

# Employee Retirement Income Security Act 1999 Report to Congress

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U.S. Department of Labor  
Pension and Welfare Benefits Administration

# ERISA

*25<sup>th</sup>*

*Anniversary*

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# Introduction

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The Pension and Welfare Benefits Administration (PWBA) of the U.S. Department of Labor protects the integrity of pensions, health plans and other employee benefits for more than 150 million people. The Agency's mission is to administer and enforce the fiduciary, reporting and disclosure, and coverage provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). The provisions of Title I were enacted to address public concerns that funds of private employee benefit plans were being mismanaged and abused.

Since its enactment in 1974, ERISA was amended to meet the changing retirement and health care needs of employees and their families. The role of PWBA also has evolved continually to meet these challenges. In 1986, the Consolidated Omnibus Budget Reconciliation Act (COBRA) was passed, and PWBA was charged with certain notification requirements under the Act. The passage of the following health care laws gave the Agency added responsibilities with respect to group health plans:

- The Health Insurance Portability and Accountability Act of 1996 (HIPAA);
- The Mental Health Parity Act of 1996;
- The Newborns' and Mothers' Health Protection Act of 1996; and
- The Women's Health and Cancer Rights Act of 1998.

As a result, the Agency provided technical guidance on how to apply ERISA's Title I provisions, as amended by HIPAA and other health care laws that affect group health plans. In addition, it created a new office in December to address its expanded role in the health care area.

The SAVER Act (Savings are Vital to Everyone's Retirement) also amended ERISA in 1997 to require that the Secretary maintain an ongoing program of public outreach to effectively promote retirement income savings. The Agency has partnered with numerous public and private

businesses and organizations through its Retirement Savings Education Campaign to increase the public's understanding of this important issue.

On another front, the Agency developed an electronic filing system called EFAST to accept annual reports that will make Form 5500 Annual Reports faster and cheaper for plans to file and for the government to process the filings. It also continued to work to support the Administration's proposals to simplify pension rules and to improve pension portability.

Finally, 1999 marked the 25<sup>th</sup> anniversary of the passage of ERISA. PWBA commemorated the anniversary by raising public awareness of the Agency's role in protecting both pension and health benefits through a series of national and regional outreach initiatives. This report details the year's accomplishments in executing the Agency's mission, and adds highlights of the last quarter century.

# Overview of PWBA Office Functions

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*PWBA accomplishes its mission through the collective efforts of seven major offices that administer and enforce the law and through two offices that support the Agency's operations. The Agency also provides support for a bipartisan, independent Council that appraises the programs instituted under ERISA and makes recommendations to the Secretary of Labor.*

## ***Office of Enforcement***

The Office of Enforcement is responsible for overseeing and implementing the Agency's investigative programs. Through 15 regional and district offices<sup>1</sup> in major cities throughout the country, it conducts investigations to detect civil and criminal violations of Title I of ERISA and criminal laws relating to employee benefit plans.

These investigations are performed to gather information and evaluate compliance with ERISA's civil law requirements as well as criminal law provisions relating to employee benefit plans. Except in those cases involving national priorities, projects, enforcement policy or other designated matters, the field offices generally exercise broad discretion in determining when investigations are to be opened and which entities or individuals are to be investigated. The field offices conduct their investigations in accordance with established enforcement procedures.

<sup>1</sup> PWBA's regional offices are located in Atlanta, Boston, Chicago, Cincinnati, Dallas, Kansas City, Los Angeles, New York, Philadelphia and San Francisco. PWBA's district offices are located in Detroit, Miami, Seattle, St. Louis and Washington, D.C.

Each PWBA field office coordinates civil investigations and case referrals with its local regional Solicitor's Office or with the Plan Benefits Security Division of the Solicitor's Office in Washington, D.C., both of which are responsible for bringing civil lawsuits on behalf of the Agency.

