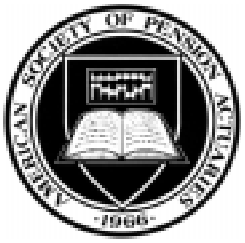
Many of us attended classes at Iowa U. under Dr. Knowler, as well as many night sessions during the annual fall meetings learning these principles from Jim who so patiently gave us the benefit of his vast knowledge of actuarial science.

All this time, many of us attempted to contact other actuarial organizations and had some small success in convincing their members on a one-on-one basis of ASPA's sincerity and dedication to the actuarial profession. I remember one meeting I attended in Cincinnati with Howard Johnson, MSPA; Brian Kruse, FSPA, CPC; and Brendan O'Farrell, Jr., FSPA, CPC of the Consulting Actuaries In Public Practice. Brendan was most aggressive, as I recall; button-holing members of this organization in the halls, men's room, elevators and bars of the hotel!

From this meeting sprang a school organized the next summer at Stanford University headed by Brendan on which Jim Kirkpatrick, Dr. Knowler, and I were privileged to serve on the faculty.

Pre-ERISA Activities

As far back as the fall of 1967, ASPA was instrumental in the formation of the legislation formerly named the Employee Retirement Income Security Act of 1974. During the ASPA meeting in Philadelphia, I served on a committee to meet the airplane arrival of the then Chairman of the House Labor Committee who was a Pennsylvania Congressman and who spoke to us as the top speaker of the meeting. He outlined many of the basic principles his committee had considered, particularly the guarantees of benefits to defined benefit plan participants. There were many meetings of ASPA directors, committee members and annual membership meetings following the legislation which was introduced in both houses of Congress.


AMERICAN SOCIETY OF PENSION ACTUARIES
1966

Original ASPA logo design. This abacus logo contains the imbedded numeric solution to ASPA's first "one question" exam problem originally developed to obtain membership into ASPA.

In 1973, I was elected to the ASPA Board of Directors. We established a Washington office in a dank, dreary building on Connecticut Avenue. Also, our annual meetings were held for many years at the Mayflower Hotel, not far from the Washington office. I particularly recall Bill Evans, MSPA, from South Carolina. Bill was quite a worker, making up his own calling card and informing all who read it that he was a Vice President of the American Society of Pension Actuaries. His imposing height and weight, as well as the card, opened up many offices of the Congressmen and Senators, and probably did more in the field of public relations for ASPA than the money we spent in later years for this purpose.

Official Designation as Actuaries

One particular concern of this legislation was the designation of "Enrolled Actuary", who the law provided had the exclusive right and responsibility of certifying that proper contributions had been made to the defined benefit plans.

The American Academy of Actuaries pushed for the exclusive right to name their members, and as very few ASPA members had met their membership requirements, ASPA made a concerted push for a hearing before the Joint Committee of Labor and Treasury officials to be recognized. Our opposition denigrated ASPA due to the one-question requirement, but we countered with Jim Kirkpatrick's testimony as to the written exam tests currently required.

The Joint Committee grandfathered all actuaries with sufficient experience who passed written examinations and those Fellows of the Consulting Actuaries in Private Practice who met their requirements of experience. The Joint Committee designated ASPA and the Society of Actuaries to provide for future examinations on a joint basis, and ASPA at last became of age having been recognized by the Federal government.

As a matter of fact, ERISA formally recognized qualified plans granting the deductibility of contributions and the tax free accumulations of retirement benefits so that pensions would certainly contain these favorable features for some time to come.

The Final Conclusion

It was most satisfying to me that during my term as President of ASPA, a beginning of association of all North American actuarial societies was initiated. I recall that Harold Ingraham, MSPA then President of the Society of Actuaries, appeared before the Board of Directors of ASPA and presented the case for cooperation between the Society, the Conference, the Academy, the Canadian Actuary, ASPA and the Conference of Consulting Actuaries. (Harold Ingraham, who later was elected to the Board of ASPA for two terms, had worked for the New England Life Insurance Company during a period when that company was prominent among insurers who sold fully insured and combination plans.) It was at this meeting held in June of 1988 that ASPA was deemed an equal among actuarial organizations. I felt in that moment, Harry Eidson's dream had come to fulfillment, and all our early efforts over the past twenty years were well worthwhile. ▲

R. William Dozier, Jr., FSPA, CPC, was President and CEO of The Dozier Company, a consulting and actuarial firm. Mr. Dozier was ASPA's president in 1987 and served on its Board of Directors for nine years. He also was a member of the Academy of Actuaries and qualified for the Million Dollar Round Table. He was a member of the ERISA Advisory Board with the U. S. Department of Labor from 1991-1994.

CONTINUED FROM PAGE 1

Washington Update

New Comparability Plans Expand Small Business Retirement Plan Coverage

58 percent of the new comparability plans surveyed were adopted where the small business previously provided no retirement plan coverage. An additional 20 percent of the new comparability plans were adopted where the only previous plan was a 401(k) plan funded with employee contributions and matching contributions only. Consequently, new comparability has produced significant new retirement benefits for small business employees where, in more than one-half of the cases, they were receiving no retirement benefits at all.

Small Business Retirement Plans Would Terminate Without New Comparability

Respondents to the survey stated that 50 percent of the small businesses with a new comparability plan would not adopt another qualified retirement plan for their employees if new comparability plans were no longer permitted.

New Comparability Plans Provide Substantial Benefits to Small Business Employees

21 percent of the new comparability plans surveyed provide at least a 7 percent of pay contribution to small business non-highly compensated employees. 49 percent of the new comparability plans surveyed provide at least a 5 percent of pay contribution. Virtually all (96 percent) of the new comparability plans surveyed provide at least a 3 percent of pay contribution to small business non-highly compensated employees. This exceeds the 75 percent of new comparability plans surveyed, which were considered "top-heavy" under qualified retirement plan rules. In addition, 63 percent of the new comparability plans surveyed had an allocation group that included only the small business owners.

New Comparability Plans Are Mostly Small Business Retirement Plans

Of the more than 10,000 new comparability plans surveyed, 36 percent were plans maintained by small businesses with less than 10 employees. 35 percent were maintained by small businesses with between 10 to 25 employees. 19 percent were maintained by small businesses with between 26 to 50 employees. 10 percent were maintained by businesses with more than 50 employees.

Impact of the Survey

The results of the survey have already had a significant impact on Capitol Hill and with Treasury. Currently, ASPA's Government Affairs Committee is mounting a significant educational campaign on Capitol Hill. To this end, we are making a substantial effort to clear up the misperceptions that surround new comparability plans and emphasize how important these plans are to small business retirement plan coverage. For example, courtesy of meetings Treasury had with Congress just before the notice came out, and the scathing report regarding new comparability conveniently issued the next week by the liberal think tank Center on Budget and Policy Priorities, several staff thought that new comparability by regulation had to provide over 90% of the contributions to the small business owner. We have already conducted and are planning hundreds of meetings with members and staffs to ensure they have a better understanding of the realities of new comparability plans. The survey has contributed greatly to this effort. In fact, several staffers, who initially felt that new comparability should be eliminated, have subsequently agreed to call Treasury to let them know that they now believe a swift and reasonable compromise needs to be worked out on this issue.

The survey and our congressional education campaign have also positively contributed to our ongoing discussions with Treasury. At our last meeting with Treasury, they conceded that they are no longer looking to entirely eliminate new comparability, although elimination of new comparability was discussed with congressional staff at the initial Capitol Hill meetings they had when the notice was issued. This is a very positive step in the right direction, and is directly attributable to the significant results of the survey and the accompanying pressure from key Capitol Hill staff.

Status of Grassroots Effort

A number of members have asked whether we are going to engage in a grassroots to fight the attack on new comparability plans. When the notice first came out, the inclination of the Government Affairs Committee was to mount a significant grassroots effort to fight Treasury's attack head on. In fact, several members volunteered to begin coordinating the grassroots, and their efforts were greatly appreciated. However, a successful grassroots effort requires a sympathetic ear from the Congressional members and staff you are appealing to. When we initially went to Capitol Hill to test our arguments, it was clear we had some work to do to counteract the effects of Treasury's initial meetings and the impact of the very negative Center on Budget Policy and Priorities report. Many of the members and staff we initially met with (both Democrat and Republican) were quite negative about new comparability, with some suggesting the testing methodology should be completely eliminated. It became quickly apparent that we needed some time to educate Congress about the realities of new comparability.

It was also clear that Treasury was going to make a public issue of this. They had gathered website information, conference tapes, and outlines that showed new comparability in an unflattering light. They had also already coordinated with the Center on Budget Policy and Priorities to issue its report and with Dow Jones to write an article (which fortunately only was picked up in electronic form). Sources made it clear that Treasury was preparing for a public relations campaign to respond to our grassroots effort similar to that used in the cash balance debate. Given how hard all of you have worked to be respected as retirement plan professionals, the last thing we wanted was another public relations debacle like the cash balance debate.

Finally, and this has proven to be true, we felt an aggressive lobbying effort would help with our negotiations with Treasury. As stated earlier, we have already been able to convince several key Democrats to withdraw their support for a complete elimination of new comparability and in many cases call Treasury to encourage them to swiftly work something out.

For these reasons, ASPA's Government Affairs Committee concluded that it would be best to postpone grassroots efforts to determine whether a reasonable compromise could be worked out with Treasury. Rest assured if a favorable compromise that is in the best interest of ASPA's members is not worked out, ASPA will use all possible means, including grassroots, to ensure that new comparability and the private pension system are protected. ▲

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

CONTINUED FROM PAGE 2

Voluntary Fiduciary Correction Program

program by engaging in a new prohibited transaction. An application will not be eligible if either the plan or the applicant is under investigation by the DOL or if the application contains evidence of potential criminal violations. Compliance with the VFC program does not give applicants relief from actions by any governmental agencies other than the PWBA nor from actions by plan participants or other plan fiduciaries. In addition, the VFC program does not exempt prohibited transactions from the imposition of excise taxes under the Internal Revenue Code ("Code")[1] nor prevent penalties for the late or incomplete filing of a Form 5500.

The costs of compliance under the VFC program cannot be passed onto plan participants and beneficiaries. The costs of correction must be borne by the applicant and not by the plan. Such costs may include evaluation of the need and usefulness of participation in the program, obtaining market value determinations, executing asset transactions, adjusting account balances and benefit distributions, documenting the correction and completing the application.

The DOL specifically states that it developed the VFC program in response to requests from the employee benefits community for a formal program that would reduce the risk of enforcement action and the imposition of the 20% penalty under ERISA §502(l). Most DOL investigations of employee benefit plans are resolved by voluntary corrective action by fiduciaries, and the DOL has recognized a need for innovation in fiduciary compliance. The DOL believes that the VFC program provides an opportunity to inform plan fiduciaries of their obligations so that complete and acceptable corrections may be made without prior discussion with the DOL. The program has been issued to encourage the full correction of the specified breaches of fiduciary duty. Benefits of the VFC program to plan participants include restoration of losses to the plan or reversal of impermissible transactions involving the assets of the plan and the resulting increase in security of the plan assets. Benefits to plan fiduciaries include both risk reduction and the savings of civil penalties that would otherwise be payable on the amount of assets recovered by plans following a civil investigation.

Eligibility for the VFC Program

Plan fiduciaries considering use of the VFC program need to be careful that the breaches and corrections at issue come within the very specific requirements of the program. VFC applications concerning correction of breaches that are not among the thirteen breaches described in the program will not be accepted. The correction methods set out in the program are the only ones acceptable under VFC for the eligible transactions.

In order to be eligible for the VFC program, neither the plan nor the applicant can be under investigation by the DOL pursuant to ERISA or under any criminal statute affecting a transaction that involves an employee benefit plan. A plan is "under investigation" for purposes of VFC if a Plan Official, as defined in the program,[2] or a representative, has received oral or written notification from the DOL of an investigation of the plan. A plan is not considered to be under investigation merely because the DOL has contacted a Plan Official or representative in connection with a complaint, unless the complaint concerns the transaction that is the subject of the application. In addition, the application must contain no evidence of potential criminal violations, as determined by the DOL.

Transactions that may be corrected under VFC include certain violations of the fiduciary responsibilities imposed by Part 4 of Title I of ERISA concerning contributions, loans, purchases, sales and exchanges, benefits and plan expenses. The specific eligible transactions are:

1. Delinquent participant contributions to a pension plan;
2. Loans at a fair market interest rate to a party in interest;
3. Loans at a below-market interest rate to a party in interest;
4. Loans at a below-market interest rate to a person who is not a party in interest;
5. Loans at a below-market interest rate solely due to a delay in perfecting the plan's security interest;
6. Purchases of assets by a plan from a party in interest;
7. Sales of assets by a plan to a party in interest;
8. Sales and leasebacks of real property to the employer;
9. Purchases of assets by a plan from a person who is not a party in interest at a price other than fair market value;
10. Sales of assets by a plan to a person who is not a party in interest at a price other than fair market value;
11. Payments of benefits by a defined contribution plan based on improper valuation of plan assets;
12. Payments by a plan of duplicative, excessive, or unnecessary compensation; and

13. Payments of dual compensation to a plan fiduciary.

The Benefits of an Application under the VFC Program

Upon the successful completion of a VFC application, the DOL will issue to the applicant a “no action letter” (a sample of which is contained in Appendix A to the program) with respect to the breach identified in the application. The no action letter provides that the PWBA will not take any civil enforcement action and will not recommend legal action by the Solicitor of Labor against the applicant concerning the transaction described in the letter. The PWBA will also not assess the 20% civil penalty under ERISA §502(l) on the correction amount paid to the plan or its participants. The effect of the no action letter is limited to the breach and the persons identified in the letter. Persons eligible to participate under the program include the breaching fiduciary, the plan sponsor, parties in interest and other persons who are in a position to correct the breach.

