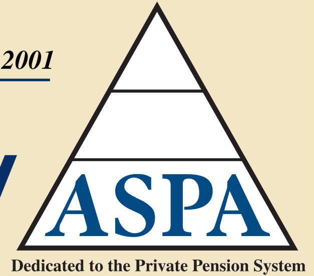
A publication of the American Society of Pension Actuaries *Vol. XXXI, Number 4* *July-August 2001*

THE Pension Actuary



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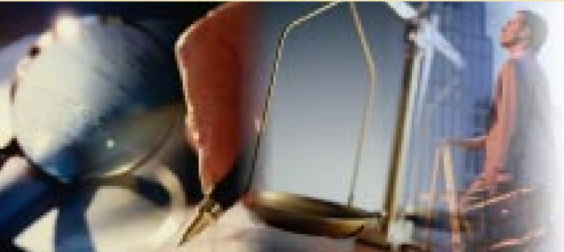

Oops!! I'm a Fiduciary?

by Lee Kliebert, CPC, QPA
and E. William Berke, APM

With investment markets in their current state of flux, many 401(k) plan sponsors will be looking at their plans with a critical eye in the coming months. Inevitably, many will choose to change investment providers, recordkeepers, and TPAs. As a result, chances are good that most TPAs will find themselves on both ends of 401(k) takeover cases. Regardless of which end of the takeover a TPA finds itself, there are many issues to trip over. Handled improperly, some of these issues have the potential to create fiduciary status for the TPA. This article attempts to address how ERISA fiduciary rules impact a 401(k) plan's blackout period and what the TPA must be concerned with to avoid becoming a fiduciary. While there are currently no cases directly on point, there are many cases that provide the road map as to how this issue will probably be litigated, sooner rather than later.

WASHINGTON UPDATE

The Next Generation of Pension Legislation

Revitalizing Defined Benefit Plans

by Brian H. Graff, Esq.

This article is the first in a series of periodic articles discussing the possible framework for future pension legislation.

It has been a couple of months since EGTRRA was enacted, and if you think we are done with pension legislation, forget it. ASPA's Government Affairs Committee has already started to have meetings with Congressional staff about possible proposals for the next generation of pension legislation. Remember, it took almost five years for EGTRRA to be enacted. Preserving and enhancing the private pension system is a full time job.

One of the major themes we are pursuing is the revitalization of defined benefit plans. There is renewed interest in DB plans on

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Background

1. ERISA §3(21)(A) defines a fiduciary as a person who (i) has any discretionary authority or control over the management of the plan or its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to the plan's assets or has any authority or responsibility to do so, or (iii) has any discretionary authority or responsibility in the administration of the plan.

   In addition to the requirement that the plan document name a fiduciary [ERISA §402(a)], a person can be deemed a fiduciary because the term is a functional term, not merely the result of a formal identification [*Mertens v. Hewitt Assocs*, 508 US 248 (1993)].

   The courts have consistently applied the three-pronged test set forth in ERISA §3(21)(A) to determine fiduciary status. For purposes of this article, the third test (discretionary administrative control) is one that few, if any, small plan TPAs should encounter. Thus, this article focuses on the first two tests and how their application could affect the reader. While we split the two prongs for discussion purposes, the courts do not make such a distinction. Rather, the courts use the facts and circumstances and apply the separate standards of the two prongs simultaneously without regard to the specific prong.

2. For purposes of this article, the fact pattern is:

   Plan Sponsor has maintained a 401(k) plan for ten years. During this time, ABC TPA firm has provided all the administrative and recordkeeping services. Al Agent, owner of ABC, sold the sole funding vehicle, a group annuity contract with investment choices, and received the commissions personally.

   Plan Sponsor is approached by his bank, which offers a typical bundled service product. Plan Sponsor decides to transfer to the bank and signs a letter drafted by the bank. The letter instructs ABC to wrap up its work as of December 31, liquidate the annuity contract, and wire transfer the proceeds, with the further demand to provide the individual accounting as soon as possible. Neither the bank nor Plan Sponsor makes any further contact with ABC.

   On January 2, the bank receives the proceeds and places them in a money market account. ABC doesn't provide the participant accounting until April 1, and the bank does not allocate the funds from the money market account until June 1, when it transfers the money to the participant

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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.

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ASPA Members Participate in IRS 403(b)/457 Workshop

by Theresa Lensander, CPC, QPA, JoAnn Albrecht, APM, and Amiram Givon, CPC, QPA

On April 5, 2001, Theresa Lensander, JoAnn Albrecht, and Ami Givon of ASPA's Tax-Exempt and Governmental Plans Committee participated in an interactive panel discussion at the IRS's annual 403(b)/457 workshop at the IRS's Laguna Niguel, California offices. This was the third year of the workshop. ASPA participated in the workshop at the invitation of the IRS all three years. This was the first year that vendor representatives served as panelists. The workshop is an annual training meeting of IRS technical field employees involved in 403(b) and 457 plan examination, voluntary correction, and educational outreach activities. Robert Architect and Cheryl Press chaired the panel.

Panel members shared the experiences and insights of practitioners and vendors on the current trends, problems, and concerns affecting such plans. All agreed that during the last five years, compliance in the 403(b) area has improved, due in large part to IRS educational, outreach, and voluntary correction programs which have evolved with ongoing input from the practitioner community.

ASPA encouraged the use of the VCT correction program under Revenue Procedure 2001-17 for 403(b) eligible employers, while at the same time acknowledging that the self-correction process is still at a basic level. The concept was stressed that increased participation with self-correction will follow once employers and vendors have time to work out policies and be comfortable that policies and procedures are developed properly. It was noted that development of policies and procedures would greatly assist with operation of 403(b) plans.

The most common problems mentioned were violations of the universal eligibility requirements and the maximum exclusion allowance calculations. Panel members noted that 403(b) plans with a salary deferral feature often have not made that feature available to all employees, as is generally required by the §403(b) "universal eligibility" requirement. Under IRS correction programs, the standard method of correction for a violation of that requirement is making contributions for improperly excluded employees. Many panel members felt that a 403(b) plan which has violated the universal eligibility requirement in the past should be permitted to correct on a prospective basis only, since most eligible 403(b) employers do not have the financial resources to make the standard correction.

Many audits have revealed that the counting of years of service for purposes of the "maximum exclusion allowance" (MEA) is often incorrect, especially in the case of teachers. When employees are asked how long they have been employed, they usually provide the total number of years they have worked in the state retirement system, not the number of years they have been with a particular school district. The panelists acknowledged that a step-up in the IRS audits with regard to the MEA calculations will occur, particularly in light of new legislation which would no longer require the MEA limit, beginning in 2002.

Vendor representatives indicated that more definitive guidance from the IRS was needed regarding the vendor's role in 403(b) compliance, particularly in situations when there are multiple vendors without a centralized recordkeeping system. Many operational issues continue to exist for 403(b) plans (*e.g.,* improper account registration), often causing improper distributions to occur. The panelists were informed that the IRS was in process of developing a basic guide to assist 403(b) eligible employers with VCT operational matters, and ASPA offered to help with the development of this manual.

The panelists were asked to comment on what the IRS could do to improve its outreach to 403(b) plan sponsors. Suggestions for improved education and outreach were given, including increased vendor participation and increased utilization of the IRS website and other informational services. The panelists commended the IRS on its outreach

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Making Phased Retirement Work

by Adrien R. LaBombarde

Traditionally, qualified retirement programs have been designed and regulated on the basis of a simple "cliff" view of the retirement event: before the retirement date, employment is full-time and no distributions are made from the plan; after the retirement date, plan distributions are the only income associated with the former employer. Practical experience has long been carving graded slopes into that cliff. The retiree might seek special contract work with the former employer or might take up a part-time job with a new employer. Except in the public sector, "phased retirement" has usually been through ad hoc, individual arrangements that have frequently been difficult to coordinate with the employer's existing pension plan. The convergence of emerging demographic trends, shifts in the economy, and the repeal of the Social Security earnings limit for older workers is forcing employees, employers, lawmakers, policymakers, and regulators to rethink the balancing of retirement income goals with labor patterns.

Phased Retirement Patterns

Phased retirement typically involves a delay of full retirement, preceded by a phased retirement period of partial employment. Retirement plan distributions would differ from the normal retirement benefit in timing and amount. During the phased retirement period, distributions would be designed to coordinate with reduced compensation levels; after complete retirement, distributions would increase to full retirement levels. Planning for benefit adequacy through the phased retirement period should take all relevant factors into account, including eligibility for employer-sponsored retiree welfare benefits, Social Security eligibility, and the individual's changing needs during the transition.

In a perfectly competitive labor market, phased retirement design faces a challenging pro forma: the individual might always elect to retire from the former employer on a full pension and go to work part-time with a new employer. This simple alternative helps define two of the most critical aspects of an effective phased retirement program. First, the employee must be given access to receipt of retirement distributions prior to complete retirement. Second, the value of any unpaid retirement distributions should be preserved. Absent these two elements, a retiree candidate might do better to simply jump off the traditional full retirement cliff.

Regulatory Hurdles

Distributions under a defined benefit plan cannot be made prior to attainment of the plan's normal retirement age unless the employee completely severs employment. An individual cannot circumvent that rule by retiring and then simply returning to work full-time with the same employer. The employer could amend the plan to lower the normal retirement age, but might need to couple that change with complex benefit formula redesign to preserve all benefit rights without significantly jacking up employer costs. Even then, special optional distribution forms that make partial payments during the phased retirement period would best match the retiree's needs. Internal accumulations fashioned after the deferred retirement option programs (DROPs) common among public employers, perhaps maintained under a hybrid plan structure that relies on hypothetical account balances (for example, a cash balance plan), offer one possible direction to proceed with tailoring plan design to phased retirement goals.

If phased retirement periods commence after age 59½, partial payments can be made from a 401(k) account. Before that, 401(k) distributions are generally prohibited without complete severance from service. Non-401(k) defined contribution plans are the friendliest toward phased retirement intentions, allowing partial withdrawals free of any significant regulatory constraint. For both post-59½ distributions and withdrawals from any other defined contribution plan, the most difficult issues in practice will be ensuring that the plan's design and administrative procedures contemplate the customized payment schedules characteristic of phased retirement.

Beyond the issues arising from distribution rules, a phased retirement program can encounter other regulatory concerns. Existing retirement plans may require revision to satisfy accrual rules for additional benefits earned during phased periods. Since the concentration of highly compensated employees is likely to be higher among workers currently eligible for phased retirement benefits, compliance with nondiscrimination requirements could be complicated by phased retirement program benefits and features. Design and operation of the phased retirement program must comply with prohibitions against age discrimination.

Phased Retirement Program Design

An employer wishing to introduce phased retirement opportunities for its workforce should first revisit how the various alternative work arrangements fit with the employer's current retirement plans. Under ad hoc individual arrangements, benefits would simply follow existing plan design, with continuing service levels and compensation adjusted to suit joint objectives of the employer and employee. Since regulators generally view rehiring after full retirement as continued employment, such arrangements should be handled similar to any other ad hoc individual arrangement. To facilitate more broadly available phased retirement arrangements, existing pension plans might be amended to accelerate the normal retirement age, with suitable adjustments to benefit accrual patterns and partial suspension of benefit provisions. Accumulation of "missed" portions of retirement benefits might be introduced, much like the deferred retirement option programs (DROPs) popular among public employers. Plan distribution options and plan administration should be revised to reflect the phased retirement schedule.

Again, the employer always faces the phased retirement "pro forma": if an employee wants to receive a retirement benefit while continuing at a reduced level of work, that result can usually be achieved by retiring from one employer and seeking employment with a different employer. Unfortunately, an employer might find it easier under current rules to design its compensation and benefits programs to attract new workers from other employers than to retain its own workers through a phased retirement arrangement. Typically, however, employer interests in retaining experienced talent and employee interests in maintaining stable long-term employment provide strong incentives for developing workable phased retirement solutions. ▲

Adrien LaBombarde, ASA, MAAA, EA, is a consulting actuary in Milliman USA's Houston office. Adrien is an Associate of the Society of Actuaries and a member of its Pension Section Council, a Member of the Pension Committee of the American Academy of Actuaries, and an Enrolled Actuary under ERISA. He serves as Associate Editor of the American Academy of Actuaries' Enrolled Actuaries Report and as a member of the Retirement and Investment Policy Committee of the Association of Private Pension and Welfare Plans.