Field offices also coordinate criminal investigations with the appropriate U.S. Attorney's Office that has responsibility for the prosecution of Federal crimes. Field offices may also coordinate criminal investigations with local or state prosecutor offices.

PWBA's Office of Enforcement (OE) communicates national enforcement policies, priorities and procedures to PWBA's field offices. OE is responsible for operational review and oversight, enforcement policy direction, program coordination and technical assistance.

## ***Office of Program Services***

PWBA also satisfies its mission of protecting pension, health and other benefits in private-sector employee benefits plans by helping plan participants and beneficiaries understand their rights, and employers and plan sponsors their obligations, under the Federal law that protects pension and health benefits.

This function is executed through the Office of Program Services's (OPS) Division of Technical Assistance and Inquiries in the Washington, D.C., office, and in the 15 PWBA field offices. When participants write, call

or visit one of these offices, they receive individual assistance from benefits advisors who explain their rights under the law and help them obtain benefits that have been denied.

Public education is also a significant responsibility of PWBA. Through the OPS Public Affairs Division, the Agency provides plan participants, plan sponsors and the general public with educational publications and materials that increase public awareness of basic health, pension and retirement planning issues.

It is responsible for coordinating two national education campaigns on retirement savings and health benefits education; for constructing and maintaining the Small Business Retirement Savings Advisor Web site to help small business owners interested in starting a retirement plan; and for developing a toll-free publications hotline number as a central source for free publications on retirement savings and pension and health benefits. The Public Affairs Division also serves as a liaison between the Agency and the news media.

In addition, this division issues press releases on civil and criminal cases pertaining to ERISA; answers and directs media inquiries; holds press events to publicize Agency issues and initiatives; and arranges and hosts briefings for foreign officials to educate them on the Agency's mission and the U.S. pension and health laws. It also arranges speaking engagements throughout the country for the Assistant Secretary and other departmental officials, who deliver

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the Agency's message on health, pension and retirement issues. Through the OPS Public Disclosure Room, the Agency provides the press and the public with basic financial information on employee benefits plans that private-sector companies file with the Labor Department.

### ***Office of Exemption Determinations***

The Office of Exemption Determinations administers the Agency's program for granting administrative exemptions from the prohibited transaction provisions of ERISA. The Office has two divisions. One is responsible for class exemptions. The other administers the program for individual exemptions.

ERISA prohibits certain specified transactions between employee benefits plans and entities defined as "parties in interest". However, it gives the Labor Department authority to grant exemptions from these prohibited transactions if an applicant can demonstrate that a transaction is administratively feasible; serves the interest of the plan, its participants and beneficiaries; and protects the rights of the plan participants and beneficiaries.

The Office reviews applications for such exemptions and determines whether to grant relief. Individual exemptions relate to a particular plan or applicant. Class exemptions are applicable to anyone in the described transactions, provided the enumerated conditions are satisfied.

### ***Office of Regulations and Interpretations***

The Office of Regulations and Interpretations is responsible for planning, directing and carrying out PWBA's program for the development and delivery of policy and technical guidance concerning the application of Title I of ERISA. It also is responsible for interpreting certain provisions of the Internal Revenue Code, the Federal Employees' Retirement System Act of 1986, and other laws affecting employee benefit plans. The Office develops regulations and interpretive bulletins, and issues advisory opinions, information letters and rulings. It also develops employee benefit plan reporting forms and provides training, technical assistance and other guidance to facilitate compliance with and enforcement of the fiduciary, coverage, reporting and disclosure, and other statutory provisions administered by PWBA.

### ***Office of Policy and Research***

The Office of Policy and Research provides technical, legislative, and research analysis on health and pension benefits legislation proposed by the Administration and pending before the Congress. It also provides leadership and coordination of employee benefit plan policy analyses, and prepares congressional and executive departmental briefings and proposed testimony.

In addition, it is responsible for maintaining comprehensive data and statistics on the private retirement income system and pension plan investments that are derived from the annual reports of the Form 5500. These are released semiannually in the *Private Pension Plan Bulletin* to make timely information available to research and policy analysts.