As was recommended by ASPA, the VFC program makes clear that a transaction may be corrected under it without a determination or admission that an actual fiduciary breach has occurred. The only requirement for purposes of a VFC application is that there be a potential breach. This feature of the program will be useful in the event of any later participant lawsuit and favorably distinguishes VFC from the IRS remedial programs, which require the existence of a qualification failure for participation. Another beneficial difference of VFC from the IRS programs is that VFC does not require the payment of a user fee or sanction. Indeed, correction under VFC avoids the 20% ERISA §502(l) penalty, while the IRS programs require the payment of a fee or sanction as well as correction.

Corrections Required by VFC

Restoration of Losses and Earnings

Many of the transactions eligible for the VFC program will have resulted in a loss to the plan or an improper profit to a party to the transaction. Determining the amount of the loss to the plan requires calculating how much money the plan would have if a particular transaction had not occurred. In general, correction under VFC requires the fiduciary or other Plan Official to restore to the plan the “Principal Amount,” which is defined as the amount that would have been available to the plan for investment or distribution on the date of the fiduciary breach if the breach had not occurred. Correction also requires payment to the plan of the greater of (i) Lost Earnings, as defined, from the date of the loss to the date the Principal Amount is restored to the plan, or (ii) Restoration of Profits, as defined, resulting from the use of the Principal Amount for the same period. What constitutes the Principal Amount is specifically identified for each of the thirteen categories of transactions eligible under VFC.

Lost Earnings that have to be restored to a plan under VFC are defined as the greater of (i) the amount that otherwise would have been earned (including reinvestment earnings) on the Principal Amount if it had been invested, from the date of the loss to the date the Principal Amount is restored to the plan, in accordance with applicable plan provisions and Title I of ERISA, less actual net earnings or realized net appreciation (or plus, if applicable, any net loss to the plan as a result of the transaction); or (ii) the amount that would have been earned on the Principal Amount at an interest rate equal to the underpayment rate defined in Code §6621(a)(2), less actual net earnings or realized net appreciation (or plus, if applicable, any net loss to the plan as a result of the transaction). In addition, if the Lost Earnings are paid to the plan after the date the Principal Amount is restored, correction must include an additional amount of Lost Earnings.

For a participant-directed defined contribution plan, the Lost Earnings to be restored to the plan is the amount that each participant would have earned on the Principal Amount from the date of the loss to the date the Principal Amount is restored to the plan. For administrative convenience, the Lost Earnings amount for a self directed plan may be calculated using the rate of return of the investment alternative that earned the highest rate of return, among the ERISA §404(c) designated broad range of investment alternatives available under the plan.

The Restoration of Profits that may have to be restored to a plan under VFC, if greater than Lost Earnings, is defined as the amount of profit made on the use of the Principal Amount, or the property purchased with the Principal Amount, by the fiduciary or party in interest who engaged in the fiduciary breach, or by a knowing participant in the breach. If the Principal Amount was used for a specific purpose and the actual profit can be determined, the actual profit must be calculated and returned to the plan. An example would be the plan sponsor’s cost of funds that it otherwise would have incurred if it did not have the improper use of plan assets, such as overdue employee contributions. If the actual profit cannot be determined, the Restoration of Profits is calculated as interest on the Principal Amount at an interest rate equal to the Code §6621(a)(2) underpayment rate. In addition, if the Restoration of Profits is paid to the plan after the date the Principal Amount is restored, correction must include an additional amount of restored profits.

Valuations

Correction under the VFC program may frequently require that the fair market value of an asset be determined either as of the date the plan originally acquired an asset or the date of the correction, or, perhaps, both. In order for a valuation to be acceptable under VFC, it must meet requirements specified in the program. If there is a generally recognized market for the property (e.g., the New York Stock Exchange), the fair market value of the asset is the average value of the asset on the market on the applicable date, unless the plan document specifies another objectively determined value (e.g., the closing price). If there is no generally recognized market for the asset, the fair market value of that asset must be determined in accordance with generally accepted appraisal standards by a qualified, independent appraiser in a written appraisal report signed by the appraiser. The program provides guidelines for when an appraiser will be considered qualified and independent.

Transaction Specific Correction Methods

The VFC program also specifies additional correction methodologies that are required only for some of the thirteen eligible transactions. These include, in addition to appraisals, determinations by an independent commercial lender of fair market interest rates for both secured and unsecured loans, determinations by an appraiser of the fair market value of lease payments and present value determinations of future correction amounts. The program permits alternative methods of correction for certain of the eligible violations, such as a choice between the repayment of the loss to the plan or the repurchase by the plan of an asset sold by it at other than fair market value.[3] In these cases, the choice of which correction alternative is used must be made by an independent plan fiduciary based upon the greater benefit to the plan. The independent fiduciary is to make determinations such as to the prudence of the investment and liquidity and diversification issues. Appropriate additional supporting documentation must be submitted for these particular types of corrections. Amended Form 5500 filings may be required for the correction of certain breaches.

Supplemental Distributions

In order to correct under VFC, plans will have to make supplemental distributions to former employees, beneficiaries receiving benefits or alternate payees, if the original distributions were too low because of the fiduciary breach. In these situations, Plan Officials must determine who received distributions from the plan during the applicable time period, recalculate account balances and determine the amount of the underpayment to each affected individual. It must be demonstrated in writing in the VFC application that the plan has used its best efforts to locate and pay anyone who has received a lump sum distribution but is due an additional distribution as a result of the VFC correction. The costs of such efforts would be borne by the Plan Official as part of the cost of correction.

Notice to Participants

In what is probably the most controversial feature of VFC, the applicant or the plan administrator must provide a written notice of the correction to all plan participants. No specific format is prescribed for the notice, but it must state that the correction was made pursuant to the VFC program, and that the individuals receiving notice may obtain a copy of the application and all supporting documentation from the plan administrator upon written request. The notification must also state that the application has been submitted to the VFC Program Coordinator at the appropriate PWBA Regional Office and include the address and phone number of the Regional Office. The notice must be provided no later than the date required for distribution of the plan's summary annual report. Notice may be given by posting, regular mail or electronic mail, but it must be distributed or posted in a manner reasonably calculated to inform plan participants of the VFC application. When correction involves a supplemental distribution, a notice explaining the distribution must also be sent to each individual entitled to the supplemental distribution at the same time as the supplemental distribution. If the correction involves an adjustment to the account balance of a participant, beneficiary receiving benefits, or alternate payee, a notice explaining the adjustment must be provided at the same time that the individual is furnished with the benefit statement that includes the adjustment. The notice can be given when the benefit statement is ordinarily provided and additional benefit statements are not required.

Application Procedures

A VFC application must be prepared by a Plan Official or his or her authorized representative, in which case the application must include a statement signed by the Plan Official that the representative is authorized to represent the Plan Official. The application is to include the name, address, and telephone number of a contact person familiar with the contents of the application and with authority to respond to inquiries from the DOL.

The applicant must provide a detailed narrative describing the fiduciary breach and the corrective action, including:

- a list of all persons materially involved in the breach and its correction;
- the EIN and address of the plan sponsor and administrator;
- the date the plan's most recent Form 5500 was filed;
- an explanation of the breach, including the date it occurred;
- an explanation of the correction, including who made it and when; and
- specific calculations demonstrating how the Principal Amount and Lost Earnings or Restoration of Profits were computed and an explanation of why payment of Lost Earnings or Restoration of Profits was chosen for correction.

A checklist contained in Appendix B to the program must be completed, signed, and submitted with the application, and the application is to be mailed to the appropriate regional PWBA office listed in Appendix C. The applicant must maintain copies of the application and any subsequent correspondence for the period required by ERISA §107. A VFC application must also include a statement in the form specified in the program that is signed under penalty of perjury. The statement is to be signed and dated by a knowledgeable plan fiduciary and the authorized representative, if any. The statement must also accompany any later additions to the application. The DOL will maintain the confidentiality of any documents submitted under the VFC program to the extent permitted by law.

The application must also provide supporting documentation including:

- the current fidelity bond for the plan;
- a copy of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with the relevant sections identified;
- documentation that supports the narrative description of the transaction and correction, such as leases, appraisals, loan documents, service provider contracts, perfected security interests, and amended annual reports;
- documentation establishing the Lost Earnings amount, including documentation of the return on the plan's other investments;
- documentation establishing the amount of Restoration of Profits;
- all additional documents required under the program for the specific breach involved in the application;
- proof of payment of the corrective amounts, such as copies of canceled checks, executed wire transfers, a signed, dated receipt from the recipient of funds transferred to the plan (such as a financial institution), and bank statements for the plan's account; and
- a sample of the notice to participants.

Examples of Specific Eligible Breaches and Required Corrections

Delinquent Participant Contributions to Pension Plans

One violation eligible under VFC, based upon the DOL's prior Pension Payback program, is where an employer receives directly from participants, or withholds from employees' paychecks, amounts for contribution to a pension plan but fails to forward the contributions to the plan within the time limits under the DOL's plan asset regulation.[4] Correction under VFC when the participant contributions have not yet been paid to the plan requires payment of the unpaid participant contributions to the plan and the greater of Lost Earnings or Restoration of Profits resulting from the employer's use of the participant contributions from the earliest date on which they could reasonably have been segregated from the employer's general assets. If the participant contributions have already been paid to the plan, but outside the time period required by the regulation, the only correction required is to pay to the plan the greater of the Lost Earnings or Restoration of Profits.

Additional documentation required for this specific correction includes (i) copies of accounting records identifying the date and amount of each contribution received from participants; (ii) a copy of payroll documents showing the date and amount of each withholding of participant contributions from employees' paychecks; (iii) a statement from a Plan Official identifying the earliest date on which the participant contributions reasonably could have been segregated from the employer's general assets, along with supporting documentation for this conclusion; and (iv) a sample notice to participants, including any who are entitled to a supplemental distribution.

Loan at Below-Market Interest Rate to a Party in Interest

Another violation eligible for VFC is a loan made by a plan to a party in interest with respect to the plan at an interest rate less than the fair market interest rate at the time for loans with similar terms (such as the amount of loan, amount and type of security, repayment schedule, and duration of the loan) to a borrower of similar creditworthiness. The loan was not exempt from the prohibited transaction provisions of ERISA. Correction will require paying the loan off in full, including any prepayment penalties, and payment to the plan of the Principal Amount, plus the greater of Lost Earnings or

Restoration of Profits, if any. For purposes of this particular transaction, the Principal Amount is equal to the excess of the interest payments that would have been received if the loan had been made at the fair market interest rate over the interest payments actually received under the loan terms. An independent commercial lender must determine the fair market interest rate. Any supplemental distributions that are due must be paid.

Additional documentation required for this specific correction includes a narrative describing the process used to determine the fair market interest rate at the time the loan was made, a copy of the independent commercial lender's fair market interest rate determination and a sample notice to participants, including any who are entitled to a supplemental distribution.

Payment of Benefits Based upon Improper Valuation of Plan Assets

A violation eligible for VFC that may be of particular interest to service providers is when a defined contribution plan pays benefits based upon an incorrect valuation of a plan asset. Correction requires that the correct value of the improperly valued asset be established for each plan year in which the asset was improperly valued and the participant account balances for each year must then be adjusted accordingly. In addition, Forms 5500 must be amended and refiled to reflect the proper values for the lesser of the last three plan years or all plan years in which the value of the asset was reported improperly. The Plan Official must determine who received distributions from the plan during the time the asset was valued improperly. For distributions that were too low, the amount by which participants were underpaid their benefits must be restored to the plan for distribution to the affected plan participants, or paid directly to the plan participants, along with the Lost Earnings on the underpaid distributions. For distributions that were too high, the total of the overpayments plus the Lost Earnings must be restored to the plan or to the participants.

Additional documentation required for this specific correction includes the qualified, independent appraiser's report for each plan year in which the asset was revalued, a written statement confirming the date that amended Forms 5500 were filed, proof of payment of any losses restored to the plan, copies of the adjusted participant account balances, proof of payment of any supplemental distributions and a sample notice to participants, including any who are entitled to a supplemental distribution.

