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Comments on Proposed Regulations Relating to Performance of Actuarial Services Under the Employee Retirement Security Act of 1974

November 20, 2009

Joint Board for the Enrollment of Actuaries
20 CFR Part 901
[REG-159704-03]

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the proposed amendments to the regulations relating to performance of actuarial services under the Employee Retirement Security Act of 1974 (ERISA) as issued by the Joint Board for the Enrollment of Actuaries on September 18, 2009 (REG -159704-03).

ASPPA is a national organization of more than 6,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system. All credentialed actuarial members of ASPPA are members of the ASPPA College of Pension Actuaries (ASPPA COPA), which has primary responsibility for the content of comment letters that involve actuarial issues.

Summary of Recommendations

The following is a summary of ASPPA COPA's recommendations which are described in greater detail in the Discussion of Issue section.

I. **Continuing Education**

A. The core hours requirement should remain at 18 hours, with the definition of core hours expanded to include requirements for profit sharing and other tax qualified employer retirement plans.

B. The rules governing qualifying programs should make it clear that any reasonably available technology can be used to satisfy the requirements.

C. Teleconferencing and webcasts should be considered formal programs and the formal/teleconferencing/webcast program requirement increased to half of the required hours.

D. Sole proprietors should not be prohibited from being qualifying sponsors.

E. Additional examples should be provided as to what would constitute strong evidence of extraordinary circumstances with regard to obtaining a waiver of the continuing education requirements.

II. **Standards of Performance**

A. The meaning of "relevant standards of professional responsibility and ethics for actuarial practice" should be clarified and reissued in proposed form for public comment.

B. The proposal to require reporting of violations to the Executive Director should be withdrawn. If not withdrawn, the proposed rule needs significant modifications, and should be reissued in proposed form.

C. The proposed requirement that "an enrolled actuary may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service, the Department of Labor, the Pension Benefit Guaranty Corporation, or any other applicable Federal or State entity" is unnecessary and should not be included in final regulations.

Discussion of Issues

I. Continuing Education

A. Proposed section 901.11(e) would reduce the number of core hours after the initial renewal cycle from 18 to 12. It is critical that continuing education requirements for enrolled actuaries provide adequate updating of core actuarial knowledge. Diminishment of the core requirement would send the wrong message to the public and to regulators, suggesting that the profession requires fewer core skills for actuarial practice under ERISA.

ASPPA COPA recommends that the core hours requirement remain at 18 hours. However, we also recommend that the definition of core hours in proposed section 901.11(f)((1)(i) be expanded. As pension practice has evolved since ERISA, the chasm between "defined benefit plan practice" and "defined contribution plan practice" has narrowed considerably. An enrolled actuary should have a solid grounding in all areas of qualified plan compliance. Accordingly, we recommend that the phrases "requirements for the

qualification of pension plans" and "tax treatment of distributions from pension plans" be expanded to include profit sharing and other tax qualified employer retirement plans.

B. Proposed section 901.11(f)(2)(i) lays out the characteristics of a qualifying program.

   1) Proposed section 901.11(f)(2)(i)(D) provides that a qualifying program must provide a written outline or textbook. Given technological advances, ***ASPPA COPA*** *recommends* that this be reworded to provide that a qualifying program must make available (either in paper or other media) a written outline or textbook. This would make it clear that providing electronic versions of outlines is sufficient. Additionally, this would clarify that it is sufficient to provide an internet link to the written outline.

   2) Proposed section 901.11(f)(2)(i)(F) requires that a qualifying program must provide a means for evaluation by the Joint Board. ***ASPPA COPA*** *recommends* that this be clarified to require that a qualifying sponsor must collect and retain evaluation forms from attendees using any reasonably available technology.

   3) Proposed 901.11(f)(2)(i)(G)&(H) provides that a qualifying program must provide a certificate of attendance and instruction respectively. ***ASPPA COPA*** *recommends* that these be reworded to provide that the certificate must be made available to attendees and instructors using any reasonably available technology.

C. Proposed section 901.11(f)(2)(ii) provides three types of qualifying programs: formal, correspondence, and teleconferencing/webcasts. The proposed regulations provide that at least one third of the continuing education requirement must be satisfied through formal qualifying programs.

   ASPPA COPA recommends that the requirement be amended to provide that one half of continuing education must be provided through a combination of formal programs and teleconferencing/webcasts. ASPPA recognizes the value of attending formal programs and teleconferences /webcasts. With advances in technology, there is not a significant difference in the ability to verify attendance between formal programs and webcasts. Additionally, webcasts can provide opportunity for attendees to interact with both the instructor and other attendees. Lastly, webcasts can provide an economical way for both large and small firms to satisfy their continuing education requirements.

   If the Joint Board retains the current proposed rule, ASPPA requests clarification that a group of actuaries listening to a webcast together in person can be a formal presentation even though the presenter is not physically present if all of the other requirements are satisfied.

D. Proposed 901.11(f)(3)(i) provides that qualifying sponsors are organizations recognized by Executive Director and provides that sole proprietors cannot be qualifying sponsors. It is not clear why the criteria include the structure of the sponsor as opposed to the capabilities of the sponsor. An organization that happens to be unincorporated could provide the required content at the same quality level as an incorporated organization.