### ***Office of the Chief Accountant***

The Office of the Chief Accountant (OCA) is responsible for administering a reporting compliance function designed to enforce ERISA's reporting and disclosure requirements. OCA insures the integrity of the reporting and compliance process through enforcement initiatives involving civil penalties imposed against plan administrators for their failure to submit complete and accurate Form 5500 Annual Reports; reviews the quality of work performed by auditors of employee benefit plans; establishes several proactive programs designed to help educate plan professionals; and encourages voluntary compliance through reduced fines.

In addition, OCA is responsible for establishing a program to carry out audits to determine the level of compliance with the requirements of the Federal Employees' Retirement System Act (FERSA) of 1986 relating to fiduciary responsibilities and prohibited activities of fiduciaries.

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## ***Office of Health Plan Standards and Compliance Assistance***

The Office of Health Plan Standards and Compliance Assistance (The Health Office) is responsible for planning, directing and carrying out a program for providing policy and technical guidance with respect to the recently enacted health care provisions under Title I of the Employee Retirement Income Security Act of 1974 (ERISA). These include provisions added to ERISA by:

- The Health Insurance Portability and Accountability Act of 1996;
- The Mental Health Parity Act of 1996;
- The Newborns' and Mothers' Health Protection Act of 1996; and

- The Women's Health and Cancer Rights Act of 1998.

The Health Office is responsible for providing regulations, interpretive bulletins, opinions, rulings, forms, training, technical assistance and other guidance to facilitate compliance with, and enforcement of, these provisions relating to group health plans.

### ***ERISA Advisory Council***

The duties of the Advisory Council on Employee Welfare and Pension Benefit Plans are to advise the Secretary and submit recommendations regarding the Secretary's functions under ERISA. The council customarily holds four meetings each year that are open to the public. The Council consists of 15 members, appointed by the Secretary of Labor to serve 3-year terms. The members

must be qualified to appraise the programs instituted under the federal pension and health benefits law.

Three members must represent employee organizations — with at least one representing participants of a multi-employer plan. Three must be selected from employer organizations, with at least one representative of employers maintaining or contributing to multi-employer plans; and three members must be selected from the general public, one of whom must receive benefits from a pension plan. The other six members must be selected from the insurance, accounting, actuarial counseling, investment management and investment counseling, and corporate trust communities. The law also requires that five members rotate off the council each Nov. 14 and that no more than eight appointees represent any one political party.



# 1999 Highlights

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Richard McGahey was Assistant Secretary through early December. Upon his departure, Leslie Kramerich was named Acting Assistant Secretary. She was and also continued to serve as the Agency's Deputy Assistant Secretary for Policy. Also in 1999:

- In the area of enforcement, the Agency closed a total of 4,287 civil and criminal cases and recovered more than \$574.7 million.
- As the Retirement Savings Education Campaign neared its 5-year mark, the Agency increased its media and grassroots efforts throughout the country to bring the retirement savings message to diverse populations.
- The Health Benefits Education Campaign also continued to gain momentum, with meetings of the 65 partner organizations that were acquired in the Campaign's 1998 kickoff.
- With respect to reporting and disclosure of plan documents, the Agency assumed the responsibility from the Internal Revenue Service for processing the new 1999 Form 5500 and developed a more streamlined processing system called the Electronic Filing Acceptance System, or EFAST.
- A notable class exemption was granted by the Agency permitting parties in interest to employee benefit plans to make interest-free loans to plans.
- The Agency published proposed rules designed to enhance the security of assets held by small pension plans.
- In regard to research, a 16-study compendium that examined health care issues was published.
- The Patients' Bill of Rights also remained a major health policy initiative for PWBA.
- The Office of Health Plan Standards and Compliance Assistance replaced the Health Care Task Force in December reflecting the Agency's increased responsibility under the new health care laws.
- Finally, the ERISA Advisory Council examined issues such as the growth of the contingent work force and the market trend toward cash balance plans.