Limitations of the VFC Program

The VFC program assumes the transaction which is the subject of correction under the program was otherwise an appropriate investment decision for the plan. No relief is provided under VFC for violations not addressed in the program, such as imprudence in making investments or a failure to diversify plan assets.[5] The issuance of a VFC no action letter does not imply approval of any matter not specified in the letter, including steps that the plan fiduciaries implement to prevent recurrence of the breach and to ensure the plan's future compliance with ERISA.

The DOL reserves the right to conduct an investigation at any time to determine the truthfulness and completeness of factual statements in the application and to determine that the correction was actually made. A no action letter issued under the VFC program is conditioned on the truthfulness, completeness and accuracy of the statements made in the application and in any subsequent oral and written statements or submissions. Any material misrepresentations or omissions will retroactively void the no action letter with respect to the transaction that was materially misrepresented.

The DOL also reserves the right to conduct an investigation and take other enforcement action relating to the transaction identified in a VFC application in other circumstances, such as an oncoming expiration of the statute of limitations period or significant harm to the plan or its participants that is not cured by the VFC correction. Also, while a VFC application involving a plan or plan sponsor is pending, the DOL may investigate and take enforcement action relating to matters not covered by the VFC application or relating to other plans sponsored by the same plan sponsor.

Compliance with the VFC program does not preclude the DOL or any other governmental agency from conducting a criminal investigation of the transaction identified in the application nor preclude the DOL from assisting any other agency. The DOL may also make appropriate referrals of criminal violations as required by ERISA §506(b).[6] Compliance with the VFC program also does not preclude the DOL from seeking removal or other non-monetary injunctive relief against any person responsible for the transaction at issue or from imposing civil penalties under ERISA §502(c)(2) for the failure or refusal to file a timely, complete and accurate Form 5500. A successful VFC application also does not prevent the

DOL from referring information regarding the transaction to the IRS as required by ERISA §3003(c).[7] The sample no action letter for the VFC program specifically states that prohibited transactions will be referred to the IRS. However, it should be noted that, while VFC does not provide for a waiver of excise taxes on prohibited transactions, there is no requirement that a Form 5330 be filed with the IRS concerning the transaction at issue in a VFC application.

Another important limitation on the effect of a VFC no action letter is that it does not affect the ability of any other governmental agency to carry out its authority nor prevent any other person from enforcing any rights they may have. For instance, a successful VFC application would not prevent plan participants or beneficiaries from filing legal actions under ERISA concerning the transaction that was the subject of the application. However, since compliance with the VFC program requires complete correction of the fiduciary breach at issue, at least in the eyes of the DOL, there should be little for plan participants to gain from filing suit over the same transaction and, therefore, minimal incentive for them to do so.

If a VFC application is submitted, but the DOL determines that it fails to meet the requirements of the VFC program, the DOL reserves the right to investigate and take any other action concerning the transaction and/or plan that is the subject of the application, including refusing to issue a no action letter. If an applicant has taken corrective action prior to filing a VFC application, but the DOL deems that the correction is not a complete and acceptable correction under VFC, the DOL may reject the application and pursue enforcement, including assessment of the ERISA §502(l) penalty. However, in this circumstance, as proposed by ASPA's Government Affairs Committee, the ERISA §502(l) penalty would not be imposed on any amounts restored to the plan prior to filing the VFC application and would only apply to any additional recovery amount paid to the plan pursuant to a court order or a settlement agreement with the DOL.

The Future of the VFC Program

The reaction of the employee benefits community to the introduction of the VFC program has been mixed. Some practitioners have criticized the restrictions on the violations that are eligible for the program and the limitations on the relief provided. Specific complaints include the requirement for notice to participants and the lack of relief from excise taxes when the violation corrected was a prohibited transaction. Some have advocated using the corrections required under VFC as guidelines for self-correction of fiduciary breaches but without submitting a VFC application.

It should be realized, however, that the VFC program does not take away any means of compliance or ability to self-correct or any other alternative available to fiduciaries and plan sponsors today but, instead, only adds an additional option that has significant favorable benefits despite the program's restrictions. Participation in the program is entirely voluntary and does not foreclose resolution of fiduciary breaches by any other means. Further, the program as introduced is meant to be the initial stage of what is anticipated to be a program that evolves to be more inclusive and flexible over time, as was the experience with the various IRS remedial correction programs. The DOL is seeking comments on VFC including different methods of correction that might be appropriate for the specified transactions and whether there are additional fiduciary breaches that should be included in the program. ASPA's Government Affairs Committee will be filing comments with the DOL advocating the expansion of the VFC program. In addition, the Government Affairs Committee has already begun discussions with the IRS requesting relief from prohibited transaction excise taxes for corrections made under the VFC program.

The limited initial scope of the program appears to some extent to be a result of the DOL's hope to maximize the new program's chances of success. The thirteen eligible violations were selected based upon DOL experience in the field and because they are violations that can be precisely described. Further, some of the limitations exist because VFC was designed so applicants have information available to identify eligible violations and to make acceptable corrections without any discussion or negotiation with the DOL. The DOL has consistently asserted, contrary to the position of ASPA, that it must assess a penalty under ERISA §502(l) if there is any negotiation by the DOL over the relief owed to a plan in exchange for a no-action letter. ASPA's Government Affairs Committee believes that non-binding and tentative negotiation and discussion with the DOL concerning the form of an acceptable correction prior to the issuance of a no-action letter does not constitute a settlement agreement within the meaning of ERISA §502(l). ASPA has consistently recommended that the VFC program encompass preliminary negotiations concerning correction of breaches that are more complex than those specified in the current thirteen eligible violations or for which the proper form of correction is not readily apparent. In addition, the Government Affairs Committee has consistently recommended that the DOL permit applicants to initially contact the DOL under the program on an anonymous basis and to be able to discuss tentatively acceptable corrections which would not be binding upon the DOL.

ASPA's Government Affairs Committee believes that the VFC program will be of significant benefit as experience is gained with it, and it is expanded and refined by the DOL in light of that experience. Plan sponsors and fiduciaries will benefit from the program's certainty of correction methodology and protection against DOL civil enforcement action. Plan participants and beneficiaries will benefit from the plan assets restored under the incentive of the finality provided by VFC. Issuance of the VFC program is an innovative step by the DOL, which should be commended for its willingness to try new ways of encouraging compliance with the many and detailed requirements of ERISA. ▲

R. Bradford Huss, APM, is a partner in the San Francisco, California law firm of Trucker Huss which specializes in ERISA and employee benefits. Mr. Huss concentrates his practice on qualified pension and profit sharing plans, ERISA litigation, and IRS and DOL audits of employee benefit plans. He serves on ASPA's Board of Directors, is a cochair of ASPA's Government Affairs Committee, is a past president of the San Francisco Chapter of the Western Pension & Benefits Conference, and is a member of the American Bar Association, the Bar Association of San Francisco, and the International Foundation of Employee Benefit Plans.

[1] The IRS has conducted a preliminary review of the VFC program. The IRS indicates that a VFC correction generally will be acceptable for purposes of correction of a prohibited transaction under the Code, except where the fiduciary breach or its correction has resulted in an abusive tax situation or a plan qualification failure.

[2] Plan Official is defined under VFC to mean a plan fiduciary, plan sponsor, party in interest with respect to a plan, or other person who is in a position to correct a fiduciary breach.

[3] The repurchase of the same property from the party in interest to whom the asset was sold is a reversal of the original prohibited transaction. The sale is not a new prohibited transaction and does not require an exemption.

[4] 29 CFR §2510.3-102.

[5] An example of this limitation is if a plan fiduciary causes a plan to engage in a prohibited transaction by purchasing real estate from the plan sponsor without an applicable exemption and the purchase also causes the investment of the plan assets to not be diversified as required by ERISA §404(a)(1)(C). A no action letter issued upon a VFC application that fully complied with the requirements of the program in these circumstances would apply to the prohibited transaction, but the letter would not apply to the lack of diversification.

[6] ERISA §506(b) provides that the Secretary of Labor shall have the responsibility and authority to detect and investigate and refer, where appropriate, civil and criminal violations related to the provisions of Title I of ERISA and other related Federal laws, including the detection, investigation, and appropriate referrals of related violations ofTitle 18 of the United States Code, which contains federal criminal provisions concerning employee benefit plans.

[7] ERISA §3003(c) provides that, whenever the Secretary of Labor obtains information indicating that a party in interest or disqualified person is violating §406 of ERISA, the Secretary shall transmit such information to the Secretary of the Treasury.

ASPA Benefits Councils' Calendar of Events

Date	Location	Event
June 6	Delaware Valley	Plan Amendments Necessary to Comply with Recent Legislation (e.g., GUST) and Other Regulations and Rulings
	Speaker: Robert Bildersee, Esq.	
June 6	South Florida	TPA as Fiduciary and Allowable Plan Paid Expenses
	Speaker: Beth Levine, IRS	
June 8	Chicago	Loan-A-Rama
	Speaker: Ilene H. Ferenczy, Esq., CPC	
June 21	North Florida	Plan Audits: What CPAs Need and How Plan Administrators Can Prepare
	Speaker: Robert Ennis, CPA	

For more information or for the name of a local contact, please call the ASPA office at (703) 516-9300.

CONTINUED FROM PAGE 3

IRS

while the 12 month extension for prototype and volume submitter adopters is welcome, it can lead to great confusion because of the lack of a uniform date by which restatements must be made for all plans. The problem is heightened where the prototype sponsor has gone out of business or otherwise decided not to continue to sponsor the prototype. In that case, plan sponsors may not be informed that there is no document for them to adopt until the RAP has already expired.

As a result, we urged the Service to further extend the RAP to the end of the plan year beginning in 2002. In part, we suggested this date because there will be a substantial number of prototype and volume plans which are not approved until late this year or even until 2001, so that, as a practical matter, many plans will not be restated (and will not need to be restated) until sometime in 2002. However, to keep the process moving, we also suggested that the required date for submission of master and prototype and volume submitter lead documents be left at December 31, 2000.

An additional reason for urging an extension of the RAP was the Service's and Treasury Department's notice that they were reviewing the rules for cross-tested plans (the so-called "new comparability" plans). We pointed out that if these rules are changed, so that cross-tested plans would need to be amended to comply with the new rules, it would mean that these plans would be amended in the year 2000 and then again in 2001 or 2002. Though large plans tend to be amended on a current basis as the rules change, small plans cannot afford the cost of amendments every year or two.

It is not certain whether any further extension of the RAP will be granted, and it was suggested that if any extension is granted, it may not apply to individually-designed plans.

EPCRS

With respect to the remedial programs themselves, we provided the IRS with the following suggestions:

(1) We again urged that the Service create an appeals process within EPCRS to deal with situations in which the plan believes that the Revenue Agent has misapplied the criteria for a particular program on audit. These could include cases in which the Revenue Agent indicates that a failure is not eligible for correction under APRSC or sets a sanction amount under Audit CAP which the plan sponsor believes does not adequately consider the facts and circumstances of the case. We understand that such an appeals process is not likely to be created in the near term. However, the IRS understands the concern and is making a concerted effort, through training and coordination, to achieve uniform results nationally. If a plan sponsor is concerned that EPCRS is not being properly applied in an audit, the Agent's group manager should be included in the discussions.

(2) We asked that the IRS consider creating an unsupervised correction process for certain types of plan document defects, such as the failure to check a box in a prototype adoption agreement or where a plan has operationally permitted participant loans or hardship withdrawals even though the document does not permit these transactions. Currently, such document issues must be submitted under Walk-in CAP with the attendant cost and compliance correction fees. We urged that certain of these document problems were sufficiently minor to warrant a correction process similar to APRSC (which can, at this time, only be used for operational failures). GAC will be submitting formal written comments further expanding on this suggestion.

(3) We discussed the concept of a "Group CAP" or "Group VCR" program to be used where a service provider discovers a "systemic" failure, that is, a failure common to many plans served by that provider which result from a problem caused by the provider rather than the individual plan sponsors. Such a program could be useful for ASPA members who discover such a problem (such as a group of plans which are not timely amended for GUST because of a computer defect or an employee problem). TEGE currently has a pilot project for Group VCR filings for systemic operational failures. While there are no published rules for Group VCR, we understand that, to be eligible for the pilot program, a service provider must be in a position to submit at least 15 or 20 plans with similar violations, such as failures to make minimum required distributions.

(4) We discussed the new Voluntary Fiduciary Correction program adopted by the Pension and Welfare Benefits Administration (PWBA) of the Department of Labor in March. We urged that there be coordination between the IRS and PWBA on these cases because many of the breaches which are eligible for correction under VFC are prohibited transactions on which excises taxes must be paid under the Internal Revenue Code. In addition, some of the VFC breaches also result in disqualifying defects *(e.g.*, the failure to value assets each year). We pointed out that a coordinated filing would save the plan the expense and effort of approaching

each agency separately and could lead to increased voluntary compliance. The TEGE officials indicated that they intended to explore this with the PWBA.

(5) Finally, we suggested that TEGE expand the TVC program to include 457 plans; (6) that the IRS issue a Revenue Ruling dealing with restoration payments to plans (to consolidate the guidance which is now scattered among a dozen private letter rulings); and (7) that the IRS develop programs for dealing with problems in IRA-based retirement arrangements, such as SIMPLE plans.