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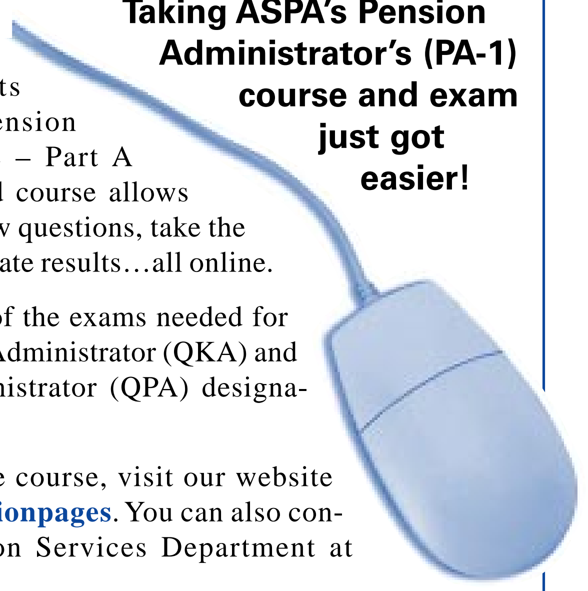

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To register for the online course, visit our website at **www.aspa.org/educationpages**. You can also contact the ASPA Education Services Department at (703) 516-9300.

FOURTH ARTICLE IN A SERIES

Qualified Plan Compliance

by Amy L. Cavanaugh, CPC, QPA, QKA
and Tom Poje, QPA

This is the fourth in a series of articles designed to highlight the entire administrative process. This segment was to be an overview of the compliance and reporting process; however, as we went to press, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) was signed into law, followed by the release of final cross-testing regulations. In an effort to stay on topic, yet be timely, the changes in the law that directly impact compliance testing have been woven into this piece.

The Importance of Compliance Testing

Compliance testing is the process of performing all requisite coverage and nondiscrimination tests, as well as making sure that none of the limits imposed by the Internal Revenue Code are violated or exceeded. This process is an essential aspect of the overall operation of a plan. The key to assuring that compliance testing is performed accurately and completely lies within the quality of the data received. As the experts, consultants are charged with the task of asking the right questions. Some of these questions may seem obvious, such as:

- "Who are your employees?"
- "How much are they paid?"

Complex rules surrounding the definition of employer, the exact nature of employee-employer relationships, and complexities with respect to the different definitions of compensation make these questions tougher to answer than one might expect. In general, the compliance tests include the following:

- Minimum Participation (in the case of a defined benefit plan)
- Minimum Coverage
- 415 Benefits and Annual Additions
- The General Test for Nondiscrimination (which may include cross-testing)
- Testing Benefits, Rights, and Features for discrimination with respect to availability
- ADP and ACP Testing
- Salary Deferral Limitations under IRC 402(g)
- Compensation Limits under IRC 401(a)(17)
- Top-Heavy

While the plan's determination letter offers assurance that the terms of the plan have been drafted in accordance with all applicable law, operational compliance is just as critical, if not more so. Compliance testing is the annual process of assuring operational compliance. The results of the annual compliance testing process add a level of confidence that the plan's favorable tax treatment can be preserved.

The good news is that Congress appeared to recognize that certain complexities in the law made it tough to perform many of these tests properly. As a result, in EGTRRA, certain tests were streamlined, simplified, and even eliminated. Additionally, certain limitations were raised to encourage the sponsorship of, and participation in, qualified plans. The primary law changes that impact the compliance testing process are as follows:

- The increase in the annual addition limitations under IRC 415 to the lesser of 100% of compensation or $40,000, and the increase in the benefit limit to $160,000, with changes in the early and late commencement of benefit rules
- The increase in the compensation limitation to $200,000
- The simplification of top-heavy testing and the relaxation of the top-heavy rules regarding requisite minimum contributions
- Changes to deduction limitations
- A repeal of the Multiple Use Test

Some changes, such as the incentive tax credit for low-income individuals and changes to the hardship rules, do not *directly* affect the testing process; however, they could *indirectly* impact the testing results by increasing the participation levels of the lower paid workers.

It remains to be seen how certain changes, specifically the catch-up

election, will impact testing. The full ramifications of many of these changes will not be known until we are provided with further guidance from the IRS. It is important to note that the changes in the law simplify, but do not eliminate, the need for compliance testing. The IRS has promised that model amendments will be published by the end of the summer. It appears that these model amendments will be essential for a plan sponsor to take advantage of many of EGTRRA's enhancements.

The Testing Group

Quality data collection is the Rosetta stone of compliance testing. The data collection process is equally as important as a thorough understanding of testing methodologies. The data should be complete and accurate. The plan sponsor is going to find a data request to be extensive and exhaustive; however, it must be communicated to the plan sponsor that without complete and accurate data, there are a host of compliance issues that could haunt the plan later. Two of the most critical issues in defining the testing group are:

- Who is the employer?
- Who are the employees?

While the answers to these questions may seem straightforward – they are not. It is surprising how many companies are unaware of the fact that they are affiliated with other companies or have not considered the other companies under common control when they designed their plan. Careful examination must consider not just actual ownership, but also must reference control and stock options that create ownership interest, even if not exercised.

Similar complications can arise with respect to employees. Employment relationships have changed dramatically in recent years. To ensure a qualified plan is operated properly, it is essential that all employees, not just plan participants, be identified. Again, asking the right questions is as important as the answers you receive. Do not presume that your client will know that *all employees* includes leased employees, seasonal employees, and perhaps even workers who are presumed to be independent contractors. Many employers assume that employees who are not benefit eligible can simply be disregarded.

A data request should be crafted to capture these non-traditional employment relationships. Once these relationships are identified, the exact nature of the relationship must be determined based on the structure of the relationship as opposed to the way the individual is taxed or his job title. It may seem like extra work, but as recent court cases have illustrated, it is time well spent.

Once data is received, it should be carefully reviewed for reasonableness. Of course, a complete payroll audit is not economically feasible; however, the census should be reviewed for inconsistencies. For example, it is unlikely that an employee who terminates early in the year will have worked over 1,000 hours of service. Also, look for family members who may be working for the company and are low paid but are considered highly compensated employees as a result of family attribution of stock ownership. Employees listed with zero compensation must be investigated and properly classified.

It is also important to obtain a complete list of any other plans an employer maintains. Although IRC 415(e), which mandated aggregation of defined benefit accrued benefits with defined contribution account balances for purposes of determining maximum benefits and/or contributions, has been eliminated, other plans (both pension and welfare benefit plans) can have an impact on the administration of the plan being administered. For example, the new EGTRRA catch-up contribution rules as set forth in the statute state that if a plan will offer catch-up contributions, all plans of that single employer (applying the controlled group rules) must offer the catch-up contribution option. It appears that this restriction applies regardless of the type of plan. Therefore, in order to evaluate the usefulness of a catch-up election, information would be needed regarding all plans maintained by all employers within the controlled group. Hopefully, this burdensome requirement will be clarified and simplified in regulations.

Nonetheless, there are many other good reasons for having information with respect to all plans. In the case of two defined contribution plans, the application of IRC 415 limitations, applying the average benefits test, and other coverage and nondiscrimination test should be reviewed. Uncovering other plans also creates consulting opportunities. Often it is more cost effective and efficient to have one TPA administering all of a company's retirement and benefit plans!

It is important that a consultant ask these questions annually, since businesses are always changing. A carefully crafted information request form will provide you a clear perspective of what has changed during the year and allow you to better serve your clients. For example, suppose there is a sudden shift in ownership due to an owner sell out or retirement, but this individual is still a plan trustee. The trustee removal may require attention and was probably not addressed as a part of the corporate transaction.

Compensation

Another critical aspect of the data collection process is compensation. Compensation is used for several purposes, and there can be varying

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Washington Update

Capitol Hill, given the current stagnant state of the stock market. ASPA's Government Affairs Committee is working on a set of proposals designed to make DB plans more attractive to employers, particularly small to medium-sized businesses.

Certainly, the passage of pension reform this year will provide more working Americans with the opportunity to save for retirement. By simplifying outdated pension rules, pension reform will encourage more employers, particularly small businesses, to provide retirement plans to employees.

However, simply increasing retirement plan coverage is not enough. Further changes to the law need to be made to help ensure that working Americans have sufficient retirement benefits in order to retire comfortably. In particular, we need to make sure that low and moderate income working Americans are not left out of the retirement system. These Americans need retirement benefits that are secure, guaranteed, and are not entirely dependent on their own ability to save. For these working Americans, retirement income based only on their individual savings will virtually always be inadequate.

We all recognize that an employer-funded defined benefit plan is an excellent way to deliver quality retirement benefits to rank-and-file employees with lower incomes. However, the clear trend over the last 15 years has been away from defined benefit plans toward employee-funded defined contribution plans, like 401(k) plans. Although 401(k) plans play an important role in the retirement savings equation, ideally they should not be the sole retirement vehicle. Unfortunately, more frequently this is becoming the case. The current fickle state of the stock market further highlights the risks and uncertainty associated with relying solely on a 401(k) plan for retirement.

Despite the attractiveness of defined benefit plans, few employers are considering adopting a defined benefit plan and many employers with DB plans are considering terminating them. This is an unacceptable trend. Some of the most burdensome and complex rules in the pension laws apply to defined benefit plans. We need to reevaluate and modernize these rules so that defined benefit plans become more attractive to employers. This **can** be done while still protecting the interests of plan participants. If we can revitalize defined benefit plans, both employers and employees will benefit from the enhanced retirement security of working Americans.

Proposals to Revitalize Defined Benefit Plans

SAFE Plans – a simplified defined benefit plan specifically designed for small businesses, a "SAFE" plan, would stimulate small business defined benefit plan coverage. ASPA previously supported and helped develop the SAFE concepts. SAFE plans would be available to businesses with 100 employees or less. They would be funded with either a SAFE annuity (an individual retirement annuity) or through a qualified plan trust. SAFE plans utilize the best features of defined benefit and defined contribution plans by providing a fully funded minimum benefit with a higher benefit if investment returns exceed specified conservative expectations. The plan could allow for up to 10 years of prior service and would provide fully portable benefits.

Combination 401(k)/DB Plans – These combo plans provide for the best of both worlds by allowing employers to adopt combination defined benefit/401(k) plans for employees. The "simplest" version of this proposal would allow employers to maintain a DB plan along with a 401(k) plan (plus matching contributions) in a single trust. More complicated ideas being developed would provide for increased DB plan benefits based on the amount of elective deferrals contributed by employees. Watch for future articles discussing these ideas in more detail.

Modernize Actuarial Assumptions – Current laws with regard to actuarial assumptions required for defined benefit funding and benefit calculations are outdated. For example, current rules require the use of 30-year Treasury rates. Given recent budget surpluses, 30-year Treasury rates are no longer a relevant benchmark for determining future rates of return. Use of the artificially low 30-year Treasury rate has contributed to the unnecessary overfunding of DB plans, making them less attractive to employers. Further, the low rate has effectively subsidized lump sum distributions. ASPA is resisting attempts made by some other organizations to correct the interest rate for funding, but not for lump sum purposes. If the rates are no longer linked, a funding gap, particularly for small plans, could result since the rates for funding and paying out benefits will no longer be the same. To address concerns about the potential immediate impact on participants currently terminating, ASPA is suggesting a transition rule of two to three years in which the participant will receive the larger lump sum determined under both the new and old interest rate. In addition, if interest rates are going to be changed, we need to "delink" the interest rate used for calculating the lump sum §415 limit from the §417(e) interest rate. Otherwise we will be effectively reducing the benefits of plan decision-makers, making DB plans that much more unattractive. Instead, we should

return to the specified 5% interest rate that was used prior to GATT. Obviously, the big question is what benchmark to use. The Society of Actuaries is currently studying this issue. It will likely take Congress some time to make this decision.