# Enforcement

## *25<sup>th</sup> Anniversary Milestones in Enforcement*

- The first enforcement action taken by the Agency was filed on June 3, 1976, in the Western District of Oklahoma. The purchasers of the plan sponsor had used the plan assets to acquire control of the plan sponsor without giving the plan substantial consideration. The Court ordered cancellation of the transaction and restitution of all assets to the plan.
- In an investigation that extended over a number of years during the late 1970s and early 1980s, PWBA recovered more than \$21.5 million for the Central States Teamsters Pension, Health and Welfare Funds.
- In 1983, the Department took vigorous steps to prevent the misuse of pension assets in corporate takeovers by establishing investigator/lawyer teams with special expertise in takeovers and by filing a lawsuit (*Donovan v. Simmons*).
- In 1986, in *Brock v. Cunningham*, the Court required restitution of \$400,000 to plan participants and beneficiaries of the Metropolitan Contract Services, Inc. Employee Stock Ownership Plan. The appeals court ruled that the defendants breached their fiduciary duties. The opinion contains a full discussion of ERISA's "adequate consideration" requirement. This case was typical of the Department's enforcement actions, in that it both restored assets to the plan and helps to clarify the law.
- In 1993, PWBA and the Office of the Inspector General restored \$494,000 to health plan participants who belonged to a Multiple Employer Welfare Arrangement (MEWA) that was a bogus union health plan. The case represented a milestone in ongoing efforts to vigorously investigate and bring to justice health plans sponsored by bogus unions and the plans. During the 1990s, PWBA aggressively investigated MEWAs and recovered more than \$89.9 million in civil and criminal MEWA actions.
- In 1995, PWBA launched its 401(k) Employee Contribution Enforcement Project to hold employers accountable for failing to promptly deposit employees contributions in the employees' accounts. By Dec. 31, 1999, the Agency had recovered \$87 million nationwide through the initiative.

## **1999 Accomplishments**

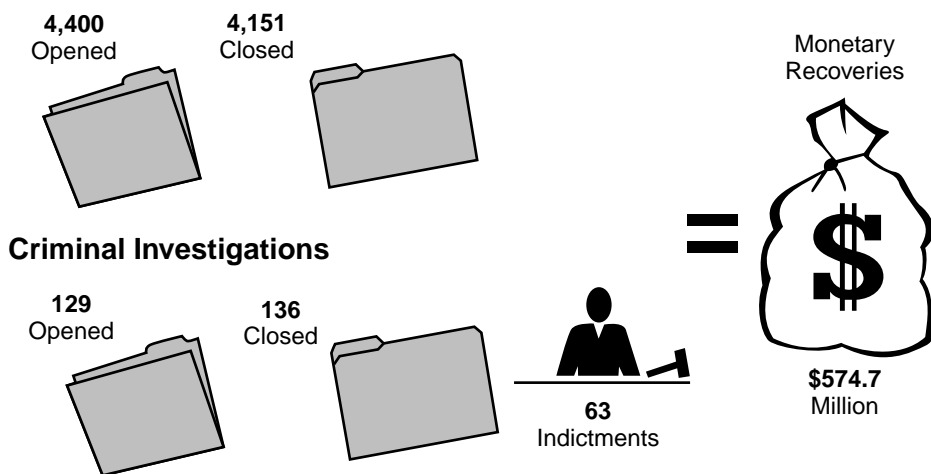
PWBA recovered \$574.7 million for employees of pension, health and employee benefit plans in 1999. This monetary recovery resulted from the Agency's closing of 4,151 civil investigations and 136 criminal investigations, which included 63 indictments (see Figure 1).

The Agency also increased the number of investigations that targeted fraud in employer plan assets in which a plan had been either misused by a fiduciary or endangered by his or her imprudent conduct. This strategy contributed significantly to the Agency's success in protecting plan assets.