Form 5500

We pointed out that even though the PWBA had granted an automatic extension (without the necessity of filing Form 5558) of the filing of the Form 5500 to October 16, 2000, this might not be a long enough extension. The issue exists because the software for producing the forms is not expected to be available until May at the earliest. As a result, plan service providers will be forced to compress into a five to five and one-half month time frame the work they have typically handled in nine and one-half months. When combined with the requirement to restate plans by the end of the year, the burden on service providers is significant.

We also discussed how to deal with delinquent returns for earlier periods. Up until this year, the Form 5500 was submitted to the IRS. For plan years beginning in 1999, the agency to which the Form 5500 is submitted is the DOL. But what if a plan failed to file for 1998 or before? Should the form be submitted to the DOL, since that is where 5500s are now being submitted, or to the IRS because that was the agency which previously accepted the forms for those years? The IRS officials indicated that delinquent returns which were previously required to be filed at the IRS Service Centers should continue to be submitted to the IRS Service Centers.

Miscellaneous Issues

We asked the IRS when it would release its report on the 401(k) plan audit project which it completed in 1998. We were informed that the report would be posted on the IRS website in the near future. We also urged the IRS to address contingent workforce issues through education and outreach rather than through enforcement actions given the widespread misunderstanding of the qualified plan requirements as they apply to contingent workers (for example, provisional employees, temporary employees, employees misclassified as independent contractors and the like). ▲

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

Department of Treasury

by Jeffrey C. Chang, APM

On March 27th, members of ASPA's Government Affairs Committee met with Mark Iwry, Benefits Tax Counsel – Treasury, and members of his staff to share and discuss employee benefit issues and priorities for both the Treasury and ASPA. Representatives of the IRS also attended the meeting.

The meeting began with a review by Iwry of the just issued 2000 joint business plan for IRS and Treasury. (You can download a copy at **http://www.irs.gov/prod/bus_info/tax_pro/2000Priority.pdf**.) Treasury's top employee benefits projects/issues for this year include:

- The imminent release of proposed regulations under Code §411(d)(6). These regulations are expected to provide relief, in certain instances, from the anti-cutback rules as outlined in Notice 98-29. Due to their importance, Treasury hopes and expects to issue final regulations by the end of the year.
- Although the form of guidance is not yet known, Treasury has plans to issue guidance on cash balance plans. This project is a high priority.
- Additional guidance on participant loans.
- Positive guidance (and additional relief for 2000) with respect to hardship distributions ala Notice 99-5.
- Guidance on reporting issues for Roth IRAs.
- The long awaited guidance concerning required documentation of 401(k) testing methods and related testing elections. Iwry indicated, however, that the guidance "shouldn't affect plan restatements" since the IRS/Treasury position is still that plan sponsors must choose a testing method and reflect this choice in their plan document. (Iwry stated that this position is not likely to change.)
- Treasury is also interested in reviewing and updating the Code §457 regulations.

Although items specifically mentioned in the joint business plan are likely to be addressed this year, Iwry indicated that a number of additional issues will receive Treasury's attention as well. These include:

- Further analysis and review of what Treasury perceives as abuses and problems stemming from the designs of certain cross-tested and new comparability plans. ASPA's new comparability task force will be working closely with IRS and Treasury over the next several months to make sure that the views and concerns of ASPA's membership are considered in connection with any proposed changes in existing regulations.
- Treasury officials also indicated a willingness to work with ASPA and IRS on some further guidance concerning the proper treatment of restorative payments to qualified plans. Both ASPA and Treasury agreed that appropriate tax guidance is particularly important in light of the opening of PWBA's Voluntary Fiduciary Correction Program.

The meeting closed with brief discussions of "future" issues for which further review or guidance might be appropriate. These included:

- ASPA's reaction to recent legislative proposals on "phased retirement," which would permit certain "in-service" distributions from defined benefit pension plans.
- 401(k) issues relating to mergers and acquisitions.
- Qualified plan problems stemming from the improper treatment of common-law employees as independent contractors or leased employees.
- The need for participant education and appropriate disclosure to participants in connection with a choice between an early retirement lump sum benefit and a subsidized early retirement annuity. ▲

Jeffrey C. Chang, APM, is a shareholder in the law firm of Chang, Ruthenberg & Long Law Corporation. Mr. Chang specializes in profit sharing and pension plans, as well as various deferred compensation and employee benefits matters. He is the founder of the Sacramento Employee Benefits Roundtable, has taught deferred compensation and qualified retirement plans courses in the Masters of Law program at McGeorge School of Law, and is a former member of the executive committee of the State Bar's Taxation Section. In 1990, he formed the Employee Benefits Committee of the State Bar Tax Section and served as its chair during 1990 and 1991. Mr. Chang currently serves as the chair of the IRS subcommittee of ASPA's Administration Relations Committee. Recently, he coauthored the Business Owner's Retirement Plan Survival Guide, *along with his partner, Ken Ruthenberg, and the principals of Foord, Van Druggen & Ebersole Financial Services. Mr. Chang received a B.A. in Economics from U.C. Berkeley in 1976, and a J.D. from U.C. Davis School of Law in 1979.*

Department of Labor

by R. Bradford Huss, APM

Representatives of ASPA's Government Affairs Committee met with senior officials of the Pension & Welfare Benefits Administration of the Department of Labor on March 27, 2000 to discuss issues of concern to ASPA members and their clients, including the Department's recent proposed regulation on small plan asset security. This proposed regulation would impose additional requirements for small plans to avail themselves of the exemption from the requirement for an annual audit. ASPA GAC has previously submitted comments on the proposed regulation and the GAC representatives emphasized the need to minimize additional paper work required by the proposed regulation. GAC also expressed concerns about the proposed requirement to provide information on financial institutions holding plan assets and the amounts held by each institution, particularly in the situation of a plan with self-directed investments where only one participant may hold assets at a particular institution. There may be a loss of financial privacy to participants in this situation.

Another issue discussed was the uncertain status, under the terms of the proposed regulation, of mutual fund shares owned by individual trustees. Language in the preamble to the proposed regulation indicates that mutual funds are included among "qualifying plan assets" under the regulation. Mutual fund companies, however, are not included among the regulated financial institutions listed in the proposed regulation as being eligible to "hold" qualifying plan assets. The Department stated that the mutual fund industry, as well as ASPA, has raised the issue of the status of mutual funds under the proposed regulation. The Department indicated that one possible solution is to further delineate the meaning of the term "held" as used in the proposed regulation.

The GAC representatives also expressed concern that the current effective date provision of the proposed regulation may not provide adequate time for plan sponsors and their advisors to be sure that plans comply with the requirements under the new rule for avoiding plan audits. The proposed regulation would be effective sixty days after publication in the Federal Register and would be applicable to the first plan year beginning after the effective date. The Department, however, feels there is no need to have a multiyear phase in of the rules under the proposed regulation as the Department does not intend to require any plans to divest themselves of nonqualifying plan assets in order to remain exempt from an audit. The proposed regulations provide that an increased ERISA §412 bond is an alternative for compliance when the plan does not meet the 95% requirement for qualifying assets. The Department further indicated that the time lag inherent in having the regulation not apply until the first plan year beginning after the effective date would also allow adequate time for plan administrators to take any action needed to come into compliance under the regulation.

GAC questioned the practicality, in light of the inherent delay in the availability of year-end data, of the proposed requirement that, in order to remain exempt from having an audit, increased bonding be obtained as of the beginning of each plan year if the Plan fails to hold 95% of its assets in qualifying Plan assets as of the end of the prior plan year. The Department has received comments from the surety industry, concerning the increased bonding alternative under the regulation, advocating bonding levels even higher than those required by the proposed regulation.

Finally, GAC advocated that the Department provide an expedited prohibited transaction exemption procedure in conjunction with the finalization of the small plan asset regulation. Although the Department does not intend to regulate plan investments through the proposed regulation, ASPA believes some plan sponsors and fiduciaries may wish to comply with the new regulation by divesting the plan of certain investments, such as limited partnerships or second deeds of trust, that may pose ongoing issues for plan administration, particularly with respect to valuation or liquidity. It is anticipated the small plan asset security regulation will be finalized this year.

GAC's ongoing project to consult with the Department concerning how it conducts service provider audits was also discussed. GAC has begun a dialogue to try to help the Department focus its resources on other areas that are more productive than service provider audits and to lessen the burden and cost of such audits to service providers. GAC is gathering information with respect to how service provider audits are conducted and is interested in hearing from ASPA members who would like to share their experience in responding to such audits.

The GAC representatives congratulated the Department on its recent issuance of the Voluntary Fiduciary Correction ("VFC") program. VFC is an innovative program that will enable plan sponsors and fiduciaries to correct certain actual and potential breaches of fiduciary duty under ERISA and to receive a "no action" letter from the DOL with respect to civil enforcement. (See article in this issue on the VFC program.)

GAC emphasized to the Department the work flow problems and timing issues that are anticipated to arise due to the new Form 5500 and the new electronic filing system with the DOL. GAC advocated that any 1999 Form 5500s due during 2000 be granted an extended filing deadline until December 31, 2000. GAC believes such an extended deadline is needed even though the Department recently granted an extension to October 16, 2000 for certain Form 5500s that would otherwise be due sooner. ASPA pointed out to the Department that if the necessary software for the new Form 5500 is not available until May, then service providers and plan administrators would only have five and one half months to complete work normally done during a period of seven to nine and a half months. It was also pointed out that this compression of annual administration work to complete Form 5500s will come at the same time that service providers are undertaking the large task of restating plan documents for tax qualification purposes if the IRS does not extend the remedial amendment period. Several issues regarding Form 5500 filings for short plan years that were not resolved by the previously announced filing extension were also discussed. The Department representatives indicated that, while they understood the concerns expressed by ASPA, the Department has also heard from other organizations and entities that do not want a further extension of the filing deadline for 1999 Form 5500s. The Department is also concerned that any further extension may cause the processing of 1999 Form 5500s to overlap into time needed for processing 2000 Form 5500s.

The Department emphasized it is aware this is a transition year both in terms of the new form and the required software, and that both service providers and the Department will need to use common sense in dealing with problems and issues that arise during this time. The Department will consider transition year problems in reviewing reasonable cause requests for waiving any penalties for late-filed 1999 Form 5500s.

Another subject discussed was the need for the Department to revamp its Delinquent Filer Voluntary Compliance program, which permits payment of reduced penalties in connection with the filing of overdue Form 5500s. GAC expressed its view that the reduced penalties under DFVC are still too high to effectively encourage non-filers to come forward and file overdue Form 5500s. It has been the experience of many ASPA members that, when plan administrators are informed of the DFVC program and the penalties still payable under it, many administrators choose to take their chances by filing the overdue Form 5500 outside of the auspices of DFVC. The Department representatives indicated they have similar concerns with the level of penalties required under the DFVC program.

Finally, the GAC representatives discussed with the Department the outstanding issue of when there is a termination of a Code §403(b) plan. The Department is reviewing questions raised in connection with termination of 403(b) plans and, in particular, when does a 403(b) program cease being a Title I plan even though payments under the program, and the related tax ramifications, may continue on into the future. The Department is analyzing this problem under the concepts applicable to the termination of any employee benefit plan. ▲

R. Bradford Huss, APM, is a partner in the San Francisco, California law firm of Trucker Huss which specializes in ERISA and employee benefits. Mr. Huss concentrates his practice on qualified pension and profit sharing plans, ERISA litigation, and IRS and DOL audits of employee benefit plans. He serves on ASPA's Board of Directors, is a cochair of ASPA's Government Affairs Committee, is a past president of the San Francisco Chapter of the Western Pension & Benefits Conference, and is a member of the American Bar Association, the Bar Association of San Francisco, and the International Foundation of Employee Benefit Plans.

Pension Benefit Guaranty Corporation

by Kurt F. Piper, MSPA

Representatives of ASPA's Government Affairs Committee met on March 28, 2000 with representatives of the Pension Benefit Guaranty Corporation. This was our semiannual conference to discuss a range of issues of importance to ASPA members.

The first item of discussion was cash balance plans. The PBGC has been trying to cope with the termination (and anticipated termination) of underfunded cash balance plans. As part of the termination process, it is necessary to estimate the present value of benefit liabilities. This calculation does not just affect the money which a sponsor owes the PBGC. It can affect what the other participants get under ERISA §4044. Ed Burrows, MSPA, has suggested that one way to manage the problem is to have the IRS require adequate plan language to spell out what happens to a variable index on plan termination and, perhaps, to remove the 411(d)(6) protection so as to fix the variable rate.

There is also a problem with how the PBGC regulations say to pay deminimis lump sums. First apply the variable rate index to get a benefit at NRA; then use PBGC lump sum assumptions to get the prevent value. If the value is less than $5,000, then the PBGC can pay a lump sum; if not, then PBGC can not. Note that this value will be different than the cash balance account balance. The PBGC might have to change their regulations to get a different result.