PBGC Premium Relief – This relief includes the provisions that were dropped from EGTRRA for procedural reasons. Those provisions would have provided reduced PBGC premiums for new small plans and would have significantly capped the variable rate premium for all small plans. Also, ASPA is working on a proposal to allow small business owners to opt out of coverage. When a small plan is taken over by the PBGC, the owner is almost always required to waive benefits. Why require the owner to buy insurance for essentially no coverage? Further, because of past service, it is typically the owner's benefits that cause excessive variable premiums discouraging formation of the plan in the first place. Allowing owners to opt out of PBGC coverage will encourage DB plan formation while still protecting workers' benefits.

Cash Balance Plan Clarifications – We need to clarify the uncertainty surrounding so-called "cash-balance plans" so that employers without defined benefit plans will no longer be reluctant to adopt these guaranteed, portable benefit programs for employees. Treasury is working on guidance that will, hopefully, clarify that cash balance plans are not age discriminatory and do not violate the Code's backloading rules. We may need legislation to correct the so-called "whipsaw" problem. Because of whipsaw, cash balance plans sometimes are required to make distributions to participants in amounts different than the amounts provided in participant's theoretical accounts, creating confusion for both employees and employers. This situation occurs because the interest rate used for crediting benefits under the plan may be different from the §417(e) rate. Ideally, the amount in a participant's account should be the amount that is distributed to the participant.

Flexible Funding – Employers, particularly small employers, are often reluctant to adopt DB plans because of mandatory funding requirements. Employers are worried that they may not be able to afford the minimum funding requirements if there is a business downturn. Why not allow employers to contribute an additional amount when the business can afford it (within reasonable limits, of course) to cover a future business downturn? Perhaps this could be allowed once every four years, for example. A more revolutionary concept questions why DB plans cannot be discretionary. Perhaps, small businesses would be more willing to offer a DB plan if they were not locked into providing a benefit before the end of the year. This is an interesting concept being discussed that obviously raises a number of issues.

This article is just a summary of some of the more significant ideas being discussed. Even more ideas will likely surface over time. ▲

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

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IRS 403(b)/457 Workshop

efforts and commented that a joint private sector/governmental effort was a worthwhile outreach approach.

Discussion also focused on the significance of the increasing IRS activity in the 457 arena. Cheryl Press commented that plans of public schools would be examined more closely, and also that there was substantial non-compliance in the 457(f) area. Panelists agreed that 457 compliance was important to both plan sponsors and plan participants and were hopeful that the IRS outreach and educational efforts for 457 plans would help promote that end in a manner similar to the successful development of the 403(b) educational outreach program.

At the conclusion of the discussion, Robert Architect thanked the panelists and expressed his desire to add a representative from the accounting profession as well as a custodial account vendor representative to future 403(b)/457 panel discussions. ▲

Theresa Lensander, CPC, QPA, serves as chair, Administration Relations and chair, Tax-Exempt and Governmental Plans subcommittee for ASPA's Government Affairs Committee (GAC). She is president of The American Pension Company in Santa Barbara, CA and specializes in the administration of qualified plans and 403(b) arrangements.

JoAnn Albrecht, CPC, QPA, is employed by Nationwide Retirement Solutions and specializes in 403(b) and governmental plans. JoAnn is a member of the Tax-Exempt and Governmental Plans subcommittee for ASPA GAC and is also a member of the ASPA IRS Midstates Conference Steering committee.

Amiron Givon, APM, is an attorney with Sideman and Bancroft. Amiron is vice chair of the Tax-Exempt and Governmental Plans subcommittee for ASPA GAC.

CONTINUED FROM PAGE 2

Oops!! I'm a Fiduciary?

accounts. During this blackout period, the money market returned 4.5% and the "market" experienced a 15% gain.

Plan participants and Plan Sponsor are looking for someone to blame for "losses" experienced during the inordinately long blackout period. Plan Sponsor will look to both ABC TPA and the bank, putting forth a number of claims involving breach of fiduciary duty as well as state law claims for negligence. ABC and the bank will look to insulate themselves by denying status as plan fiduciaries based on case law and DOL regulations. In many jurisdictions, ABC and the bank will attempt to mitigate their liability by claiming breach of co-fiduciary duty by Plan Sponsor and plan trustees for failure to adequately monitor the actions of the other parties.

Discussion

The first prong of the fiduciary test under ERISA §3(21)(A) creates fiduciary status if any person (or organization) has any discretionary authority or control over the management of the plan or any authority or control over the management or disposition of plan assets. The United States Court of Appeals for the Eighth Circuit stated that "[t]he term fiduciary is to be broadly construed and a person's title does not necessarily determine if one is a fiduciary." *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.,* 949 F.2d 960 (8th Circuit 1991). The US Supreme Court has reiterated these points [*Harris Trust & Savings Bank v. Salomon Smith Barney*, 24 EBC 1654 (2000)]. Under this functional test, it is a person's relationship and influences relative to the plan or with the plan's fiduciaries that will determine fiduciary status. It is the concept of "effective control" that the courts have looked at to determine if a TPA or other service provider is a fiduciary.

A TPA does not have to meet all the tests to be deemed a fiduciary. Reg. §2509.75-8, D-3 states that the determination of fiduciary status is highly factual and will depend upon the particular actions, discretion, influences, and responsibilities that a TPA has with a plan or its fiduciaries and whether the TPA has performed **any** of the functions described in ERISA §3(21)(A). In the Slyman case, the court stated that a party is a fiduciary to the extent it actually exercises control over the disposition of plan assets, even if it did not possess any discretionary authority. *Slyman v. Equitable Life Assurance Soc'y*, 1987 US Dist. LEXIS 8652 (N.D. NY 1987). Also, the absence of any specific grant of authority does not preclude a party from being deemed a fiduciary. *Olson v. E.F.Hutton & Co., Inc*., 957 F.2d 622 (8th Circuit 1992). What is clear is that if the plan and its fiduciaries follow the TPA's recommendations regarding assets, the TPA will be more likely to be deemed a fiduciary. If the TPA is more clearly acting as a salesperson, including suggesting competitive alternatives, then it is unlikely that the TPA will be deemed a fiduciary.

The second prong of the fiduciary test under ERISA §3(21)(A) creates fiduciary status where the party renders investment advice for a fee, direct or indirect, or has any authority or responsibility to do so. ERISA Reg. §2510.3-21(c) defines "investment advice" as follows (emphasis added):

(1) A person shall be deemed to be rendering "investment advice" only if:

(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; **and**

(ii) Such person either ***directly or indirectly***…

(A) Has discretionary authority or control, ***whether or not pursuant to agreement, arrangement or understanding,*** with respect to purchasing or selling securities or other property for the plan; or

(B) Renders any advice regarding the value of securities or the advisability of making specific investments on a ***regular basis*** to the plan pursuant to a ***mutual agreement, arrangement or understanding, written or otherwise***, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a ***primary basis*** for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

Interesting arguments must be raised by Plan Sponsor to establish fiduciary status for ABC TPA. First, ABC TPA was not involved directly in the sale of the group annuity contract. Can the plan sponsor successfully link Al Agent with the TPA firm?

In *Reich v Lancaster* (55 F.3d 1034), a case involving an insurance agent as owner of a welfare plan TPA firm, the court found that the TPA firm owned by the insurance agent (Lancaster) was a fiduciary because, through Lancaster, the TPA firm exercised discretionary authority and control over the assets of the fund in the sale of insurance. TPAs that receive commissions, marketing allowances, or other forms of compensation from insurance companies or investment firms might want to review the manner in which such compensation is received and whether sales disclosure issues exist that need to be addressed.

PTEs 77-9 and 84-24 allow for the sale of commissioned insurance and brokerage products to qualified plans without conferring fiduciary status on the salesperson. If a broker or insurance agent is not a fiduciary, the PTEs apply. If the party-in-interest is found to be a fiduciary, then the payment of ***any*** commission is prohibited. Another court, *Reich v McManus*, (883 F Supp 1144 ND Ill 1995), found that brokers who were paid only commissions were not precluded from being ERISA plan fiduciaries. The facts in *McManus* are similar to our hypothetical situation. That case involved two brokers who had an ownership interest in a TPA firm. The TPA firm charged fees separate from the commissions and, in fact, the brokers took no compensation from the TPA firm. The facts indicated that the brokers were the only financial consultants used by the plan over a ten-year period, and that investment decisions were based exclusively on their recommendations. The court linked the investment recommendations made by the brokers with the professional and administrative services provided by the TPA firm, indicating that one who exerts such a degree of influence over a plan can be held accountable as a fiduciary. Therefore, the entire "package" created fiduciary status, where, considered separately, neither would have done so.

The *McManus* case represents a very dangerous and slippery slope for TPA firms that are directly or indirectly involved in the sale of financial products. Someone who has cultivated a multi-year business relationship with clients would probably not want to disturb that relationship with the kinds of disclosures or invitations to solicit other asset bids that might be necessary to keep from falling into the same situation as *McManus*. TPAs in this situation need to examine the ways they can protect themselves from claims similar to the ones made in the *McManus* case.

We think that the facts in our hypothetical situation present an argument to consider ABC TPA an investment fiduciary. Case law requires us to look at one more component of the facts before determining if ABC has any ***liability*** as a fiduciary. In *Lockheed Corp. v. Spink* (517 US 882 1996) and in *Hughes Aircraft Corp. v. Jacobson* (525 US 432 1999), the US Supreme Court held that even when a party is deemed to be a fiduciary with respect to certain activities, that party must be a fiduciary with respect to the specific misconduct at issue in order to be held liable. In our hypothetical case, it would be hard to characterize ABC TPA as an investment fiduciary with respect to the takeover transaction. ABC exercised no discretionary authority or control over plan assets, unless one takes the, perhaps extreme, position the ABC's failure to timely transfer records results in taking "effective control" over plan assets (the records). ABC did not render investment advice for a fee in connection with the takeover. We speculate that ABC's predicament as a fiduciary would turn out quite differently (and badly) had it been the party taking over the plan.

The key issue to the bank's status as an investment fiduciary is how the decision to park the assets in a money market account was made. On the assumption that Plan Sponsor was relying on the bank as to the management of the transition, it would appear the bank has problems. The bank drafted the letter that was used to instruct and inform ABC TPA of the change and the manner in which plan assets were to be transferred. There is no indication that the bank ever discussed alternative strategies for the assets during the transition, such as mapping. There is nothing in the letter, or in subsequent communications with ABC, that attempts to nail down the date the account reconciliation would be provided by ABC. Plan Sponsor would argue that the bank took discretionary control over the assets when it made the decision to transfer them into a money market account.

In its defense, the bank must argue that it was a "directed trustee," making the Plan Sponsor responsible for investments. The bank could argue that the decision to invest in the money market account was based only on a recommendation made by the bank, and that there was no fee paid by either the plan or Plan Sponsor for investment advice relating to this transaction. At trial, a court may apply these facts to the DOL regulations and case law to come to the conclusion that the bank's recommendation amounted to the exercise of discretionary authority, either directly or indirectly, and that such conduct formed the primary basis for the investment decision in question. The *McManus* case cited above supports this conclusion where it states…"Although professionals do not become fiduciaries simply by providing services, a professional

that exerts an unusual degree of influence over a plan can be held accountable as an ERISA fiduciary."