In the field offices, more effective targeting techniques were used to increase the number of cases that resulted in corrections of fiduciary and other violations. Some field offices, for example, requested special computer-generated targeting reports that would identify specific types of plans that might have problems, such as an Employee Stock Ownership Plan (ESOP). Other offices worked directly with financial institutions to help them identify plans that might have a delinquent contribution problem or plans that might have been abandoned by irresponsible plan officials.

PWBA also continued to commit substantial resources to address abusive practices that violated ERISA, and pursued enforcement actions against unscrupulous operators of multiple employer welfare arrangements (MEWAs), and against insurers and service providers who received hidden discounts in connection with the operations of health benefit plans.

## Civil Investigations



**Figure 1.** Both civil and criminal cases may continue from one calendar year to the next (i.e., a case opened in 1999 may not be closed until 2000). The numbers in the chart above represent totals for the 1999 calendar year.

The following is a sampling of the civil and criminal cases investigated in 1999.

### Civil Cases

#### **Herman v. Seafarers International Union of Puerto Rico, the Caribbean and Latin America**

10-22-99

*Hato Rey, Puerto Rico*

The U. S. Department of Labor obtained a consent order requiring the Seafarers International Union of Puerto Rico, the Caribbean and Latin America to pay \$374,729, plus interest, to its welfare plan as repayment for improperly retaining employer contributions owed to the welfare plan.

According to a lawsuit filed simultaneously with the order, the union failed to forward to the welfare plan

contributions paid by employers from 1976 to March 1997. The union allegedly retained the money for its own use.

The welfare plan provides health and other benefits to eligible participants. As of Dec. 31, 1995, there were 646 eligible participants and the welfare plan had net assets of \$249,965.

#### **Herman v. Veatch, Carlson, Grogan & Nelson, et al.**

9-30-99

*San Francisco, Calif.*

A Los Angeles law firm, its executive director/administrator, and attorneys were ordered to restore \$647,188, plus interest, to the firm's pension plan, and a former partner was ordered to restore \$127,600 to the pension plan, in two separate consent decrees entered by a San Francisco District Court.

In a lawsuit simultaneously filed with the consent decrees, the Department alleged that the law firm of Veatch, Carlson, Grogan & Nelson; Phillip M. Borini, its executive director/administrator; attorneys James C. Galloway, Jr., Mark A. Weinstein, Anthony D. Seine, and former partner C. Snyder Patin either failed to make or made untimely employee and employer contributions to the firm's pension plan, and diverted participant contributions into the firm's general account in violation of ERISA.

The consent decree required the lawyer defendants to make monthly installment payments of \$10,000 until March 2001, and monthly installments of \$30,000 thereafter until the total amount owed is fully paid. Patin is required to make a lump-sum payment to satisfy the consent decree. The decree also requires that the defendants relinquish their positions as fiduciaries of the firm's pension plan and remain permanently barred from servicing any benefit plan covered by ERISA; that an independent fiduciary be appointed to administer the pension plan; and that the defendants pay all costs in connection with the appointment and retention of the independent fiduciary.

#### **Herman v. Agati, et al., Herman v. Spatol, et al., and Herman v. Marchio, et al.**

9-16-99

*Binghamton, N.Y.*

The U.S. Department of Labor reached settlements in three related lawsuits with trustees of three pension plans that resulted in a total of \$3 million being repaid to the plans.

The settlements also required the trustees to use the funds' investment managers, with full power and discretion, to manage all the assets of the trusts held for investment purposes.

The funds to which the recoveries will be paid are noncontributory defined benefit plans established through collective bargaining agreements between the three unions and various employers and employer associations. In addition, trustees of the pension plans agreed to pay ERISA Section 502(1) penalties amounting to \$600,000 for their alleged violations of Federal pension law.