The experience of the PBGC with cash balance conversions is that the funding is sufficient at conversion, but gets worse. Despite the problems, the PBGC has no problems with cash balance plans; they are just another plan design, more easily understood by employees, and certainly better for them than a 401(k) plan. Also, employers should have flexibility with respect to plan design. The wearaway issue is a policy issue, which needs to be addressed.

The second item of discussion was proposals to foster defined benefit pension plans. One proposal (an Ed Burrows idea) was to allow participants to elect which index to use for their cash balance account. While there are some issues to be worked through, such as election changes, 401(a)(4), and modifications for small, top heavy plans, it seems workable.

Floor offset plans have certain age issues and are complicated to employees.

Larry Deutsch, MSPA, suggested a plan which would provide the better of a traditional defined benefit pension plan or a cash balance account.

The third item of discussion involved a proposed expansion of the missing participant program to be extended to non-Title IV defined benefit pension plans and defined contribution plans. The PBGC wants this, and it is in the President's proposal. Some industry groups opposed the idea at first, but now are agreeable to it. PBGC has an agreement with Social Security to help find people who are no longer in the work force but receiving Social

Security benefits. The IRS has been helpful, too.

There was a discussion regarding "woodwork" employees. (Former employees who come out of the woodwork.) Without adequate records of distributions, the PBGC has little choice but to pay them. Clearly to protect themselves, employers should keep good records on pension distributions so that a "woodwork" employee cannot collect twice.

The fourth item of discussion was to request more examples of how to calculate the amount to send to the PBGC for missing participants. There is also the need for a calculator program to calculate the PBGC annuity values, as many industry software programs do not do so.

The fifth item of discussion was that the PBGC will accept pro-rated premiums for short plan years. (They need to change their regulations on this.) Some small employers were not staying around in business long enough to get the refund. Also, the PBGC was not paying interest on the refund.

The sixth item of discussion was the proposed cap on small plan premiums. The cap, which was in the recently vetoed tax legislation, is also in the minimum wage bill. This is a non-controversial provision and is likely to be included in any pension legislation which passes. The cap is linked to the phase-in premium for new plans.

Other topics included:

- The extension of the due date of Form 5500 until October 16, 2000. This has no effect on the due date of the PBGC-1 Form. The due date for any notice to participants would be affected.
- The PBGC has released a worksheet, which allows a plan sponsor to determine whether a notice to participants is required. It is on the PBGC web site under Participant Notice.
- There is a regulation coming out with respect to terminations starting May 1, 2000. Terminating plans must use PBGC annuity rates rather than PBGC lump sum rates for valuation (although not for actual distributions).
- The PBGC is coming out with a two column table for their lump sum assumptions. One column will be entitled for "Private Sector Plans" and will be the historic rates. The second column will be for PBGC use. Right now they are the same. Any plan documents, including amendments for GUST, should refer to the PBGC rates for Private Sector Plans. Treasury has determined that there are no 411(d)(6) issues. The purpose is to prevent the PBGC from being locked into a methodology for their own purposes.

Conclusion

The meeting with the PBGC was very constructive. The PBGC is very anxious to promote the growth of defined benefit pension plans and prevent politics from destroying incentives for employers to implement and continue defined benefit pension plans. ▲

Kurt F. Piper, MSPA, is owner and Chief Actuary of Piper Pension & Profit Sharing in Los Angeles. Mr. Piper serves on ASPA's Board of Directors, is a member of the American Academy of Actuaries, an associate of the Society of Actuaries, a Member of ASPA, and an Enrolled Actuary. He is a frequent speaker and currently serves as chair of GAC's Regulations Committee.

The following people represented ASPA at meetings with the DOL, IRS, and Treasury: Bruce Ashton, Craig Hoffman, R. Bradford Huss, Fred Reish, John Parks, Theresa Lensander, Kurt Piper, Valeri Stevens, Jeff Chang, Mike Canan, and Brian Graff.

Welcome New Members

Welcome and congratulations to ASPA's new members and recent designees.

MSPA

Kevin J. Donovan
Marc Jacobs

CPC

Craig S. Abbott
Jonathan D. Ginzel
Helen W. Godwin

QPA

Joseph G., Jr. Barmess
Teresa A. Bothum
Darlene Clark
Theresa T. Cones
Robert S. Frost
Robin B. Hadley
Michelle L. Judge
Kelly A. Kurtz
Stephen G. Lazarek
Beverly H. Lovenguth
Sherri L. Malless
Jeannine M. McAllister
Barbara G. Newburg
Suzanne D. Smith
Rachel M. Stampfli
Bryan D. Uecker
D. Taylor Welch

APM

Jeffrey C. Mapstone

Affiliate

Martin L. Kerns
George W. Kovka
Jasmine L. Robinson
Roger Rocha
Ted Rusinoff
Elizabeth A. Savage
Clint Stanley
Charles A. Wendt

CONTINUED FROM PAGE 4

Cafeteria Plans – A Refresher Course

accounts that are considered to be "limited scope benefits" under the terms of HIPAA are not subject to HIPAA certification requirements. A health FSA is exempt from HIPAA if: (1) the employer provides other health coverage that is subject to HIPAA; and (2) the maximum benefit under the health FSA is less than the greater of: two times the salary reduction amount; or the salary reduction amount plus $500.

To the extent a health FSA is exempt from HIPAA, then it is also exempt from COBRA in the year following the year of the COBRA qualifying event. It can also be exempt from COBRA in the year of the qualifying event depending upon the level of benefits that have been reimbursed to a participant. If the maximum amount that the health FSA could require to be paid for COBRA coverage equals or exceeds the maximum benefit available under the health FSA for the year, the COBRA continuation of coverage does not need to be offered for the year in which the event first occurs. Alternatively, if as of the qualifying event date, the maximum benefit available under the health FSA is more than the maximum amount that the plan could require as payment for the remainder of that year to maintain coverage , the plan is not exempt from COBRA in the year of the qualifying event.

For example: assume an employee elected $1,200 of coverage under a health FSA for the year and at the time of the qualifying event, the participant had paid $600 for coverage in the form of salary redirections, but had already been reimbursed $800. Since the participant could be required to pay $612 ($600 X 102%) for COBRA in order to receive the remaining $400 in benefits, COBRA coverage does not have to be offered under the plan.

Finally, two new sets of IRS regulations (one proposed and one final) set forth the specific rules with respect to mid-year benefit election changes. These rules, which will be discussed in greater detail later within this article, offer significant more flexibility than offered in the past with respect to changes in benefit elections and include events such as:

- Moving to a location where coverage is not available (i.e., outside an HMO's area of coverage)
- A dependent reaching an age when coverage is no longer available;
- A judgement or decree requiring the employee to provide coverage; or
- Eligibility for Medicare.

General Administrative Operation of Cafeteria Plans

There are three general types of cafeteria plans:

- Premium conversion plans (often called Premium Only Plans – "POP")
- Flexible Spending Accounts (FSAs)
- Full flex plans

A premium conversion plan is the simplest form of cafeteria plan. Rather than providing reimbursements for incurred expenses, a premium conversion plan is used to change the tax treatment of employee paid insured benefits from an after-tax to pre-tax basis. Despite the fact that premium conversion is really just a function of payroll, a cafeteria plan is the sole method for achieving this tax shift and, as a result, a premium conversion plan must be set forth in writing as a cafeteria plan and must follow all cafeteria plan rules, including reporting and disclosure and nondiscrimination testing.

Cafeteria plans can also offer certain reimbursement accounts. The most common are medical reimbursement and dependent care assistance. In most cases, these benefits are offered in conjunction with premium conversion. Special rules must be followed with respect to the election of benefits (benefits must be earmarked before the beginning of the plan year); claims substantiation, as well as separate nondiscrimination tests which must be applied.

A full flex plan is a plan where the employer contributes all or a part of its benefit expense into a cafeteria plan and permits plan participants to select the benefits that are most useful to them. To the extent a participant does not want the benefits offered under the plan, the participant would be entitled to the cash option.

Regardless of a plan's level of complexity, all cafeteria plans must:

- Be in writing
- Be properly communicated to employees
- Be operated in accordance with all applicable laws
- File annual Form 5500s, including all appropriate schedules and attachments
- Pass all applicable nondiscrimination tests.

In general, the existing cafeteria plan guidance focuses on the following key concepts:

(1) Cafeteria plans can not be used to defer compensation (although a 401(k) plan is a permissible benefit under a cafeteria plan). This means there can be no contribution carried

forward across plan years for a participant, and insurance products with cash accumulation features are not permissible.

(2) Benefits must be elected before the beginning of the period of coverage and can only be changed in certain limited circumstances, including certain changes in status, a significant change in the cost of coverage for the benefits offered through the cafeteria plan, or separation from service.

Qualified benefits under a cafeteria plan fall into two general categories – insured benefits and uninsured benefits.

Insured benefits include:

- accident and health insurance
- dental insurance
- vision insurance
- dreaded disease insurance
- AD&D insurance
- group-term life insurance

Uninsured benefits include:

- dependent care assistance programs
- medical reimbursement accounts
- vacation days
- 401(k) plan elective deferrals
- cash

As a result of certain SBJPA changes, adoption care assistance is a permissible benefit although few plans offer such benefit. All cafeteria plans must provide a cash option. In the case of a cafeteria plan with no employer contributions, the cash option is the participant's full salary unreduced for benefits.

Benefit Elections

In general, benefit elections must be made before the beginning of the plan year, or in the case of a new participant, before the participant's coverage under the plan takes effect and are irrevocable for the period of coverage (generally, the plan year). Benefit elections can only be changed in certain limited instances including certain changes in health coverage or cost, or if there is a change in status. According to recent proposed and final regulations, a change in status includes the following types of events:

- Marriage
- Divorce
- Change in employment status on the part of the employee's spouse (i.e. starting a job, terminating employment, shifting from part to full time status)
- Birth or adoption of a child
- Death of a spouse or dependent
- A dependent becoming eligible or ceasing eligibility due to student status
- A change in the work site or residence of a participant
- An unpaid leave of absence
- Changes in work schedule on the part of the participant or the participant's spouse
- A significant change in coverage under the health plan offered through the participant's spouse's employment
- Dependent Care Provider Changes

The new regulations further clarify that the change in election must coordinate with the change in status and place additional restrictions on when changes can be made to group-term life insurance coverage, limiting changes only to changes in family status that involve marital status or the number of dependents. Although these regulations are not yet effective (and only one of the two sets is finalized), they can be relied on currently. Proposed regulations issued prior to these most recent regulations described above set forth examples of changes in family status that could warrant a change in benefit election. These regulations applied to all benefits under the cafeteria plan and were meant to serve as an example, not an inclusive list of permissible events. Recently, the IRS also informally indicated that if there is clear evidence that an administrative error was made in processing an election, that a correction can be made. (The regulations do not currently address such mistakes.)

Plan and Trust Requirements

A cafeteria plan must be documented in a written plan document. However, unlike many other employee benefit plans, cafeteria plan assets can be held as a part of the employer's general assets and do not need to be maintained in a trust. This has been the case since 1992 when the Department of Labor clarified their stance in Technical Release Memorandum 92-01. The plan should also be communicated to employees. Some plans are required to provide a Summary Plan Description.

Nondiscrimination Testing

Nondiscrimination testing is probably the most complicated aspect of cafeteria plan administration. Some of the tests are applied to the cafeteria plan as a whole, while others are applied to the underlying benefits. To further complicate the testing process, the "prohibited group" (i.e., the

A cafeteria plan must be documented in a written plan document; however, its assets do not need to be maintained in a trust.

group of employees in which the plan can not discriminate in favor of) differs from test to test, and there is a lack of clear guidance as to how to apply some of these tests. The IRS has made it quite clear that it is critical that a good faith effort is made to apply these tests on an annual basis, and IRS corporate tax auditors have been instructed to look for patterns of discrimination in cafeteria plans.

In general, unless the nondiscrimination rules that apply to a cafeteria plan are satisfied, the tax benefits offered to the highly compensated participants and key employees are denied. The nondiscrimination tests that apply to the cafeteria plan are described below.

The plan cannot discriminate in favor of highly compensated participants with respect to eligibility. This test is satisfied if the plan benefits only collectively bargained employees or if the plan benefits a nondiscriminatory classification of employees. (For this purpose the nondiscriminatory classification component of the IRC §410(b) average benefits test can be applied); no employee is required to complete more than three years of service in order to participate; and all employees who meet the plan's eligibility requirements enter the plan no later than the first day of the plan year following the date the eligibility requirements are met.

The cafeteria plan, as a whole, must also satisfy certain standards with respect to contributions and benefits. This standard is satisfied if each participant has an equal opportunity to select nontaxable benefits, and highly compensated participants do not disproportionately select nontaxable benefits while others select taxable benefits (i.e., cash).

Cafeteria plans must also pass a concentration test. This test is considered to be satisfied if no more than 25 percent of the nontaxable benefits are provided to key employees (within the meaning of IRC §416).