The bank may attempt to use two cases, *Board of Trustees v Callan Associates, Inc.* (175 F.3d 1007 2nd Circuit NY 1999) and *King v National Human Resource Committee* (218 F.3d 719 US Court of Appeals, 7th Circuit 2000) to defend the decision to invest all plan assets in a money market account. In each of these cases, the decision to invest assets during a transition was found not to be a breach of fiduciary duty. In the *Callan* case, the court placed a great deal of weight on the fact that Callan did not prescribe the timing or manner of liquidation of plan assets to money market accounts, and therefore did not exercise the requisite degree of discretion over the assets. In the *National Human Resources Committee* (NHRC) case, the court found that NHRC: (1) through no fault of its own, did not have the information to transfer assets to the individually selected accounts, (2) that investing in a money market account could not be characterized as irresponsible, and (3) the plan assets earned more in the money market account than would have been earned in the participant selections over the period in question. It seems that the court placed significant weight on the third "no harm, no foul" aspect of the fact pattern, which is the major difference from our hypothetical case and the fortuitous investment circumstances NHRC encountered.

Conclusions and Observations

The 401(k) takeover transaction subjects all parties involved to increased exposure of fiduciary liability. Based on the cases cited above (and many others), the determination of fiduciary status for a TPA seems to be based upon the total relationship between the TPA and the plan over the entire course of the relationship, not just the TPA's actions during the takeover transaction. The courts are looking more and more at patterns of behavior. These cases are also providing better roadmaps for others to follow in future fiduciary cases.

TPA's can use the issues highlighted herein to examine their client relationships, their conduct on a daily basis, and their revenue streams to spot any potential problems such as "effective control." The TPA that performs exclusively as a TPA is unlikely to be deemed a fiduciary. The TPA firm whose revenue streams directly or indirectly include commissions, compensation from investment providers, or other forms of remuneration has increased its chance of being deemed a fiduciary. Full disclosure of any remuneration and well-crafted service agreements seem to be the best current defense to fiduciary breach claims by making clear in action and writing that the ultimate discretion concerning plan assets lies with a plan sponsor or administrator.

If you win, you lose! A successful defense against a deemed fiduciary suit will cost upwards of $45,000 to $150,000 or more. This cost does not bring into the equation the time, hassle, and agony of the defense while you are trying to stay in business.

Perhaps the ultimate penalty is found in two unrelated egregious fiduciary cases, where separate courts went beyond permanently enjoining the TPAs from being fiduciaries. Those two courts also permanently forbade the TPAs from being service providers to ERISA plans, effectively putting the parties out of business. So check your business practices, service agreements, errors and omissions coverage, and revenue streams – or, in the alternative, brush up your resume! ▲

Lee Kliebert, CPC, QPA, JD, is president of Kliebert Investment Counsel (KPIC), a Registered Investment Advisory firm that specializes in fee-only 401(k) vendor search services. Lee has been an ASPA member since 1982 and is currently a member of the DOL subcommittee of ASPA's Government Affairs Committee.

Bill Berke, APM, APA, is president of Benefit Associates, Inc., a TPA firm in Orange, CA. Bill has been an ASPA member since 1974 and is currently a member of the DOL subcommittee of ASPA's Government Affairs Committee.

ASPA Announces Locations and Topics for Best of Great Lakes Workshops

ASPA is teaming with the Internal Revenue Service Great Lakes Area Tax Exempt/Government Entities to offer three workshops originating from the 2001 IRS/ASPA Great Lakes Benefits Conference.

The workshops are scheduled in:

- Minneapolis, MN .... Sept. 19
- Indianapolis, IN .... Sept. 24
- Milwaukee, WI .... Sept. 28

Topics will include *Pension Reform; 401(k) Plan Compliance Issues; 403(b) and 457 Plans; GUST Amendments-The Deadline is Approaching; Plan Distributions Including 411(d)(6), Loans, and Same Desk Rules and What to Do with the Money*; and *IRS Voluntary Compliance Programs.*

The agenda provides up to eight hours of ASPA continuing education credit. Four hours of core and four hours of non-core credit for the Joint Board for the Enrollment of Actuaries will also be available. Visit **www.aspa.org** for registration information.

Focus on the Board of Directors

Update from the President

by George J. Taylor, MSPA

I am on my way back from our Summer Academy. Special thanks to this year's Chair, Cathy Green, CPC, QPA, her committee, and the ASPA staff for making this year's Summer Academy our most successful yet. In addition to the Academy, ASPA's Board of Directors and most major committees met. I continue to be amazed at the dedication of our volunteers. We have a lot going on with all of our committees, and the Board continues to provide leadership and direction to our committees and task forces.

Of course, the biggest news since my last update is the passage of Pension Reform. I am convinced that if it were not for the incredible efforts of our **Executive Director, Brian Graff**, this legislation would not have been included in the recent tax bill. In addition, ASPA would like to thank **Senators Max Baucus (D-MT)** and **Charles Grassley (R-IA)** and **Respresentatives Rob Portman (R-OH)** and **Ben Cardin (D-MD)** for their efforts in seeing that this important legislation was included in the bill. The Government Affairs Committee has worked and will continue to work with representatives from the IRS and Treasury to provide guidance as quickly as possible regarding these pension changes. The guidance that has been issued to date clearly reflects the IRS' and Treasury's goal to provide quick and workable solutions. ASPA thanks them.

The following are updates from the Board meeting:

- The Board approved those individuals who have attained the designations of CFP and FLMI and have satisfied the necessary experience requirements to be eligible to receive the APM designation.
- The Finance and Budget Committee has been instructed, when preparing the 2002 budget, not to anticipate *ASPA ASAP* revenue from those who are now receiving the *ASPA ASAP* via e-mail. Starting next year, as part of their dues, all members will receive the *ASPA ASAP* via e-mail. (An additional fee will still be required for faxed *ASPA ASAP*s.) In light of the fact that there has not been an increase in ASPA dues for five years and there will be lost revenue due to the new policy regarding the *ASPA ASAP*, the Board also instructed the Finance and Budget Committee to consider a dues increase for 2002.
- The Education Restructuring Task Force presented its thoughts and recommendations to date regarding restructuring our education program. The Board provided direction to the Task Force and instructed it to continue its work.
- The Marketing Task Force reviewed the report and the recommendations that were made by our outside marketing and research consulting firm. The Board directed the Task Force to continue in operation and to proceed with our advertising campaign to promote our professional designations to plan sponsors and to those in the profession who are currently not designated members.
- The Board considered reducing the size of the current yearbook by eliminating the listings of members and providing this information via the ASPA website. It was decided, despite the increasing expense and size of the current yearbook format, that members find it very useful and it should remain unchanged.
- The Pension Actuary Committee was directed to research the feasibility of allowing advertising in our newsletter. The Committee was also authorized to consider

possible name changes for our newsletter. Consideration will also be given to providing the newsletter electronically to those members who prefer this method of communication. The Committee will be reporting their findings at the next Board meeting.

- The Membership Committee reported that we currently have 3,128 credentialed members and 1,128 affiliate members, bringing ASPA's total membership to 4,256. Our ABCs have grown to ten and several more are currently being developed.
- The Conferences Committee reported its intention to continue to provide webcasts, with the help of the Technology Committee, in order to keep ASPA members up-to-date. The Annual Conference Committee expects another big turnout and plans for the Visit to Capitol Hill, during which attendees visit their representatives, continue to be developed. ASPA's conferences will have an expanded number of sessions in order to include all the latest information and guidance from the regulatory agencies.
- The E & E Committee reported a successfully completed exam cycle. This effort was our first shot at providing online or "window" exams. They are working hard to ensure that the upcoming window period is also a success. Good luck to all exam candidates!
- The Nominating Committee presented to the Board its slate of officers for the 2001-2002 year. The Board approved the Nominating Committee's slate. Congratulations to our 2001-2002 officers:

  Craig Hoffman, President

  Scott Miller, President-Elect

  Gwen O'Connell, Vice President

  Sarah Simoneaux, Vice President

  Chris Stroud, Vice President

  Bruce Ashton, Secretary

  Stephen Rosen, Treasurer

  Stephen Dobrow, Ex-Officio

  Curtis Huntington, Ex-Officio

  George Taylor, Past President (that's me, the "Has Been!")

What Else is Going On?

- Craig Hoffman, our current President-Elect, and I recently attended the Council of Presidents and Council of Presidents-Elect meeting in Banff, Canada. (What a beautiful country!) ASPA's relationship with all of the actuarial organizations in North America is strong. ASPA will be the host for the next meeting in December in Scottsdale, Arizona. All actuaries are reminded that the IAA Conference is scheduled for March 2002, in Cancun, Mexico. It looks like a great program (and another great place to visit).
- Several members of ASPA's leadership, along with some ASPA members and non-members, met to discuss issues that are vital to our future success. Core ideologies, as well as governance issues are some of the items that were discussed.
- Members are reminded that nominations to the Board for the 2001-2002 year are still open. Please go to our Members Only website to submit your nomination.
- The E & E Committee is looking for a few volunteers. If you are interested, check out our Members Only website.
- If you have not been on our website lately, please visit us at **www.aspa.org**. It is really impressive and will keep you up-to-date on what's happening.

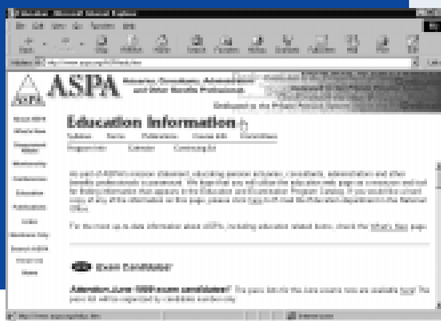
Well, we are about to land. I may get home the same day I left San Francisco (that will be a change). If you have any questions or wish to express your views on anything ASPA is doing (or not doing) please do not hesitate to e-mail me at georget@uplink.net or call me at (814) 231-3704.

See you at the Annual meeting. ▲

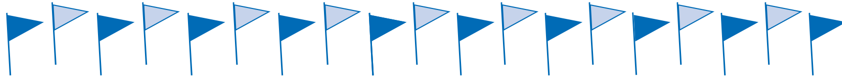
George J. Taylor, MSPA, EA, is senior vice president of ARIS Pension Services, a division of ARIS Corporation of America in State College, PA. George has over 30 years of experience in the administrative, actuarial, and technical aspects of maintaining qualified retirement plans. He is currently serving as ASPA's President. He has served as ASPA's President-Elect, Vice President, and co-chair of the Government Affairs Committee, in addition to numerous other ASPA volunteer activities.

ASPA Exam Results Posted Online

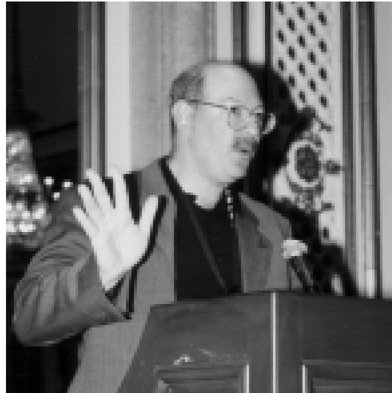
Exam results for the December 2000 A-4, C-1, C-2(DB), C-2(DC), C-3, and C-4 exams are now posted by candidate name at **www.aspa.org/aspaedu.htm**. A list of candidates who earned the Pension Administrator's Certificate effective August 31, 2000 is also available on the site.



Highlights from the ASPA 2001 Summer Academy



Cathy Green, CPC, QPA, introduced the band at Sunday night's reception. After her three-year stint as the Academy's Chair, Cathy will now chair ASPA's Annual Conference.



Stephen Dobrow, CPC, QPA, QKA, General Chair of Conferences, was pleased with the Academy's record attendance.

ASPA President George Taylor, MSPA, greeted attendees and introduced Cathy Green, CPC, QPA, (far right), the Academy's Chair, and the Washington Update speakers Brian Graff, Esq., ASPA's Executive Director, William Sweetnam, Esq., Attorney Advisor, Office of Benefits Tax Counsel, US Treasury, and Diann Howland, Senate Finance Committee Pension Policy Advisor.

Kevin Donovan, MSPA, Joan Gucciardi, MSPA, CPC, and Larry Deutsch, MSPA, spoke to attendees about the new Pension Reform Bill.