The defendants in the three separate lawsuits, which were filed concurrently on June 12, 1998, in the Federal District Court in Binghamton, and the amounts they agreed to pay the pension plans are: trustees Sam Marchio, Gerald Spiridillozzi, Carmen Nicotera, Richard Alexander, Jack Endryck and Tony Korrie, \$930,000 to the Laborers Local 35 pension fund; trustees Carl Spatol, Edward Morgan, Richard Buck and Harold McElwain, \$960,000 to the Carpenters Local 120 pension fund; and trustees John Agati, Sam Agati, Robert Ashley, Lanny Miller, Fred Rexford and Hugh Schickel, \$1,110,000 to the Laborers Local 322 pension fund.

According to the Department's lawsuits, the pension plan trustees allegedly violated their fiduciary duties when they caused their respective plans to make numerous pur-

chases from the same broker-dealer of a class of collateralized mortgage obligations (CMOs) and real estate mortgage investment conduit bonds (REMICs), known generally as Z-Bonds, and a highly volatile class of CMOs and REMICs with high sensitivity to interest rate changes. By the end of plan year 1994, each plan held a significant number of these financial instruments. Ultimately, the Z-Bonds were sold by each of the plans at a significant loss.

The Department's complaints alleged that the trustees' purchases of these Z-bonds were imprudent because, when the investments were made, the trustees lacked a sufficient understanding of them and of their inherent risks. The lawsuits also alleged that the trustees failed to adequately investigate the bonds, failed to consider the purpose of these bonds relative to the funding needs of the plans and failed to adequately monitor the plans' investments.

**Herman v. Carmine Gelsomino, et al.**

8-20-99  
*Cranston, R.I.*

A lawsuit filed by the Labor Department was resolved by a partial consent judgment and order when the International Brotherhood of Electrical Workers' Local Union No. 99, Cranston, R.I., and trustee board members of the union's Joint Apprenticeship and Training Committee Trust (JATCT) agreed to restore a total of \$246,700.66 to the trust, which is an employee benefit plan under Federal law. The trust was

created in cooperation with employers to train apprentices for the electrical trade and to provide training programs for journeyman electricians to meet industry demands.

The suit alleged that the trustees and directors attended out-of-state conferences and authorized payment with plan assets of travel stipends to themselves without any consideration of the actual expenses and without maintaining any accounts or receipts. The suit also alleged the trustees caused or permitted the plan to rent office space in the Local Union No. 99 union hall without a valid lease, and to pay rent in excess of reasonable compensation for the space.

Consequently, the suit alleged the trustees failed to discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries of the plan; and that they engaged in transactions that constituted a transfer of plan assets to parties in interest to the plan, a prohibited transaction under ERISA.

Named as defendants in the lawsuit were the union and members of the Board of Trustees for the JATCT, including: Carmine Gelsomino, William Lepore, Jr., Walter L. Perry, Jr., John Vinnitti, Patrick Brady, Arthur Watson, Raymond Lambert, Mary Germershausen and G. Thomas Chabot. Richard Irace, director of the trust, was also named. The directors, trustees, and the union were parties in interest to the trust under ERISA.

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**Herman v. Financial Applications Consultants Services, Inc.**

7-8-99

*Livonia, Mich.*

Financial Application Consulting Services, Inc. in Livonia, Mich., and trustees of the company's 401(k) plan were ordered to collectively restore \$222,503.86 to the plan in a consent order and judgment obtained by the U. S. Department of Labor.

The judgment resolves a lawsuit filed on July 1, 1999, which alleged the company and trustees Steven Kandt, Stephen Rupe and Roger Jelsma violated ERISA by failing to promptly remit 401(k) contributions deducted from employees' paychecks into the plan's investment accounts for the period Dec. 31, 1988, to Dec. 31, 1997. The 401(k) plan provided retirement, death and disability benefits to 66 employees. As of Dec. 31, 1997, the plan had \$937,684 in assets.