Many of the underlying cafeteria plan benefits are also subject to certain nondiscrimination requirements. There is no test applied to insured accident and health benefits. However, there are nondiscrimination tests that apply to accident and health benefits that are self-funded (such as a health care FSA). A self-insured health plan or medical reimbursement account will be deemed discriminatory if it favors highly compensated individuals with respect to eligibility or benefits. For this purpose, highly compensated individuals include anyone in the following classifications of employees:

- One of the 5 highest paid officers
- A 10 percent or more shareholder
- One of the highest paid 25 percent of employees

The eligibility standard is met if the medical reimbursement account benefits at least 70 percent of all employees or, in the alternative if 80 percent or more of all eligible employees benefit under the plan and 70 percent or more of all employees are eligible to benefit under the plan. If neither of these standards is met, a plan can prove it is nondiscriminatory with respect to eligibility using the nondiscriminatory classification standard that applies to qualified retirement plans.

With respect to benefits, the nondiscriminatory standards will be met if the same benefits are available to all participants on the same basis. This standard is based on the dollar value of the benefits, not the same percentage of pay. This test is based on availability of benefits not utilization.

Certain tests apply to the dependent care assistance feature of a cafeteria plan. Some of these tests compare the benefits of the Highly Compensated Employees (HCEs) using the same definition as set forth in IRC §414(q) while others test based on a different prohibited group. Contributions and benefits can not discriminate in favor of HCEs. In addition, no more than 25 percent of the amounts paid under the dependent care assistance program can be paid to 5 percent shareholders, and the average benefit paid to participants who are NHCEs must be equal to at least 55 percent of the average benefits provided to HCEs. However, when applying this test, all employees who earn less than $25,000 can be excluded from the test.

Finally, there are certain tests that apply to the group-term life insurance feature of the plan. Under a special rule, group-term life insurance funded through a cafeteria plan will be deemed to meet the specific nondiscrimination requirements that apply to group-term life insurance plans.

Reporting and Disclosure

Cafeteria plans are subject to certain reporting and disclosure requirements imposed by the Internal Revenue Code and in some cases, ERISA. Cafeteria plans are considered specified fringe benefit plans within the Internal Revenue Code. On a stand alone basis, cafeteria plans are not considered to be welfare benefit plans by the DOL, however, some of the underlying benefits may be considered to be welfare benefit plans and require filing as a welfare benefit plan in order to meet DOL standards. To complicate matters further, certain exceptions apply to the DOL filing. Specifically, if a plan has less than 100 participants and the benefits are either fully insured or paid through the general assets of the employer, no Form 5500 is required.

For example, assume a cafeteria plan has 75 participants and offers premium conversion as well as a medical reimbursement feature. The plan would be required to file a Form 5500 and a Schedule F for the cafeteria plan itself. This is an IRS requirement. If the plan had more than 100 participants, the plan would also have certain DOL filing requirements. However, since there are fewer than 100 participants and all benefits are either fully insured or paid from the general assets of the employer, no supplemental Form 5500 filings are required.

Going Forward

It remains to be seen just how aggressive the IRS will get with respect to auditing cafeteria plans. Based on the published guidelines, it appears that cafeteria plan audits will be done in conjunction with corporate tax audits and not on a standalone basis. Now is a good time to do a quick compliance audit with respect to cafeteria plan administration. Documentation should be verified and organized. Late Form 5500s should be filed, and the nondiscrimination requirements should be reviewed to at least look for general patterns of discrimination that will require more attention.

Benefit practitioners have found that cafeteria plan administration is generally handled as a function of payroll. Few retirement plan TPAs are interested in getting involved in the checkwriting and claims review that is necessary to operate a cafeteria plan, and few plan sponsors are interested in paying the expenses involved for a third party to administer the plan. However, supplemental compliance consulting services can be a significant value-added service that can be offered in conjunction with qualified plan administration. These services help ensure your client of complying with all applicable benefit law and increase your overall value to your client. At a time when recordkeeping and administrative services are very competitive, value-added services such as cafeteria plan compliance can distinguish you from your competition. ▲

Amy Cavanaugh, APM, is an employee benefits consultant with the actuarial and consulting firm of Milliman & Robertson in Albany, New York. She has over 18 years experience in matters of plan design, compliance, and administration.

CONTINUED FROM PAGE 5

New Reporting Requirements for Payments from Insurance Companies

issued its new Strategic Enforcement Plan (StEP). In that Plan, the PWBA lists three national investigative priorities, one of which is service providers to plans. In discussing service provider investigations, the StEP states:

> "When investigating plan service providers, PWBA generally focuses on the abusive practices committed by the specific service providers rather than the plans. For example, where a third party administrator has systematically retained an undisclosed fee, generally the focus will be on the third party administrator rather than the plan that contracted for the services."

The change to the Schedule A raises the specific issue of whether certain types of compensation being paid by insurance companies to third party administrators must now be disclosed to plan sponsors, and to the IRS and DOL, on the new Schedule.

Taken literally, "other persons" would include all persons receiving payments from an insurance company, including, for example, the lawyers and actuaries who worked on creating the investment contract. Realistically, this cannot be what is intended by the Schedule A question. Without additional guidance from the DOL, we assume the term is limited to persons who are more directly associated with providing services related to the plan holding the contract and/or the investments purchased from the insurance company. Conversely, the term could be read narrowly to apply only to persons involved in selling the investment to the plan and/or the acquisition of the investment by the plan. Obviously, there are other gradations of interpretation.

Similarly, the term "fees" could be read broadly to be synonymous with all "payments" or narrowly to apply only to fees for services provided to the plan. Again, there are ranges of interpretation in between. It is precisely this range of possible interpretations of both terms that creates the uncertainty in this area.

We understand that the DOL will be publishing guidance – probably informal – on those questions and the other issues raised later on in this article.

Specific Examples

There are two key questions in determining the meaning of the new question. First, are third party administrators "other persons" for purposes of the disclosure requirements of the new Schedule A? Second, what constitutes "fees" for purposes of the Schedule A? Unfortunately, there are no definitive answers to these questions. However, one reasonable interpretation of the Schedule A language would require disclosure of payments in all of the specific fact situations discussed later in this article. For this reason, it would be prudent for service providers to begin disclosing to their clients all payments from insurance companies directly or indirectly related to their plans or the investment contracts held by those plans.

There are a wide variety of approaches used by financial companies that provide investments for plans (including insurance companies) in making payments to third party administrators (who we also refer to as "service providers") in unbundled arrangements, typically for the administration of 401(k) plans. By "financial company" we mean a company that provides investment products to ERISA-covered qualified plans, including insurance companies, mutual funds and their management and distribution companies, brokerage firms, and banks which provide investment products. In referring to "insurance companies" we include all of the entities covered by Section 103(e) of ERISA, which refers to "insurance company, insurance service, or other similar organization."

Although the different types of financial companies compete in the same marketplace for the same investment dollars of qualified plans, the disclosure obligations of the providers are different. Only insurance companies are subject to the special disclosure rules of Section 103(e) and Schedule A to the Form 5500, so that only the fees paid to service providers who are associated with plans that invest in insurance contracts (as opposed to mutual funds or products offered by banks and brokerage firms) are required to be separately reported. However, for plans covering 100 or more participants, Schedule C requires reporting of payments from a plan, as opposed to the Schedule A requirement for payments from an insurance company. Schedule C requires reporting of both direct and indirect payments from a plan, even if paid by a financial company providing investments for the plan.

> Although the different types of financial companies compete in the same marketplace, the disclosure obligations of the providers are different.

Payments made by a financial company to a service provider are often labeled as fees, expense reimbursements, marketing allowances, general agent overrides or otherwise. However, the payment is typically made in the situation where a third party administrator does one or more of the following: (1) has introduced the broker, agent or other sales representative to the plan sponsor and/or fiduciaries; (2) is the broker or agent on the sale of the investment to the plan and also receives a commission on the sale; (3) has otherwise participated in the process of suggesting, selecting or evaluating the investment; (4) has signed a general agency contract with an insurance company, but may not provide the types of services typically provided by the general agent of an insurance agency or may only provide administrative services to the plans; or (5) is not involved in the sales process and only provides administrative services to a plan which holds the insurance company investment product.

In some situations, the payment may be made from plan assets (that is, there is a direct payment which reduces plan assets or an indirect payment in which the financial institution makes the payment from its general assets, but through its pricing, assesses a corresponding charge against the plan assets). Alternatively, the payment is sometimes made from the general assets of the financial company (*e.g.*, the insurance company or a company controlled by or related to the insurance company), and is not paid by a discrete charge to the assets of the plan. In these latter cases, the financial companies' charges to the plan (*e.g.*, under the group annuity contract) are the same, regardless of whether, for a specific plan, such payments are made to third party administrators.

The following are typical situations currently in practice by various investment providers. In each case, it appears that the payments to the service provider may need to be disclosed under the new Schedule A requirement.

Example 1. An unbundled investment provider pays a third party administrator a percentage (*e.g.*, 20%) of the commissions paid to the broker on the sale of a group annuity contract, where the plan is administered by the third party administrator. In this example, the third party administrator may have signed a "general agency" agreement with the insurance company.

Comment: The instructions to line 2 column (c) of the Schedule A states: "Report all sales commissions regardless of the identity of the recipient. *Do not report override commissions, salaries, bonuses, etc., paid to a* ***general agent*** *or manager for* ***managing an agency, or for performing other administrative functions.***" [Emphasis added] Presumably, this exception relates only to payments made for activities as a general agent. Therefore, if the third party administrator is not performing the traditional duties of a general agent, substance would prevail over form, and reporting would be required.

Example 2. An unbundled investment provider pays a third party administrator a commission for its services as the broker (which is appropriately disclosed on Schedule A), plus an "expense reimbursement" equal to a percentage of that commission (*e.g.*, 5%) which may or may not be paid on an accountable basis. For this purpose, "not accountable" means that the third party administrator is not required to submit proof that it actually incurred the expenses. The "reimbursement" may be for various types of expenses, but typically involves expenses associated with marketing, sales or finder activities.

Example 3. An unbundled investment provider pays a third party administrator an amount (*e.g.*, 20 basis points) on the aggregate plan assets in all group annuity contracts of the investment provider held by clients of that service provider.

Comment: The instructions state: "For purposes of line 2, commissions and fees include amounts paid by an insurance company on the basis of the aggregate value (*e.g.*, policy amounts, premiums) of contracts or policies (or classes thereof) placed or retained. The amount (or pro rata share of the total) of such commissions or fees attributable to the contract or policy placed with or retained by the plan must be reported.…"

Example 4. An unbundled investment provider makes payments to a third party administrator. The payment is based on factors such as the total number of plans the third party administrator has with the investment provider, the aggregate assets in those plans and the total number of participants in those plans. The payments may be labeled as being for marketing, expense reimbursement or otherwise.

Example 5. A bundled investment provider undertakes to provide all investment management, recordkeeping and administration services for the plans that invest in its products. The investment provider receives one fee from the plan and pays, out of that fee, the commissions to the broker who sold the case. The investment provider bears the entire cost of administration and recordkeeping for the plan. In this example, since the investment provider also provides the administration services, there is no direct charge by an unrelated third party administrator for the administration services, and the investment provider subsidizes the administrative costs out of the fees it otherwise receives from the plan on the investment product.

Comment: This example raises some unique issues which do not exist in the other situations. These include whether: (1) the investment provider in the bundled approach needs to report the amount of the subsidized cost on Schedule A; (2) its administrative division or subsidiary is an "other person" for purposes of Schedule A; and (3) the subsidy of the administrative services division or subsidiary is a fee within the meaning of Section 103(e).

Conclusion

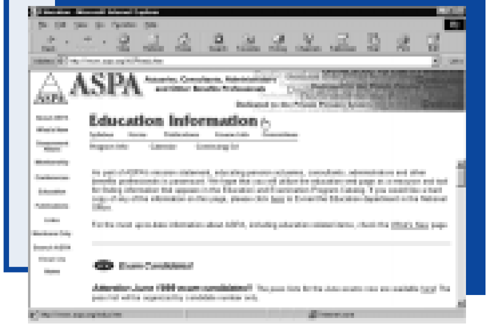
The examples discussed in this article only touch the surface of the myriad ways for paying compensation to service providers. However, the new Schedule A requirement for the reporting of the payment of insurance fees to other persons may be sufficiently broad to pick up all of them. As a result, service providers should begin the process of educating their clients about their relationships with financial institutions and the payments they receive from them. Further, we recommend that the disclosure be placed in an engagement agreement which is signed by the plan's ERISA Administrator – usually the employer or the plan committee. In that way, the service provider will have proof that the payment was disclosed and that the plan fiduciaries knowingly consented to the arrangement. ▲

[Editor's Note: For additional information, *ASPA ASAP* 2000-16 provides more detail on StEP.]