The attractive entrance to the Exhibit Hall received a lot of attention and positive comments. This year marked another sell-out for booth space.

Paul Schultz, Director, Employee Plans, Rulings and Agreements, IRS, was a special guest speaker at the Academy.

Director of Meetings, Todd Brost, and his staff worked to make the Academy a success.

GAC Co-Chairs Bruce Ashton, APM, and Brad Huss, APM, and ASPA's Executive Director, Brian Graff, Esq. presented the Government Affairs Update.

There was a great deal of interest in hearing what our vendor-partners had to offer.

Amy Iliffe, Director of Membership, enrolled many new members and provided valuable information about ASPA's membership benefits and programs.

Larry Starr, CPC, and his special pal were a frequent sight at the Academy. ASPA's Political Action Committee raised much-needed funds to keep ASPA's members' voices strong on Capitol Hill.

Brian Graff, Esq., ASPA's Executive Director, received an award in recognition of his "steadfast and dedicated efforts in securing the passage and enactment of the Pension Provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001." Alex Brucker, APM, member of the Academy's planning committee, presented the award on behalf of ASPA's membership.

Join us for the 2002 Summer Academy

Saturday July 25 - Wednesday, July 31

Sheraton San Diego Hotel and Marina

All photographs courtesy of Chip Chabot, ASPA's Webmaster/Multimedia Manager.

Special thanks to those who made the ASPA 2001 Summer Academy possible!

SUMMER ACADEMY SPEAKERS

Bruce L. Ashton, Esq., APM
Michael L. Bain, MSPA
Richard A. Block, MSPA
Rajean M. Bosier, CPC, QPA, QKA
Alex M. Brucker, Esq., APM
Christine Burwell-Woo, CPC, QPA
Larry Deutsch, MSPA
Kevin J. Donovan, MSPA
Lorraine Dorsa, MSPA
David B. Farber, MSPA
David Ganz
Brian H. Graff, Esq.
Joan A. Gucciardi, MSPA, CPC
Martin M. Heming, Esq., APM
Scott E. Hiltunen, Esq., CPC
Richard A. Hochman, Esq., APM
James E. Holland, Jr.
Diann Howland
R. Bradford Huss, Esq., APM
Norman Levinrad, FSPA, CPC
Raymond W. Liden, APM
Robert L. Long, APM
G. Neff McGhie, III, MSPA
Cheryl L. Morgan, CPC
Gwen S. O'Connell, CPC, QPA
James C. Paul, Esq., APM
Michael B. Preston, MSPA
J. Michael Pruett, CPC, QPA
Stephen H. Rosen, MSPA, CPC
Marilyn Ryding, QPA
Paul T. Shultz
Benjamin F. Spater, Esq., APM
Valeri L. Stevens, APM
Donald C. Stone
Michael B. Stuber, QPA
William F. Sweetnam, Esq.
George J. Taylor, MSPA
Sal L. Tripodi, Esq., APM
S. Derrin Watson
Nicholas J. White, Esq., APM

SUMMER ACADEMY COMMITTEE

Cathy M. Green, CPC, QPA, Chair
Alex M. Brucker, Esq., APM, Assistant Chair
Irene L. Hilgers, QPA, QKA, Assistant Chair
Nancy M. Michael, Assistant Chair
Stephen L. Dobrow, CPC, QPA, QKA, Conferences General Chair

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MFS
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PensionOnline/Flexsoft
Professional Practice Insurance Brokers, Inc.
Qualified Annuity Services, Inc.
SunGard Corbel
TeamVest RPS, LLC
Travelers Insurance

TOP 10 LIST OF THE ACADEMY

1. 400 people attended the Academy
2. Many new vendor-partners participated
3. Sponsors and vendor-partner satisfaction significantly increased
4. Government agencies were represented
5. Updates on pension reform were discussed
6. Howland and Sweetnam on-site – what a great perspective!
7. Very high level of education – the sessions were great!
8. The best West Coast gala ever
9. ASPA PAC raised $12K and received lots of donations from new contributors
10. New ASPA members joined during the Academy

CONTINUED FROM PAGE 7

Qualified Plan Compliance

definitions of compensation within one plan. It is critical that your client understand the subtle differences and the applicable computation periods (*i.e.,* plan year, calendar year, or fiscal year). One aspect of compensation data collection was simplified by EGTRRA. Under the pre-EGTRRA IRC 404(a) deduction rules, compensation for purposes of determining the maximum deductible contribution to a profit sharing plan had to be reduced by employee contributions to a cafeteria plan and salary deferrals to a 401(k) plan. The good news is that EGTRRA eliminates this burdensome and restrictive approach. To illustrate the benefit of this change, consider the following: Assume total eligible payroll is $500,000 and 401(k) salary deferrals total $25,000. Pre-EGTRRA, the $500,000 in gross compensation needed to be reduced by the $25,000 in 401(k) deferrals – and then multiplied by 15%. Thus, the deductible limit was 15% of $475,000 or $71,250. In addition, the maximum amount the employer could contribute to the plan was equal to the $71,250 amount, reduced by the $25,000 in salary deferrals made to the plan. The bottom line is that pre-EGTRRA, the employer could only contribute $46,250 or 9.25% of gross compensation in this situation. Under EGTRRA, however, the total eligible payroll of $500,000 will yield a maximum deductible profit-sharing contribution of $125,000 (25% of $500,000 instead of 15%). In addition, the $25,000 in 401(k) salary deferrals made to the plan by participants will not reduce this amount, thereby providing for an overall deductible employer contribution of $150,000 ($125,000 plus $25,000 in deferrals).

From a testing perspective, required nondiscrimination tests, including the general test and ADP and ACP test, permit significant flexibility in the definition of compensation used as long as it is not discriminatory. A consultant familiar with the flexibility allowed under IRC 414(s) can improve test results in certain cases. The key to this creativity is having enough compensation information. Since there is significant latitude in the definition of IRC 414(s) compensation, a consultant may be able to improve test results by including or excluding a specific type of compensation. Care must be taken when defining testing compensation to use a definition that is reasonable and nondiscriminatory. In applying the nondiscriminatory standard, it must be proven mathematically that there is no more than a de minimus difference between the percentage of compensation that is excluded for highly compensated employees (HCEs) as opposed to non-highly compensated employees (NHCEs). Also, the plan document may have a specific definition of IRC 414(s) compensation that would restrict unlimited creativity.

Currently, compensation that may be considered for qualified plan purposes is limited to $170,000. Under EGTRRA, beginning in 2002, the maximum amount of compensation that can be considered for plan purposes increases to $200,000. Future increases to this compensation cap will be made in $5,000 increments, based on increases in the cost-of-living. Thus, the allocation to participants with compensation in excess of $170,000 will be based on a larger dollar amount under EGTRRA. This may result in either larger allocations to the most highly paid participants without any additional allocations to the lower-paid workers, or smaller required contributions on behalf of lower-paid workers to support the current allocations of the higher-paid workers.

For example, the contribution for a participant earning $250,000 annually in a defined contribution plan with a 10% contribution rate is $17,000 (10% of $170,000). Under the new law, the same contribution formula will yield a $20,000 allocation (10% of $200,000).

On the other hand, assume that the intent is to provide a $17,000 contribution to this individual. Post-EGTRRA, $17,000 expressed as a percentage of considered compensation of $200,000 equals 8.5%. Unlike IRC 414(s) compensation where a properly designed plan results in creativity, the definition of IRC 415 compensation is limited to certain choices set forth in the statute. The differences between these definitions are very subtle and, in general, the decision of which definition to use should be based on data readily available. As a result of a law change created by the Small Business Job Protection Act (SBJPA), IRC 415 compensation is always increased by both 401(k) elective deferrals and cafeteria plan contributions made by the employee.

It is also important to consider that certain uses of the term "compensation" are based on compensation measured over different computation periods. For example, compensation used for deduction purposes is based on the fiscal year of the company, which may be different from the plan year. IRC 415 compensation is measured over the limitation year, which is often, but not always, the same period of time as the plan year. And finally, both allocations and testing may be based on compensation

earned only after the date an individual becomes a participant.

In light of these complexities, the definitions of compensation selected when designing a plan should represent amounts that are administratively feasible to collect. There is little point in excluding some type of compensation if the savings generated to the plan is overridden by the cost of collecting this information. When crafting a data request form, all applicable computation periods need to be considered (*i.e.,* fiscal year, plan year, or calendar year). To the extent that the computation periods are not uniform (*i.e.,* the plan year is different than the fiscal year and neither one is a calendar year), care must be taken to capture the correct results. If testing compensation or allocations are based on a definition that only considers compensation from the date of plan entry, an effective means of gathering partial year data must be enforced.

Hours of Service

Gathering hours of service can also be complicated. Recognizing the task at hand, the Department of Labor offered practitioners an option to use DOL-prescribed equivalencies in lieu of counting hours. Use of this alternative alleviates the need to actually count hours (especially for eligibility purposes, where hours are measured from date of hire as opposed to the plan year); however, the equivalencies are quite liberal and, for that reason, can be ineffective in achieving a plan sponsor's objective, if limiting benefits for part-timers is desired.

An alternative is to use an elapsed time method of determining service. Elapsed time is certainly easier to track but is also ineffective in limiting participation for part-time employees. While the contributions on behalf of the part-timers may be minimal, the overall cost of the plan may increase and testing problems may occur, especially in the context of ADP and ACP testing and plans that are considered to be top-heavy. Some of the ADP and ACP testing concerns can possibly be addressed through the use of the option to separately test otherwise excludable employees, but without actual hour of service data, attempts to separate out permanent part-time employees will not be effective.

Accurate service data is critical to the determination of appropriate vesting and eligibility for both entry into the plan and ongoing accruals and allocations. It is often difficult to obtain accurate records for historical hours of service. In these cases, it is hard for an administrator to be confident that vesting is accurate. This uncertainty should be clearly addressed and communicated to the client.

The Testing Process

Only after the best available data has been obtained can the actual test-

Los Angeles Benefits Conference

September 13-14, 2001
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You are invited to attend the Los Angeles Benefits Conference! The 2001 conference offers a high level of education, knowledgeable speakers, and the latest information on pension issues. Don't miss this great opportunity!

Conference Highlights:

- Access to the newest information concerning benefits regulations, litigation, enforcement, and compliance
- Opportunities to interact with high level government speakers
- General and concurrent sessions
- Networking
- Continuing education credits
- Exhibits

Topics:

Developing Issues • IRS Q&A • Emerging Issues in IRS Audits • DOL Investigations and VFC • Coping with the Changes in the Distribution Rules • IRS Litigation Update • Cross-Testing, Combination of Plans • Who is the Employer? • Who is the Employee? • DOL Litigation Update • Innovative Plan Designs: Cash Balance and Hybrid Plans • IRS Correction Programs and 401(k) Plan Defects • Participant-Directed Investments: Investment Advice and Education • 401(k) Plan Design • Key Plan Issues in Mergers and Acquisitions • Plan Expenses and Payments to Service Providers: Fiduciary and Prohibited Transaction Issues • Ask the Experts Panel

The Los Angeles Benefits Conference is the perfect opportunity to meet and discuss employee benefits issues with colleagues and government agency representatives from the Pacific Coast area and Washington, DC.

For more information on the Los Angeles Benefits Conference, contact ASPA's Meetings Department at (703) 516-9300 or meetings@aspa.org.

ing process commence. Without quality and complete data, the testing process is flawed. The testing process is a multi-stepped process. Carol Sears, FSPA, and Norman Levinrad, MSPA, have repeatedly referred to the testing process as "a dance" in their outlines during numerous presentations at ASPA conferences. The concepts they've outlined have been memorialized in a host of ASPA materials, including the C-2(DB) Study Guide, and still offer perhaps the clearest overview of the overall testing process currently available.