ASPPA COPA recommends that the prohibition on sole proprietors be removed. Prohibiting sole proprietors from serving as qualifying sponsors is detrimental to enrolled actuaries of modest resources who receive some or most of their continuing education credit by attending local study groups. For example, the Enrolled Actuaries Workshop in Los Angeles has been providing an educational experience to enrolled actuaries for over 20 years, but since it is not incorporated it would seem to not meet the definition of a qualifying sponsor. Ability to provide quality education, not business structure, should determine who can be a qualifying sponsor.

E. Proposed section 901.11(k) provides that the Executive Director may grant a waiver from the continuing education requirements only under "extraordinary circumstances", and when every effort was to obtain continuing education. The preamble says that circumstances such as extended military duty will continue to suggest strong evidence of extraordinary circumstances. ***ASPPA COPA recommends*** that other examples be provided as to what would constitute strong evidence of extraordinary circumstances.

II. Standards of Performance

A. Proposed section 901.20(b)(1) provides that "An enrolled actuary shall perform actuarial services only in a manner that is fully in accordance with all of the duties and requirements for such persons under applicable law and consistent with relevant standards of professional responsibility and ethics for actuarial practice." ***ASPPA COPA recommends*** that this section be clarified and re-exposed for public comment. ASPPA COPA supports enrolled actuaries being held to high ethical and professional standards; however, there needs to be much more clarity around the meaning of "relevant standards of professional responsibility and ethics for actuarial practice." This could be interpreted by one enrolled actuary to mean a standard that is consistent with IRS regulations while another enrolled actuary could interpret this to mean standards promulgated by one or more professional organizations. ASPPA COPA supports the Joint Board further defining the responsibilities of enrolled actuaries through its regulatory process.

Furthermore, proposed section 901.20(b)(1) appears to apply to all actuarial services, not just services provided under ERISA and the Internal Revenue Code. ***ASPPA COPA recommends*** that revised proposed regulations clarify that services subject to section 901.20(b)(1) are those described in proposed 901.20(e)(1), which applies only to actuarial services under ERISA and the Internal Revenue Code.

B. Proposed section 901.20(b)(3) requires an enrolled actuary to report a material violation of the standards of performance of actuarial services to the Executive Director upon learning of the violation. This requirement is written very broadly. There is no discussion of what is "material". The proposal also could be interpreted as requiring that a violation be reported immediately, whereas standards of practice applicable to all members of ACOPA and the other four U.S. actuarial organizations require that the actuary discuss an "apparent, unresolved, material violation" with the actuary in question to resolve misunderstandings or correct unintended errors before a formal discipline process is launched. The latter approach is more fair and efficient for all parties. Without clarification, the proposed reporting requirement could lead actuaries to bring minor issues to the Joint board's attention merely to protect him or herself from violating the requirement to notify.

ASPPA COPA recommends that proposed section 901.20(b)(3) be withdrawn. If not, the section should be re-proposed and modified to address the following concerns:

1. "Material" should be defined, including a discussion as to whether "material" relates to the impact of the conduct on calculations, or the impact on the perception of the actuary's competence. For example, the ABA model rule regarding reporting of professional misconduct for lawyers requires reporting only when there is "substantial question as to …honesty, trustworthiness or fitness." A similar concept – that an error is not material if it is corrected and is just an error, not a sign of incompetence or dishonesty – should be included in any reporting requirement.

2. ASPPA COPA believes an enrolled actuary should be encouraged to discuss an alleged violation with the actuary in question to resolve misunderstandings before concluding a violation has occurred and reporting the violation to the Executive Director. The regulations should make it clear that such an approach does not violate the reporting requirement.

3. It is critical that enrolled actuaries that are members of the Actuarial Board for Counseling and Discipline (ABCD) be exempt from the reporting requirement if they know of a violation because of their involvement with the ABCD.

4. Client confidentiality must be retained in the reporting process. Failure to protect plan sponsors when a change in enrolled actuaries uncovers a problem with work performed by the previous actuary could unintentionally discourage clients from changing actuaries when circumstances would otherwise indicate such a change is desirable. Circular 230 limits the use of information obtained in the course of disciplinary procedures to the procedure itself, and a

similar rule should be provided for the handling of complaints under this section.

C. Proposed section 901.20(h) provides that "an enrolled actuary may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service, the Department of Labor, the Pension Benefit Guaranty Corporation, or any other applicable Federal or State entity." There are already procedures in place that govern matters before the IRS, DOL and PBGC. The layering of a vague unreasonable delay prohibition on top of existing rules of procedure is unnecessary and could be abusive in its application.

ASPPA COPA recommends that this section be removed from final regulations. Enrolled actuaries that are complying with existing procedures should not be subject to potential accusations of "unreasonable delay". Those that are not complying with existing procedures are already subject to consequences for such failures.

These comments were prepared by ASPPA's Defined Benefit subcommittee of the Government Affairs Committee and the ASPPA College of Pension Actuaries, and were primarily authored by Thomas J. Finnegan, MSPA, CPC, David Lipkin, MSPA, Mark Dunbar, MSPA, Karen Smith, MSPA, Michael L. Bain, MSPA, Steven J. Levine, MSPA, Marjorie R. Martin, MSPA and Kurt F. Piper, MSPA. Please contact us if you have any comments or questions regarding the matters discussed above.

Thank you for your consideration of these comments.

Sincerely,

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