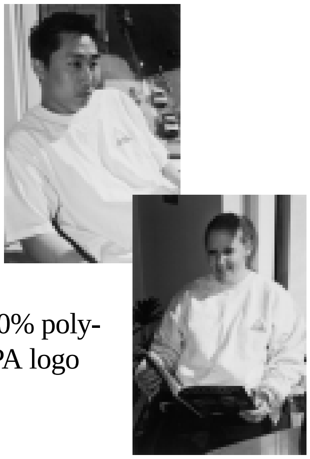
C. Frederick Reish, APM, Esq., is a founder of and partner with the Los Angeles law firm Reish & Luftman. He is a former cochair of ASPA's Government Affairs Committee and is currently the chair of GAC's Long Range Planning Committee. Bruce L. Ashton, APM, Esq., a partner with Reish & Luftman, is cochair of the Government Affairs Committee and serves on ASPA's Board of Directors.

ASPA Exam Results Posted Online

Exam results for the December 1999 C-1, C-2(DB), C-2(DC), C-3, and C-4 exams are now posted by candidate name at **www.aspa.org/aspaedu.htm**. A list of candidates who earned the Pension Administrator's Certificate effective August 31, 1999 is also available on the site.



ASPA Wearables Now Available!



ASPA is selling tee shirts and sweat shirts featuring the ASPA logo. Now you can wear the ASPA logo with pride!

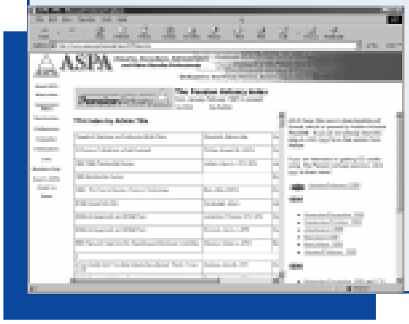
Item: ASPA Tee Shirt is 100% heavy weight 6 oz. cotton, with a blue ASPA logo printed on the front.
Color: White
Sizes: M, L, XL, XXL
Price: $10.00 + shipping and handling

Item: ASPA Sweat Shirt is 90% cotton, 10% polyester 9.5 oz. fleece, with a blue ASPA logo embroidered on the front.
Color: Ash (grey)
Sizes: M, L, XL, XXL
Price: $25.00 + shipping and handling

Order forms are available on our website at **www.aspa.org**, or you may call ASPA's membership department at (703) 516-9300 to receive an order form.

The Pension Actuary on the Web

Faster and easier!

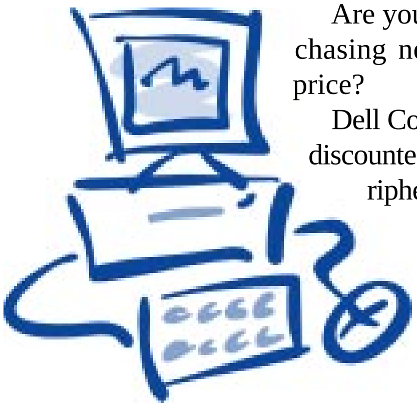


Go to the Members Only section on the ASPA website at

www.aspa.org/memonly/ASPAmemonly.htm

and check out the TPA on the web – indexed by author and article title for easier referencing.

ATTENTION ASPA MEMBERS!



Are you or your company interested in purchasing new computer equipment at a great price?

Dell Computer Corporation has established a discounted purchase plan on computers and peripherals exclusively for ASPA members!

For more information, call Dell at (800) 822-6069, refer to the Guardian discount program, and identify yourself as an ASPA member.

New ABCs on the Horizon!

ASPA is currently fostering the development of ASPA Benefits Councils in several areas around the country. ASPA members in the following areas have expressed an interest in starting a local council:

- Denver, Colorado
- Hartford, Connecticut
- Indianapolis, Indiana
- Pittsburgh, Pennsylvania
- Dallas, Texas
- North/South Dakota

If you live in one of these areas and would like to become involved in the development of these ABC groups, please contact Amy Emery at the ASPA national office at (703) 516-9300 or e-mail aemery@aspa.org. Establishing an ABC requires a significant amount of work, and we welcome your involvement!

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

The Pension Actuary welcomes your views! Send to:

The Pension Actuary
ASPA, Suite 750
4245 North Fairfax Drive
Arlington, VA 22203
(703) 516-9300

or fax (703) 516-9308

or e-mail aspa@aspa.org

Best of the Business Leadership Conference

July 15, 2000 · Fairmont Hotel · San Francisco, CA

Arrive early for 2000 Summer Conference and attend!

Make your plans to arrive early for the 2000 ASPA Summer Conference, *ASPA's Summer Academy*, and attend the one-day workshop, "Best of the Business Leadership Conference." The Business Leadership Conference (BLC) is an ASPA program designed for primary decision-makers including presidents, owners, and key managers. If you weren't able to attend the BLC in San Diego, CA, May 7-10, 2000, this workshop is a great opportunity for you to learn from and network with industry leaders and receive some of the many benefits of attending the BLC.

The workshop will be held on Saturday, July 15 at the Fairmont Hotel in San Francisco, the site of the 2000 ASPA Summer Conference. The committee for ASPA's Business Leadership Conference has carefully selected the sessions. The agenda is listed below.

8:00 am – 9:00 am	Workshop registration and continental breakfast
9:00 am – 10:40 am	*The TPA in the New Millennium*
10:40 am – 11:00 am	Beverage break
11:00 am – 12:15 pm	*Technology Issues Inside a Pension Operation*
12:15 pm – 1:30 pm	Luncheon
1:30 pm – 3:10 pm	*Employment Issues for the Future*
3:10 pm – 3:30 pm	Beverage break
3:30 pm – 4:45 pm	*Corporate Strategies for the New Millennium*

The one-day workshop is a separate registration from the Summer Academy. Registration fees are $200/$250 for members and $300/$365 for nonmembers. The information on the "Best of BLC" is included in the brochure for the 2000 ASPA Summer Conference. Additional information is available on our website at **www.aspa.org**, or you can contact the ASPA Meetings Department at (703) 516-9300, or by e-mail at meetings@aspa.org.

Los Angeles Benefits Conference

September 14-15, 2000 · Hilton Universal City & Towers Hotel · Los Angeles

The Western Area, Tax Exempt and Government Entities Division of the Internal Revenue Service and ASPA are cosponsoring the 2000 Los Angeles Benefits Conference, September 14-15, 2000, at the Hilton Universal City & Towers Hotel in Los Angeles. It is a great opportunity for participants to meet and discuss employee benefit issues such as benefits regulation, litigation, enforcement efforts, and voluntary compliance initiatives.

Conference Focus

The conference will focus on the exchange of information between regulators and practitioners, the advancement of technical knowledge, and the sharing of practical solutions to benefits questions.

Speakers

A number of prominent speakers have been invited and include: Evelyn A. Petschek, Commissioner of Tax Exempt & Government Entities Operating Division, IRS; Richard J. Wickersham, Manager of Guidance and Quality Assurance for Employee Plans, IRS; Preston Butcher, Director, Employee Plans Examinations, IRS; and Virginia C. Smith, Director of Enforcement, DOL. These and many other government agency and private industry presenters will participate.

CE Credit

The conference provides continuing education credit for ASPA designations, as well as CLE, CPE, EA, and CRSP designations.

ASPA will mail the conference brochure in July to prospective attendees in all the Western Region States. For more information, contact the ASPA Meetings Department at (703) 516-9300 or by e-mail at meetings@aspa.org. You can also visit ASPA's website at **www.aspa.org**. The registration form will be available on our website in mid-summer.

Registration Fees

Early (until August 21)	$ 425
Additional Registrant *	$ 375
Late (after August 21)	$ 525
Government Representative	$ 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.

2000 ASPA Summer Conference: *ASPA Summer Academy*

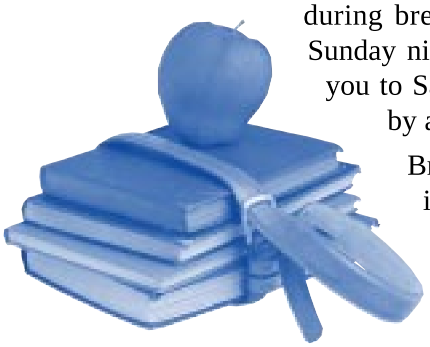
July 16-19, 2000 · The Fairmont Hotel · San Francisco, California

Join us for our 2nd Summer Conference, *ASPA Summer Academy*, to learn the latest developments in the pension industry. You will have a choice of concurrent workshops on topics designed to fit the diverse needs of our industry. Topics on the agenda include the following:

- Employee Communications
- Cash Balance Plans
- Cross-Testing
- New Form 5500
- Defined Benefit Terminations
- Post NRA Accruals in a DB Plan
- Fiduciary Duties in a 401(k) Plan
- Deduction Issues
- Understanding Business Entities
- And many more topics

Sessions include updates on the latest happenings in Washington, DC that affect you and your business, plus panel discussions on defined benefit and defined contribution plans.

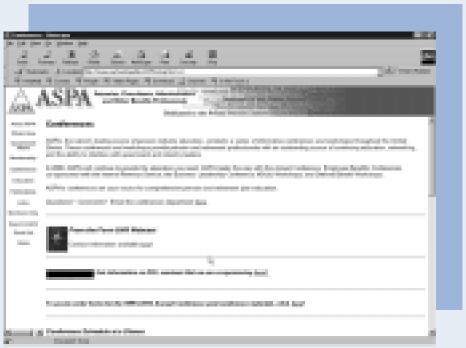
An additional Academy highlight is an exhibition with more than 20 vendors showcasing products and services essential to the pension industry. You will have the opportunity to network with the exhibitors during breakfasts, lunches, and beverage breaks. Sunday night will feature a reception to welcome you to San Francisco and include a performance by a local jazz band.



Brochures are in the mail, and conference information is available on our website, **www.aspa.org**. You can also contact the ASPA Meetings Department at (703) 516-9300 or meetings@aspa.org.

www.aspa.org

Check out the Conferences Webpage to download information, brochures, and registration forms for upcoming conferences.



Nominations Open for ASPA's Board of Directors

For ASPA to continue to be the effective pension organization that it is, 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.

To be considered for a Board position, a member'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 or someone you know would be a valuable 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*, or you may access the form on the Members Only portion of our website, **www.aspa.org**.

The best way to make a difference is to get involved!

ASPA is always looking for volunteers to assist with and/or serve on our many committees. If you or someone you know is interested in becoming more involved, please contact ASPA's membership department at (703) 516-9300. You may also complete and submit ASPA's volunteer survey on our website at **www.aspa.org**.

Focus on ABCs

Cleveland and North Florida

by Robyn C. Morris, Cleveland and Barbara L. Sanchez-Salazar, Jacksonville

The year 2000 is off to a great start for ASPA's Benefits Councils! ABC programs, the key to a council's success, feature quality speakers and informative topics at the local level. Timely topics that have kicked off the new year include: *The New Form 5500, Controlled Group Issues, A Legislative Update,* and *Creditor Claims on Pension Assets.* Upcoming programs will cover *Benefit Plan Design for the Millennium, How to Eliminate Plan Overfunding, DOL Update*, and *Plan Audits*. These and other ABC programs provide cost-effective and convenient educational and networking opportunities to attendees.

Cleveland, Ohio

The ASPA Benefits Council of Cleveland, Ohio is winding up its third program year. Programs this past year have included a presentation by Brian H. Graff, Esq., Executive Director of ASPA; a Panel Discussion comprised of Roger St. Cyr, moderator, and panelists Lindsay Borden, Ted Crawford, and Ed Kucler, answering the question, "What does the client really want?" and a discussion of employer securities in qualified plans presented by Michael Olah. Additionally, John Rose spoke on Form 5500 audits; Dave Tenenbaum, APM, lectured about Creditor Claims on Pension Assets; and Joe Canary visited our group to discuss recent changes brought about through the Department of Labor. In addition to educational programs, the ASPA Benefits Council of Cleveland held a billiards tournament social event at the end of the program year.

Board leadership changed at the beginning of this year. Outgoing President, Ron Gross of Moskal Klein, was replaced by Robyn C. Morris of Saltz, Shamis & Goldfarb (although Ron has remained on the Board). New members to the Board are Michelle Buckley of Meaden & Moore, Donna Brewster of Brewster & Brewster, Harry Slocum of Ciuni & Panichi, and Luisa Tolusso of Key Bank. These new members join veteran Board members, Gary Zwick of Walter & Haverfield, Patricia Shlonsky of Ulmer & Berne, Brendan Fitzgerald of Sustin, Bartel & Waldman, and Pete Kish of AXA Advisors.

The Board will hold a planning retreat in mid-May to determine the program and general direction for the next program year. The ASPA Benefits Council of Cleveland schedules five to six informational luncheon meetings, and is working on ways to make the local organization even more beneficial for members. ▲

Robyn C. Morris is the President of the ASPA Benefits Council of Cleveland. She is a Senior Associate with the business services firm of Saltz, Shamis & Goldfarb, heading up a segment of the Employee Benefits Consulting Practice within the firm. Ms. Morris is the current author of Panel Publishers Flexible Benefit Plan Answer Book.