If a defined benefit plan is being tested, minimum participation testing as described in IRC 401(a)(26) is still required. All other plans proceed directly to coverage testing. Coverage testing under IRC 410(b) is performed using either the ratio percentage test or the average benefits test. Certain segments of a plan are treated as a separate plan and therefore must be tested for coverage on a stand-alone basis. These "segments" include 401(k) features, 401(m) features, ESOPs, QSLOBs, and union and non-union groups. In addition, "otherwise excludable employees" (*i.e.,* employees who have met a plan's age and service but have not yet met the statutory age and service requirements under the Code) may be tested separately. This approach can be especially helpful, since rarely is an employee an HCE in their first year of employment. A note of caution, however – whatever aggregation or disaggregation is created in the coverage testing process must be retained throughout the entire testing process, including ADP and ACP testing.

Several aspects of EGTRRA impact coverage testing. First, the increased compensation limitation will generally serve to lower the benefit percentages of the most highly paid individuals. For example, assume Dr. W earns $350,000 and is entitled to a $35,000 allocation. $35,000 divided by $170,000 equals 20.59%; however, $35,000 divided by $200,000 (the new compensation limit) equals 17.5%, which represents a reduction of more than three percentage points from pre-EGTRRA testing. Also, EGTRRA clarified that in the case of an employer that includes both for-profit and not-for-profit divisions, not-for-profit employees covered under a tax sheltered annuity program may be disregarded for coverage testing purposes for the for-profit entity. This practice was a common occurrence in the medical profession, where medical practices were owned by not-for-profit hospitals. Absent this clarification, the plans maintained for the for-profit side of the business could fail coverage, although technically all employees were covered.

Once a plan has passed coverage, it can go to the next step – nondiscrimination. Nondiscrimination includes the general test; the benefits, rights and features test; and ADP and ACP tests in the case of a savings plan. Plans designed specifically to avoid nondiscrimination testing are referred to as "safe harbor" plans. Most safe harbor plans are designed in a manner such that it is mathematically impossible to fail the general test. For safe harbor 401(k) plans, the right to avoid ADP and ACP testing is "bought" by providing a certain minimum level of employer contribution.

Within the realm of nondiscrimination testing is a world of flexibility. A single plan or a combination of plans can sometimes be designed to target a specific employee or group. On its face, this skewing may appear to be disproportionate; however, when tested using the general test or cross-testing methodology, the plan may pass nondiscrimination.

Without quality and complete data, the testing process is flawed.

The IRS was weary of aggressive usage of this planning technique and, as a result, issued regulations that restrict the ability to design plans as aggressively as they had been in the past. Even with the new restrictions, effective design techniques can often be accomplished for the right demographic group.

EGTRRA made very few direct amendments to the discrimination testing process, except the repeal of the complex Multiple Use Test that was required in certain 401(k) plans. EGTRRA did, however, make changes that indirectly, and in most cases positively, impact nondiscrimination testing. Included among these changes are the following:

- The increased compensation limitation, which results in lower percentages being used for testing purposes
- The increased annual addition limitation, which allows for larger allocations and more creative corrective amendments, such as the targeted QNEC in the case of failed discrimination tests
- The ability to permit employees who have attained age 50 to make "catch-up" deferrals. (These deferrals are not supposed to create ADP test failures.)
- A new tax credit to encourage participation by low paid employees
- Higher IRA limits that may divert dollars from the employer's plan if not matched

The IRS recently released final cross-testing regulations. The final

guidance closely mirrors the proposed regulations issued last year. While a complete discussion of these regulations is outside the scope of this article, it should be noted that cross-testing remains a viable testing alternative; however, new preliminary standards will need to be met before a plan can be cross-tested. The good news in the final regulations is that the regulations somewhat relaxed what compensation needs to be considered (the gateway allocation can be based on 415 compensation earned while a participant), and the gateway allocation does not need to be provided to those employees who are not eligible to benefit under the profit sharing feature (*i.e.,* those with less than 1,000 hours or those not employed at the end of the plan year).

Top-Heavy

A number of 401(k) plans have been sold with the assurance that no employer contributions will ever be required. However, if the plan becomes top-heavy, an additional contribution will be required, even to a stand-alone 401(k) plan. This can be an ugly surprise to the employer. It is extremely important that the recordkeeper apprise the employer of the status of the plan if the plan is, or has a chance of, becoming top-heavy in the near future. In addition to the standard information requested about the employer as described above (*i.e.,* ownership percentage and officer status), the recordkeeper previously had to track data covering the prior four years. In the past, this data was sometimes next to impossible to obtain on a takeover case. Recent changes to the law have simplified things considerably by eliminating the necessity to track distributions for the prior four years. In addition, the definition of key employee was simplified and 401(k) plans are permitted to consider employer matching contributions towards the required minimum allocation in a defined contribution plan. Plan administrators will need to be aware that the simplification of the top-heavy rules could result in some plans suddenly becoming top-heavy.

Conclusion

Compliance testing is essential. Although the process seems labor intensive, it is critical to the overall operation of the plan. As consultants look to find their place in the ever-changing retirement plan market, compliance testing is a prime example of a value added service. In the large plan market, compliance testing is generally not as important as in the small to mid-size plan market. With respect to large plans, testing is generally an issue only if there are different divisions with different plans. In the small plan environment, however, even the smallest demographic shift can wreak havoc. In a small plan, a single employee termination can thwart a carefully crafted plan design. Also, if a family member of a closely held business becomes a plan participant, this can throw off testing and plan design. Plan sponsors are generally more focused on a plan's fiscal soundness as opposed to compliance with complex laws; therefore, it is essential that a plan sponsor be made aware of the important role compliance testing plays with respect to the plan's ongoing viability. If a plan is audited, one of the first things the IRS looks for is accurate employee census data. The IRS, when assessing the significances of a defect or flaw, will also determine whether or not there has been a good faith effort to comply with all applicable laws. A complete compliance report with accurate data is a good way to memorialize a good faith effort to operate a plan properly. ▲

Amy Cavanaugh, CPC, QPA, QKA, has over 20 years experience in matters of plan design and administration. She is active on ASPA's Education and Examination Committee and is the author of the Coverage and Nondiscrimination Answer Book.

Thomas E. Poje, QPA, QKA, is a principal and director of technical compliance at Lorraine Dorsa & Associates in Jacksonville, FL. Tom is an instructor in the ASPA Pension Education Program and co-authored the Nondiscrimination Testing Answer Book. *Tom is also a frequent lecturer at employee benefits seminars and conferences.*

ASPA'S FIRST "WINDOWED" EXAM CYCLE A SUCCESS!

The spring 2001 C-1, C-2(DB), and C-2(DC) exams were offered in a six-week "window" during which candidates took exams. Candidates registered through ASPA and made testing appointments at Prometric Testing Centers.

This was ASPA's first "windowed" exam cycle, and we're proud to say it was a success! Candidates were notified at the completion of their exam whether they passed or failed. As not to delay those who wish to apply for designated membership, successful candidates may apply for ASPA membership by including the Prometric "pass" letter with their membership application.

The fall 2001 exam window is October 15 - November 30.

Gearing Up for the 2001 ASPA Visit to Capitol Hill!

by Sarah Simoneaux, CPC

Plans are underway for ASPA members to visit your congressional representatives for ASPA's biennial Visits to Capitol Hill. The event will be held as part of ASPA's 2001 Annual Conference. In 1999, we had over 250 ASPA participants. (ASPA's Visit to Capitol Hill is not held in even years due to congressional elections.) It has been two years since your representatives heard from ASPA, and pension issues are hotter than ever.

Participating is simple.

- Check off the box for the Visit to Capitol Hill when you register for the Annual Conference;
- All participants will be briefed on key private pension issues to discuss with your congressional representative prior to the Visit;
- All participants will gather for a rally prior to the Visit for a final briefing on the issues and meet with others from your district and/or state;
- Because the Annual Conference is closed during the Visit, you won't miss any sessions or CE credit. ASPA will provide box lunches and bus transportation to and from Capitol Hill.
- ASPA will make appointments, provide information folders, and manage all other logistics.

As previous participants can confirm, Congress will welcome your input and your visit. Here is what the event was like for a few of your fellow ASPA members who participated in 1999.

Larry F. Boord, APM, Ohio

Larry was surprised to learn that members of Congress are quite accessible. Also, it wasn't until he visited his representative that he realized that there is an extremely high quantity of issues congressional members deal with daily. He learned that they don't have the time to become experts and are left to make decisions based on the message they hear most often. To you he says, "It's critical to get our message to members of Congress" and just as critical to create an ongoing relationship so that when issues come up, they are familiar with your concerns. "They're hungry for input."

Michael J. Pruett, CPC, QPA, Alaska

Mike has visited his local delegation three times and has enjoyed getting to know them. It wasn't until he visited that he learned that we actually do have a channel to express ourselves. After visiting for many years, it seems to have had an impact. To his fellow ASPA members, he says, "You should do it. It's a good opportunity to open channels of communication with your representative." He adds, "For ASPA, it's also good to have representation from as many districts as possible."

Sharon L. Severson, CPC, QPA, Wisconsin

Sharon most enjoyed being part of a large ASPA group making visits to Capitol Hill. In fact, her entire Madison, Wisconsin office participated. Somehow, the ASPA group was not on her representative's calendar, but upon seeing the size of the ASPA group, her representative met with them and learned about private pension issues for the next 30 minutes. Sharon was quite pleased with meeting her representative and learning

©1999 Bill Petros

Some participants from the 1999 Visit to the Hill

some of her positions. To her fellow ASPA members, Sharon says, "Do it. It's a good experience, especially if you haven't done it before."

Kim L. Szatkowski, CPC, QPA, QKA, Florida

Kim found the entire participation process quite simple and was pleased with the scheduling, lunch, and bus ride provided by ASPA. The most rewarding part of the experience was seeing Congress' work environment. Her congressional representative was not able to meet with her group, but they were able to spend considerable time with his key staff member. She vows to be more prepared and assertive the next time. To her fellow ASPA members she says "It was an awesome experience to see our government in action."

Maureen M. Thomas, APM, Illinois

Maureen found the best part was meeting her Congressman. Though she was the only person in her group, she was pleasantly surprised by the amount of time he spent with her. She learned his views on pension issues and they even talked about doing events together back home. She wants you to know that it's a good experience to go to the Hill, meet face-to-face with your representative, and see their everyday work environment in action (*e.g.,* like how busy their office is!). You may not have such an opportunity in another setting.

Jill A. Waters, QPA, Texas

When Jill attended ASPA's 1999 Annual Conference, she hadn't been to Washington, DC in over 30 years. Amusingly, she said that the hardest part about participating in the Visit was getting back into the sessions after the excitement of visiting Capitol Hill. Her group met with a staff aide who was quite engaging. She found the preparation information provided by ASPA to be very helpful. To you, she says the Visit was a "wonderful experience." She wants to encourage you to take advantage of what ASPA is offering.

We hope to see you there. Even the most reluctant participant had a great time in 1999 and came back feeling energized about how they made a difference. We just need you to come and talk about what is important to you as an ASPA member, and as your fellow members can attest, your representatives are delighted to have you come. ▲

Sarah E. Simoneaux, CPC, is vice president of Actuarial Systems Corporation, an employee benefits software firm. She currently serves on the ASPA Board of Directors, Screening subcommittee, Government Affairs Steering Committee, Legislative Relations Committee, Committee for Political Action, National Office Committee, Governance Task Force, Relationship Task Force, and Marketing Task Force, and chairs the Congressional Outreach Committee and the Marketing Committee.

Continuing Professional Education Notice for Enrolled Actuaries

The regulations for the Joint Board for the Enrollment of Actuaries require an Enrolled Actuary to complete 36 hours of continuing professional education (CPE) credit each enrollment cycle to qualify for renewal of enrollment. Core subject matter must comprise at least 18 hours. For newly enrolled actuaries who were enrolled during the current enrollment cycle, lesser requirements apply.

For the current cycle, the period during which these CPE hours must be fulfilled extends from January 1, 1999 to December 31, 2001. Note that the CPE hours must be met three months prior to the end of the enrollment cycle, which is March 31, 2002.

Enrolled actuaries are required by the regulations to retain, for a period of three years after the end of an enrollment cycle, the following supporting documentation regarding CPE:

1) the name of the sponsoring organization
2) the location of the program
3) the title of the program and description of its content
4) the dates attended
5) the name of the instructor, discussion leader, or speaker
6) the certificate of completion and/or signed statement of the hours of attendance from the sponsor
7) the total core and noncore credit hours

The Joint Board conducts random audits of claims for CPE credit, which includes the review of the documents listed above. The Joint Board urges you to pay close attention to those sections of the regulations that discuss the criteria for courses or programs to fulfill the CPE requirements.

Please note that the regulations provide that teaching, publishing articles, and certain other activities may earn a limited number of CPE hours. Similar record keeping requirements apply to these activities.

Focus on PERF

ASPA's PERF Sponsors the 2001 Math Olympiad

by Jane S. Grimm, ASPA's Administrative Director

What a delight it was for Jamie Pilot, Director of Education Services, and I to attend the awards ceremonies in recognition of the achievements of twelve very special high school students in the 30th annual Mathematical Olympiad!

This year, 386,000 high school students participated in the math contests which are held throughout the US, Puerto Rico, Guam, and many US embassies and military bases worldwide. Professor Frank Morgan from the Department of Mathematics and Statistics at Williams College addressed the top twelve students with a presentation entitled "The Double Soap Bubble Theorem." Did you know that a single round soap bubble provides the least-area way to enclose a given volume of air? This theory was asserted by Archimedes and proved in 1884. In 2000, several mathematicians proved that a double soap bubble provides the least-area way to enclose and separate two given volumes of air. Jamie and I will never again blow bubbles in quite the same way! After the presentation, everyone progressed to the State Department's elegant dining room and had a wonderful meal.

The greatest part of the evening, however, was having the opportunity to talk to these terrific young people. Please see the letter from Po-Ru Loh, one of the winners, thanking the ASPA membership for "helping build a brighter future for all of us." We heard comments like this from students and their families throughout the evening.

Jamie S. Pilot, Director of Education Services, and Jane S. Grimm, Administrative Director, with the winners of the 2001 USA Math Olympiad in front of the Einstein Statue in Washington, DC

ASPA's Pension Education and Research Foundation (PERF) is a non-profit 501(c)(3) formed to foster excellence in pension education and to promote scholarly research in the pension field. It is supported by tax-deductible contributions. ASPA members can donate to PERF by checking a box on their dues statement or sending a check to ASPA PERF, 4245 N. Fairfax Drive, Suite 750, Arlington, VA 22203.

In the picture above, how many future ASPA members do you see? ▲

July 30, 2001

American Society of Pension Actuaries
Jane Grimm, Administrative Director
4245 North Fairfax Drive, Suite 750
Arlington, VA 22203

Dear Ms. Grimm,

I am writing to thank the American Society of Pension Actuaries for sponsoring the American Mathematics Competitions' USA Mathematical Olympiad, USAMO Awards Ceremonies, and Mathematical Olympiad Summer Program. I have participated in middle and high school mathematics competitions for several years now, the USAMO being the latest and greatest. This year, I was one of twelve winners of the 2001 USAMO. In early June, we were invited to the USAMO Awards Ceremonies in Washington, DC, an honorable and grand celebration. From there we went on to the annual Math Olympiad Summer Program, a unique training program designed to cultivate the mathematical talent of the nation's best high school students. None of this would be possible without generous contributions from many sponsoring organizations, including the American Society of Pension Actuaries. Your support truly makes a difference, not only to the few of us at the very top, but also to the hundreds of thousands of high school students across the country who participate in the AMC's programs each year. By sponsoring educational programs such as the AMC's, you are helping build a brighter future for all of us, an endeavor you should be rightfully proud of.

Sincerely,
Po-Ru Loh

Focus on CE

How Do I Earn Continuing Education Credits?

by Cathy M. Green, CPC, QPA, and Marissa Pietschker, QPA

As a professional society, ASPA emphasizes the importance of the continuing professional and educational development of our members. ASPA has a mandatory program of continuing education that affects all designated members, including FSPAs, MSPAs, CPCs, QPAs, QKAs, and APMs.

The continuing education program is dedicated to helping you stay abreast of developments in the qualified retirement plan arena. This program for continuing education now applies to all designated members, regardless of when designation(s) were originally received.

The current cycle for earning your credits began on January 1, 2001 and will end on December 31, 2002. In order to keep your ASPA designation, you must earn 40 continuing education credits during this cycle (and in future two-year cycles).

For the initial CE cycle, the number of CE credits required is prorated based on the date of admittance or designation within the two-year CE cycle as follows:

- First six months of the cycle – 30 CE credits
- Second six months of the cycle – 20 CE credits
- Third six months of the cycle – 10 CE credits
- Fourth six months of the cycle – no CE credits

There are a variety of interesting and educational ways to meet your CE credit requirement, many of which are outlined below. Keep in mind that topics must be pension/retirement plan-related. One way to get ASPA credit is by attending an **educational program or course** sponsored by ASPA in **2001** as shown in the chart below. (Check program brochure for the exact number of CE credits. Credits are for 2001 only and are subject to change.)

Additionally, credit can be obtained by attending a **non-ASPA sponsored seminar or educational program**. Credits for these programs are based on a one-credit per 50-minute credit hour with a maximum of 15 credits per program. Retention of attendance records and written outlines is the responsibility of the credentialed member.

ASPA-sponsored exams are another way to earn credit. Credentialed members can use the PA-1(A), PA-1(B), Daily Valuation, C-1, C-2(DC), C-2(DB), C-3, C-4, and A-4 exams that lead to an *additional* credentialed membership category. The exams taken to obtain your first designation do not earn CE credits, but rather, earn the designation. Credits will be applied to the cycle in which the score is *received*. You will receive 20 credits for a passing grade and 15 credits for a failing grade (no less than a score of 5).

Program/Course	Credits
Annual Conference, Summer Academy, and Business Leadership Conference	[20 each]
One Day Workshops	[7 each]
Great Lakes TE/GE	[16]*
Best of Great Lakes	[8]*
Northeast Key Conference	[8 each conf.]*
Los Angeles Benefits Conference	[15]*
C-1, C-2(DB), C-2(DC) Virtual Study Groups	[20 each]
C-1, C-2(DB), C-2(DC), C-3, C-4, EA Weekend Courses	[15 each]
Pension Administrator's Course (PA-1A & PA-1B)	[10 for both]
Daily Valuation Course (DV)	[10]
The Pension Actuary Quiz	[1 per quiz]
Webcasts	[2 each]
ASPA Benefits Council (ABC) meetings	[Credits depend upon the length of the meeting and are based on a one credit per 50-minute credit hour.]

*estimated

In addition to exams, courses, and educational meetings, you can obtain credit by attending a qualified **in-house training** program sponsored by the company for which you are either an employee or representative, or by participating in a qualified **study group** program. Successful completion (*i.e.,* a passing score on an exam) of a **non-ASPA sponsored self-study** program covering acceptable subject matter also qualifies for credit. Credit for in-house training, study-groups, and self-study are calculated based on a one credit per 50-minute credit hour. Keep in mind that there is a 15 credit maximum for **self-study programs** and at least one ASPA member must be present in order to receive credit for a **study group** (refer to the *Continuing Education Guidelines and Forms* for more detailed information).

And that's not all! You can also receive credit for **speaking** at a professional meeting, or for **instructing** a course either sponsored by ASPA or by a college, university, or another professional organization. Credit can also be obtained by **serving as a panelist** at a professional meeting or for **publishing an article** on acceptable subject matter (refer to the *Continuing Education Guidelines and Forms* for more detailed information).

The opportunities to earn CE credits are endless! It is important to start now and plan how you will earn your CE credits before the end of this cycle. Designated members who do not meet ASPA's CE requirements will have their designation(s) suspended until the credits are obtained and are required to apply for reinstatement of the suspended designation(s).

For more information about how to earn CE credits, contact ASPA's membership department at (703) 516-9300 and request a copy of the *Continuing Education Guidelines and Forms*. Guidelines can also be found in ASPA's *2001 Yearbook* and in the Continuing Education section of ASPA's website at **www.aspa.org**. The 2001-2002 *Continuing Education Guidelines and Forms*, including the reporting form due at the end of this cycle, will be mailed to each credentialed ASPA member in 2002. ▲

Cathy M. Green, CPC, QPA, is vice president of CMC in Glendale, CA. She is the chair of the Continuing Education Committee. Cathy, a member of ASPA's Board of Directors, also serves on the Conference Committee and is chair of the 2001 ASPA Summer Academy. In February, she served on the Strategic Planning and Implementation Team.

Marissa Pietschker, QPA, works for Suncoast Pension and Benefits Group, Inc. in Tampa, FL, and has worked in the pension field since 1982. She has been a member of ASPA since 1990 and received her QPA designation in 1993. Marissa currently serves as co-chair of ASPA's Continuing Education Committee.

CFP and FLMI Professionals Now Eligible for APM Designation

The ASPA Board of Directors voted at their July 2001 meeting to grant those individuals with the prerequisite three years of pension practice experience who have been awarded the credential of Certified Financial Planner (CFP) or those who are Fellows of the Life Management Institute (FLMI) eligibility to become an Associated Professional Member (APM) of ASPA.

ASPA created the APM membership category several years ago to recognize those professionals who are involved in the employee benefits field and have also achieved professional recognition in another field. ASPA's Board of Directors has deemed that both the CFP and the FLMI justify admittance into this same category.

The following professionals are eligible for the APM designation if they meet the additional requirement of three years of experience in pension-related matters:

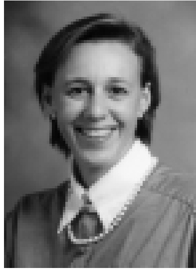
(1) attorneys currently admitted to the bar in any US jurisdiction, (2) accountants who have attained the CPA designation, (3) enrolled agents who are enrolled to practice before the IRS, (4) those who have been awarded the MSFS degree from the Graduate School of Financial Sciences of the American College, Bryn Mawr, Pennsylvania, (5) those who have been awarded the designation of Chartered Life Underwriter or Chartered Financial Consultant from The American College, Bryn Mawr, Pennsylvania, (6) those who have been awarded the credential of Certified Financial Planner from a program accredited by the Certified Financial Planner Board of Standards, and (7) other professional designations as follows: Member of the American Academy of Actuaries; Associate, Member, and Fellow of the Conference of Consulting Actuaries; Associate and Fellow of the Society of Actuaries; Accredited Pension Administrator of the National Institute of Pension Administrators; and Fellow of the Life Management Institute.

For more information, or to receive a designated membership application, contact ASPA's membership department at (703) 516-9300 or visit our website at **www.aspa.org**.

Focus on Government Affairs

Summary of Letters

by Theresa Lensander, CPC, QPA



The Administration Relations Committee for ASPA's Government Affairs Committee responds to IRS, Treasury, DOL, and PBGC notices, rulings, announcements, and regulations. The goal of the Committee is to proactively communicate the needs of ASPA's membership by writing comment letters throughout the year and by meeting with government officials at least twice a year.

The following is a summary of committee letters beginning with the most current letters, dating back to September 2000. If you would like to view the actual letters, go to **www.aspa.org** and select "Government Affairs."

May 29, 2001 – Extension for Filing Form 5500 Series. ASPA requested that the DOL provide a blanket extension of time to file the 2000 Form 5500 series letter, similar to the extension that was granted in 2000 for the 1999 forms.

April 17, 2001 – Comments Regarding Proposed Regulations under Code Section 401(a)(9). Comments were submitted regarding effective dates and the use of the model amendment, establishment of separate accounts, the identification of beneficiaries and the ability to split trust after the participant's death, and application of the proposed rules to 403(b) plans. Supplemental comments to follow at a future date.