Jacksonville, Florida

The Jacksonville ABC previously existed as the Employee Benefit Council of Northeast Florida, Inc., which provided an employee benefits forum for practitioners on Florida's East Coast since the mid 1980's. Since aligning with ASPA, the North Florida ABC has indeed been busy!

In January, we installed the board and its officers. They are Lorraine Dorsa, MSPA, of Lorraine Dorsa & Associates, President; Barbara Sanchez-Salazar of the Law Offices of Barbara L. Sanchez-Salazar, Vice President; Judy Bingler of LaFaye Brock & Associates, Treasurer; and Jennifer Yates of LeBoeuf, Lamb, Greene & MacRae, L.L.P, Secretary. Board members include Stuart Hack, APM, of the Hack Companies, and Dorothy Breakstone, APM, of Breakstone & Associates, L.L.C.

In February, Stuart Hack, APM, of The Hack Companies, spoke on fiduciary issues surrounding ERISA 404(a) and (c). In April, Brian Graff, Esq., ASPA's Executive Director, spoke about legislative issues and the status of the debate on cross-tested plans. On June 21st, Robert Ennis, CPA, of Ennis, Pellam & Griggs, will speak on qualified plan audits from the CPA's perspective. ▲

Barbara L. Sanchez-Salazar is an attorney in a solo practice specializing in employee benefits and qualified deferred compensation plans. Barbara has been in the benefits field for 11 years; starting with Corbel & Co. in 1989 and then continuing her practice with the law firm of LeBoeuf, Lamb, Greene & MacRae, L.L.P.

FOCUS ON CE

This is a CE Filing Year – Are You Ready?

by Cathy M. Green, CPC, QPA

Every ASPA credentialed member* is required to earn 40 continuing education credits in each continuing education cycle. The current cycle is for the 1999 and 2000 calendar years. Your completed CE form is due at the ASPA office by January 8, 2001. For those members who are ready to file, a blank reporting form can be found on page 35 of the *2000 ASPA Yearbook*. A copy of the *ASPA Continuing Education Guidelines and Rules* will also be mailed with a future issue of *The Pension Actuary*.

For those ASPA members who have not yet earned 40 credits, it's not too late. You still have plenty of time to earn your credits. There is an entire smorgasbord of items among which to pick!

At the top of the list is this year's Summer Conference, the *ASPA Summer Academy*, where members can earn 20 ASPA credits. The *Summer Academy* will be held in San Francisco, CA at the Fairmont Hotel from Sunday, July 16 to Wednesday, July 19. For complete details and a copy of the brochure, access the ASPA website at **www.aspa.org**.

If you are taking a June C-3 or C-4 exam, upon successful completion, members earn 20 credits. If you take the exam and do not pass it, you can still earn 15 credits.

If you are taking a spring course, or plan to take a course in the fall, enrollment in the virtual study groups earns 20 credits and the ASPA Weekend Review Course for C-1, C-2(DB), C-2(DC), C-3, or C-4 earns 15 ASPA CE credits.

If you volunteer to serve as an item writer for the December exams or, if you are a CPC and volunteer as a grader for the C-3 or C-4 exams, you can earn as many as 15 credits. If interested, contact the ASPA education department via e-mail at educaspa@aspa.org for more details.

You can earn 7 ASPA CE credits for attending any of the remaining defined benefit or 401(k) workshops. The defined benefit workshops will be held on June 20 in Los Angeles, on July 10 in Philadelphia, and on August 28 in Orlando. The 401(k) workshops will be held on June 19 in Los Angeles, on July 11 in Philadelphia, and on August 25 in Atlanta.

Two jointly sponsored ASPA and IRS conferences can also earn ASPA CE credit. The Northeast Area Employee Benefits Conference held on June 16 in White Plains, New York, earns 8 ASPA CE credits. On September 14 and 15, the LA Benefits Conference will be held in Los Angeles, earning 14.5 ASPA CE credits.

And last, but certainly not least, is the ASPA 2000 Annual Conference held October 29 to November 1 in Washington, D.C. Attendance at the ASPA Annual earns you 20 ASPA CE credits.

ASPA conferences are designed to also earn Enrolled Actuary credit. Consult each conference brochure for the numbers of credits that, in ASPA's opinion, the Joint Board is likely to grant.

For more information on any of the above, access the ASPA website at **www.aspa.org**. The ASPA meetings department can be contacted at meetings@aspa.org and the ASPA education department at educaspa@aspa.org.

* *ASPA members who received their designation(s) prior to 1990 are not required to file. Your CE requirement will be prorated if you earned your designation mid-cycle. Consult the* ASPA Continuing Education Guidelines and Rules *for the prorated requirements.* ▲

Cathy M. Green, CPC, QPA, is vice president of CMC in Glendale, Calif. She is the chair of the Continuing Education Committee. Ms. Green, a member of ASPA's Board of Directors, also serves on the Conference Committee and is chair of the 2000 ASPA Summer Conference. In February, Ms. Green served on the Strategic Planning and Implementation Team.

FOCUS ON E&E

E&E Plans New 2001 Exam Schedule

by Gwen O'Connell, CPC, QPA

Every year, ASPA's Education and Examination Committee (E&E) engages in an activity called "The Houston Project," so called because the first time it happened was at an E&E meeting in Houston, Texas. The project consists of reviewing the syllabus for each of the examinations/study guides to determine if:

1) all topics are properly covered; and

2) the topics need to be moved/enhanced/added/subtracted from/to each specific examination to ensure that ASPA's education program is meeting the needs of ASPA members and of the industry.

This year was no exception and the Houston Project was undertaken at the March E&E meeting in San Antonio, TX.

During the discussions, the E&E Committee committed to continuing the series of "take-home," self-study examinations, which includes PA-1A, PA-1B, and the new Daily Valuation examinations. The Committee also decided that a Basic Pension Mathematics course should be a part of the self-study program. This course in not currently available, but will be developed in the next year or two.

As in the case of any restructuring, topics will be moved and shifted from one examination to another. Items have already been identified that will be moved from the C-1 examination to one of the self-study examinations. Taking into consideration the comments from our examination candidates and course instructors and after reviewing the large volume of material, the C-2(DC) examination will be divided into two parts, one part will focus solely on 401(k) topics. Part II of the C-2(DC) examination will consist of more advanced defined contribution topics such as ESOP's, cross-testing, age weighted plans, and permitted disparity. The C-2(DB) examination will also be divided into two parts, one part will focus on safe harbor design, accrued benefits, permitted disparity, and other general defined benefit issues. Part II of the C-2(DB) examination will cover advanced defined benefit plan issues such as plan funding, non-safe harbor plans (e.g. cash balance, windows, offsets), plan terminations, and post NRA accruals.

Examination restructuring will take the E&E Committee some time. We will issue periodic updates on our progress through articles in *The Pension Actuary*.

As part of ASPA's commitment to deliver examinations as effectively as possible to our candidates, beginning in April 2001, the ASPA C-1, C-2(DC), and C-2(DB) examinations will all be administered at Sylvan Technology Centers. Plans are underway to open the testing periods to two six-week windows, allowing the candidates to pick the place, date, and time that they will take the examination during these two six-week periods. In addition, candidates who take the examinations will be given examination results (most likely a simple "pass" or "fail") immediately upon completion of the examination. The C-3 and C-4 examinations, however, will continue to be offered at paper and pencil sites until the testing technology is available to deliver them at the Sylvan Testing Centers.

If you have any questions or comments regarding the examination restructuring, you may e-mail them to educaspa@aspa.org or send them to me via The Pension Actuary Editor, 4245 North Fairfax Drive, Suite 750, Arlington, VA 22203. ▲

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.

PIX Digest

The Pension Information eXchange (PIX) is an online service for pension practitioners. ASPA has co-sponsored the PIX Pension Forum for many years. For more information about PIX, call 805-683-4334.

Age 70½ Minimum Distributions for non-owners

[Thread 86433]

This thread discusses what, if any, required minimum distributions apply to a non-owner participant who has attained age 70½, both in the situation where employment continues and where employment terminates. The first situation a user posted describes the situation where the participant is continuing in employment, has taken a full distribution and rolled over his account balance, but is continuing to receive top heavy minimum allocations each year. He is not planning to actually retire.

Because the plan allows for distributions after attainment of Normal Retirement Age, the participant could take a distribution of these top heavy minimums at any time. If he does, is it subject to the minimum distribution rules, or can the entire amount be rolled over?

Initially several users believed that if any distribution occurred, only the amount in excess of the minimum distribution would be an eligible rollover contribution. However, another user pointed out IRS Notice 96-67, which, in the context of discussing an employee over age 70½ who has not retired, states "a distribution to such an employee in 1997 (i.e., after the effective date of the SBJPA amendments) is not a required distribution under Code §401(a)(9)."

This citation makes it clear that no minimum distributions are required while the participant is still employed, even if a distribution is actually made, so any such distribution could be rolled over to an IRA. Of course, once the funds are in the IRA, they will become subject to the minimum distribution requirements applicable to IRAs.

To read the entire thread, download the file mindist3.fsg.

IRS Notice 2000-14 and Tiered Plans

[Threads 84969, 86597, 85676, 85669, 85934, 86107, 86137, 86179, 86241, 86381, 86785]

A number of discussions have taken place on PIX concerning Treasury's reconsideration of the use of tiered allocations in defined contribution plans. Many of these discussions relate practitioners' experiences of being able to set up plans for sponsors where no previous plan had been in place, as well as convincing plan sponsors who were considering terminating their plans to keep them.

Other discussions have dealt with the more immediate practical considerations of how to advise both existing clients and prospective clients about what to do now if they have a tiered plan or are considering the adoption of a tiered plan. The most problematic area of practice right now concerns sponsors who would like to set up a tiered allocation method while already sponsoring a plan. To read the compilation of these discussions, download the file 2000-14.fsg.

Correcting Deferrals from an Ineligible Participant

[Thread 85910]

One of the most common errors made by 401(k) plan sponsors is accepting deferrals from employees prior to their being eligible to enter the plan. This thread discusses the way to correct this error under APRSC. Many times when this error is discovered, it involves a contribution amount of just a few hundred dollars at most, a non-highly compensated employee, and often, one who did in fact become eligible for the plan later in the same plan year. Since the employee could have made the same dollar contributions during the year, could the error be treated as self-correcting, and should a corrective approach be any different if the affected participant is also highly compensated?

To read the entire thread, download the file ineligk2.fsg. ▲

ASPA NEEDS YOUR HELP

The DOL Committee, an
ASPA Government Affairs
Committee, needs to talk with
anyone who has received a
subpoena of its records as part
of a DOL service provider
audit within the last five years.

As soon as possible,
please contact
Marty Heming, APM, Esq.,
at Reish and Luftman
Phone: 310-478-5656 x263
Fax: 310-478-5831
E-mail:
martyheming@reish.com

Bulletin Board

Make hotel reservations for the Summer Conference by June 16
(800)527-4727

Early Registration Deadline for the Summer Conference June 23

Missed Midstates – Go to Best of!
Milwaukee, 7/24;
Kansas City, 7/28;
or Minneapolis, 7/31

Don't forget! PA-1 exams must be in the ASPA office on 8/31

Registration Deadline for December exams – 10/15

Filing Deadline for CE credits to maintain ASPA designation – 1/8/01

2000 Calendar of Events

		ASPA CE Credit
June 16	Northeast Area Employee Benefits Conference, White Plains, NY	8
June 19	401(k) Daily Valuation Workshop, Los Angeles, CA	7
June 20	Defined Benefit Workshop, Los Angeles, CA	7
July 10	Defined Benefit Workshop, Philadelphia, PA	7
July 11	401(k) Daily Valuation Workshop, Philadelphia, PA	7
July 15	Best of the BLC, San Francisco, CA	7
July 16-19	ASPA Summer Conference, San Francisco, CA	20
July 23	Grades for the June ASPA exams released	*
July 24	Best of Midstates, Milwaukee, WI	8
July 28	Best of Midstates, Kansas City, MO	8
July 31	Best of Midstates, Minneapolis, MN	8
August 25	401(k) Daily Valuation Workshop, Atlanta, GA	7
August 28	Defined Benefit Workshop, Orlando, FL	7
August 31	PA-1(A) and PA-1(B) exam submission deadline	**
Sept. 14-15	LA Benefits Conference, Los Angeles, CA	14.5
Oct. 15	Early registration deadline for ASPA December exams	
Oct. 29 - Nov. 1	2000 ASPA Annual Conference, Washington, D.C.	20
Nov. 1	Final registration deadline for ASPA December exams	
December 6	C-1, C-3, C-4 and A-4 exams	*
December 7	C-2(DC) exam	*
December 8	C-2(DB) exams	*
December 31	Daily Valuation Exam submission deadline	***

2001 Calendar of Events

January 8	1998-1999 ASPA CE filing deadline	
July 22-25	ASPA Summer Conference, San Francisco, CA	20
October 28 - 31	2001 ASPA Annual Conference, Washington, D.C.	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 five hours of ASPA continuing education credits each for a passing grade.

*** Daily Valuation exams earn five hours of ASPA continuing education credits for a passing grade.