March 7, 2001 – Comments to PBGC Regarding Cash Balance and Hybrid Plans. PBGC requested that ASPA comment on how to make benefit determinations for cash balance and hybrid plans at plan termination.

February 23, 2001 – Disclosure of Obligations of Fiduciaries. This letter responded to PWBA's request for information dated September 14, 2000, regarding disclosure of fiduciary obligations of employee benefit plans subject to ERISA Title I.

January 16, 2001 – IRS Notice 2000-63, Priorities Guidance List. ASPA offered suggestions in response to IRS Notice 2000-63 on priorities for guidance under the 2001 guidance priority list issued jointly each year by IRS and Treasury.

January 5, 2001 – New Comparability Proposed Regulations. ASPA submitted comments regarding proposed IRS regulations on the non-discrimination requirements for certain defined contribution plans, "new comparability plans." In addition to submitting written comments, ASPA spoke at the public hearing on the proposed regulations on January 25.

December 11, 2000 – IRS Notice 99-44, Section 415 Limitations on Benefits and Contributions. Additional comments on IRS Notice 99-44, Section 415 Limitations on Benefits and Contributions under Qualified plans, were submitted with a request to the Service to keep in mind the following goals: promote efficient plan operation, achieve consistency in plan design, simplify changes to defined benefit pension plans, and accommodate phased retirement patterns for plan participants.

October 27, 2000 – ERISA Procedure 76-1, Education for 403(b) Plan Sponsors. ASPA asked the PWBA to assist with publicizing the availability of ERISA Procedure 76-1 to promote awareness and education of ERISA requirements for Title I plans, as well as how to determine if a 403(b) eligible employer sponsors a Title I plan.

September 11, 2000 – Comments Regarding Revenue Procedure 2000-16. Comments were submitted to the Service regarding the Employee Plans Compliance Resolution System (EPCRS).

Continued on page 31

Focus on ABCs

Western Pennsylvania Nears the End of an Inaugural Year

by Stephanie Hepler

The ASPA Benefits Council (ABC) of Western Pennsylvania (Pittsburgh) became official in August of 2000. Our inaugural year includes the last two months of 2000 in addition to all of 2001. Over the past year, membership in the ABC has grown to fifteen corporate and two individual members. We are also in the process of designing our website located at **www.aspaofwpa.org**.

The elected board of directors is: President, Becky Hummer, CPC, QPA; Vice President/Gov't Affairs Coordinator, Gary Gunnett, JD; Treasurer, Cynthia Hall; Secretary/ CE Chair, Michael Viola, CPC, QPA; Program Chair/PR Chair/ASPA Liaison, Stephanie Hepler; Meeting Chair, Jackie Albee, QPA; and Meeting Chair, Russell D. Smith, CPC, QPA.

Our first meeting, held on November 29, 2000, was a great success! We were lucky enough to have Brian H. Graff, Esq., ASPA's Executive Director, present an update on Pension Reform. Our second quarterly meeting, held in March, featured Atlanta ABC Board member Cynthia Groszkiewicz, MSPA, QPA, EA, ASA. Cynthia gave the group an informative and enlightening analysis of the new cross-testing rules. In light of the GUST Remedial Amendment Period, we thought it appropriate to have the June quarterly meeting address the issues surrounding document restatements. Our very own Gary Gunnett, JD, addressed the membership and also held a question and answer session. The meeting was successful and we extend our sincere thanks to Gary, who conducted the meeting only a week after returning from his honeymoon! Our next meeting is scheduled for September and will cover the current "hot topics" surrounding the retirement plan community.

In closing, we would like to recognize our secretary and CE chair, Michael Viola, CPC, QPA. Along with being a dedicated board member of our council, he recently became a member of the ASPA PA-1 Exam Committee. This committee designs the test questions for the PA-1(A) and PA-1(B) exams and the corresponding study manuals.

For more information about the ASPA Benefits Council of Western PA, including membership registration and upcoming events, contact Becky Hummer, Board President, at rhummer@dpbz.com or (412) 642-9040. ▲

Stephanie Hepler is an administrator with dpb&z, inc., an actuarial and employee benefit consulting firm in Pittsburgh, PA. She has been in the employee benefits field for fifteen years. Her experience includes plan design, administration, and compliance.

ASPA Benefits Council Calendar of Upcoming Events

Date	Location	Event
September 5	New York	The New Tax Law, EGTRRA Speaker: Craig Hoffman, APM
September 11	Delaware Valley	The New Pension Legislation – Economic Growth and Tax Relief Reconciliation Act of 2001 Speakers: ERISA Attorneys, Arthur Bachman and Robert Bildersee
September 13	Atlanta	Annual Members-Only Meeting
September 24	Chicago	EGTRRA and GUST Restatement Speaker: Richard Hochman, APM
September 25	Central Florida	New Tax Law Speaker: Sal Tripodi, APM
October 17	North Florida	EGTRRA Update Speakers: Michele Lellouche and Kevin Merrill

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.

EGTRRA, EGTRRA, Read All About It!

[Threads 96392, 96519, 96585, 96686, 96829, 96997, 97001, 97196]

PIX users started analyzing EGTRRA before the conference committee's ink had dried, averaging over 6 messages a day since the bill passed. As the effective date of EGTRRA provisions approaches, PIX users will be at the cutting edge of problems, solutions, opportunities, and creative ideas arising from this legislation.

To date, some of the topics discussed include:

1. Impact of the elimination of the 415 25% of compensation defined contribution limit and the interaction with the addition of a 404 25% deduction limit for money purchase plans;
2. The use of a 401(k) in combination with a defined benefit plan, since deferrals will not count against the 404 deduction limit;
3. How to deal with existing plan loans to S-Corp shareholders, partners and proprietors, which are currently prohibited transactions, in light of the change permitting these loans, effective 2002;
4. Use of 401(k) deferrals with a profit sharing contribution in a one-person plan;
5. Effect of changes to 415 aggregation rules for multi-employer plans;
6. What effect the 2010 EGTRRA sunset provision might have on pension planning;
7. Plan amendment requirements;
8. Safe Harbor 401(k) plans and top-heavy requirements;
9. Changes in key employee definition and the top-heavy determination date;
10. Treatment of rollovers and new IRA rules.

Many more topics were discussed, including an apparent oversight in EGTRRA regarding SEP contributions. IRC 404 was amended to increase the SEP deduction limit to 25%; however, IRC 402(h)(2) was apparently not changed. If this is not revised, even though an employer may deduct a 25% SEP contribution, the amount over 15% will be taxable to the participant.

Another discussion involved the provision that allows defined benefit plan valuations to be performed every other year, instead of annually, if the plan funding exceeds 125% of current liability. While this is similar to the old triennial valuations that were permitted long ago, that was prior to the days of current liability. The discussion covered areas of an actuary's responsibility to participants versus the sponsor's desire to save fees, and one actuary even described some situations where he feels annual valuations are not frequent enough.

As with any new and complex legislation, there are initially far more questions than answers, and if experience is any guide, as practitioners, we will be advising clients on many issues long before we have guidance from the IRS. Interaction with colleagues nationwide will be an important part of learning how to apply EGTRRA to your practice.

To assist ASPA members with learning about EGTRRA, PIX is offering FREE introductory subscriptions to PIX by e-mail. You may request this subscription by e-mailing **mom@pixpc.com** and requesting an EGTRRA trial subscription, which will run through ASPA's annual conference in October.

To read the EGTRRA threads through July 15, 2001, download eggtra2.fsg. We will compile EGTRRA messages approximately monthly, depending on volume, and post updates available for download.

Thanks to PIX user Don Martin for the great headline.

Schedule B and Defined Benefit Takeover Plans

[Thread 97406]

A PIX user who is taking over a defined benefit plan started this thread. Upon review of the previous work, it appeared that the valuation was done using a benefit formula different from that in the plan document. The user was asking what should be done, as the improper valuation of the plan benefits will affect the funding standard account and therefore future Schedule Bs.

Most users believed that the prior actuary should be contacted for clarification, as there might be a plan amendment that the client failed to provide. If it did turn out there was an error, some users felt that the Schedule B must be amended no matter what, others felt that an amended return would be necessary only if a funding deficiency resulted. It was also noted that the IRS has on many occasions stated that an amended Schedule B must use the same actuarial assumptions as used in the original filing. If the original actuary will not amend the Schedule B, and the new actuary does not agree with the assumptions previously used, the new actuary either cannot amend the prior Schedule B, or is in the unenviable position of having to sign off on assumptions that do not represent his or her best estimate of future experience under the plan.

To read the entire thread, download tkodb2.fsg.

Partnership Loss and Plan Compensation

[Thread 97212]

This thread discusses the case where a plan is sponsored by a partnership (A). One of the partners is an active partner in another partnership (B) that does not sponsor the plan. Partnership B has a loss for the year. How does this loss affect the plan compensation in A for this partner?

Even though B is not a party to the plan, since a partner is treated as self-employed for plan compensation and deductions, the loss in B does reduce the partner's compensation for IRC 415 purposes. However, it may not reduce the participant's compensation for plan purposes, if B is not part of the "Employer" sponsoring the plan.

To read the entire thread, download partlos2.fsg. ▲

Notice of ASPA's Annual Business Meeting

ASPA's Annual Business Meeting will be held during the 2001 ASPA Annual Conference on Sunday, October 28 at 3:15 p.m. All ASPA members are invited to attend and participate in the discussion of membership business. Credentialed members are encouraged to attend the meeting and vote for new members of ASPA's 2002 Board of Directors.

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Focus on Government Affairs

This letter was a great success, and many of ASPA's ideas and comments were incorporated in Revenue Procedure 2001-17. ▲

Please contact the subcommittee Chairs directly if you have interest in a specific topic or would like to learn more about how you can assist:

Chair	Subcommittee	E-mail Address
Michael J. Canan	DOL	mcanan@ghrlaw.com
Jeffrey Chang	IRS	jcc@crl-benefits.com
Theresa Lensander	Tax-Exempt & Governmental Plans	TAPC403bLink@msn.com
Kurt Piper	Actuarial/PBGC	kurtpiper@pixpc.com
Robert Richter	Cafeteria Plans	robert.richter@corbel.com
Valeri Stevens	Reporting & Disclosure	msbi@ix.netcom.com
Janice Wegesin	401(k)	jmwconsults@juno.com

Theresa Lensander, CPC, QPA, serves as chair, Administration Relations and chair, Tax-Exempt and Governmental Plans subcommittee for ASPA Government Affairs. She is president of The American Pension Company in Santa Barbara, CA and specializes in the administration of qualified plans and 403(b) arrangements.

2001 Calendar of Events

		ASPA CE Credit
September 13 - 14	Los Angeles Benefits Conference, Universal City, CA	16
September 15	Early registration deadline for fall exams	
September 19	Best of Great Lakes, Minneapolis, MN	8
September 24	Best of Great Lakes, Indianapolis, IN	8
September 28	Best of Great Lakes, Milwaukee, WI	8
Oct. 15 - Nov. 30	C-1, C-2(DB), C-2(DC) fall exam window	*
October 28 - 31	Annual Conference, Washington, DC	20
October 31	Final registration deadline for fall exams	
November 5	Registration deadline for fall weekend courses (C-1, C-2(DB), C-2(DC), C-3, and C-4)	
November 10 - 11	C-1, C-2(DB), C-2(DC), C-3, and C-4 weekend courses, Chicago, IL	15
December 5	C-3, C-4, and A-4 exams	*
December 31	Deadline for 2001 edition exams for PA-1 (A&B)	**
December 31	Deadline for 2001 edition exam for Daily Valuation	***

* 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 passing grades.

*** Daily Valuation exams earn 10 hours of ASPA continuing education credits each for passing grade.

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Watch for more information coming soon. To find out more, visit our website at **www.aspa.org** or contact the Meetings Department at (703) 516-9300 or meetings@aspa.org.

Mark Your Calendar Today! February 28 - March 2, 2002

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