The lawsuit also alleged that the defendants failed to remit matching employer contributions, to collect employer contributions owed to the plan and to collect payment on outstanding participant loans from the plan totaling more than \$72,000, all prohibited transactions under ERISA.

The judgment obtained by the Department also stipulates that: the money restored to the plan be credited to the pension accounts of all participants, excluding the defendants; the Court appoint an independent fiduciary to manage the plan; and the defendant trustees be perma-

nently barred from servicing or acting as fiduciaries to any ERISA-covered plan.

**Herman v. Brewster Dairy, Inc., et al.**

7-1-99

*Cleveland, Ohio*

The U.S. Department of Labor settled a lawsuit with executives of Brewster Dairy, Inc. in Brewster, Ohio, who agreed to pay \$333,333 to the company's profit sharing plan. The Department's lawsuit charged that dairy co-owners Fritz Leeman, Walter Leeman and Vice President of Finance Thomas Riegler — who were also plan fiduciaries — imprudently invested more than \$1 million of the company's plan assets in a real estate limited partnership.

The lawsuit also alleged the defendants committed the plan to pay \$1,013,115 to purchase units in the Heartland California Clayton Limited Partnership. The plan ultimately invested \$749,462.50 in the partnership from December 1990 until February 1996.

The limited partnership was invested in a parcel of property located in the San Francisco Bay area. Brewster Dairy was charged with failure to take steps to remedy the improper actions of the plan fiduciaries. The money was recovered and any additional distributions from the limited partnership were prorated and allocated to individual accounts of the plan's eligible participants, excluding the defendants in the case.

**Herman v. Administrative Services of North America, Inc., et al.**

6-11-99

*Houston, Tex.*

The U.S. Department of Labor obtained a preliminary injunction freezing the assets of third-party administrator Administrative Services of Texas, Inc., of Houston (ASO Texas), its parent Administrative Services of North America (ASONA) and former corporate executive Mark A. Strange. The action was taken to prevent further depletion of the assets of client welfare plans, whose accounts were held by them. The preliminary injunction also ordered Jack M. Webb appointed as the independent fiduciary with authority to operate the plans.

The Department simultaneously filed a lawsuit against the company, its parent and Strange, for allegedly violating ERISA by using the assets of client plans to benefit ASO Texas and Strange.

According to the lawsuit, Strange signed and authorized the transfer of \$1,027,188 from plan trust accounts to corporate accounts between Oct. 29, 1998, and March 3, 1999. Approximately \$305,220 was wired back into the trust accounts, leaving a shortfall of \$721,968.

The lawsuit also alleged that approximately \$508,400 of plan assets from refund payments from service providers and Consolidated Omnibus Budget Reconciliation Act (COBRA) payments were not properly forwarded to the plans' trust accounts,



but were used to pay operating expenses of defendants ASONA and ASO Texas.

In addition, Strange allegedly diverted some \$332,700 in plan trust funds for his own personal expenses including making a down payment on a Jaguar, making payments on a personal car note, on a \$100,000 personal bank loan and for American Express credit card charges.

The lawsuit asked that defendants restore to the plans the lost money, plus interest, be removed from their positions and be barred permanently from acting as fiduciaries to the plans and any other employee benefit plan covered by ERISA.

### **Herman v. O'Brien, et al.**

5-27-99

*Tacoma, Wash.*

The U.S. Department of Labor announced that consent judgments were signed in the United States District Court in Tacoma, Wash., which formalized negotiated settlements that affected management of the J.D. English Steel Company Profit Sharing and 401(k) Plan and ordered restitution to the plan for alleged ERISA violations.

A civil lawsuit filed May 27, 1999, sought equitable relief for the plan arising from alleged breaches of fiduciary duty on the part of current plan trustee James H. O'Brien; former plan trustees William E. Saylor and Raymond A. Johnson; and Agnes Rosenberger, an officer of J.D. English Steel Company, the now-

closed Tacoma business that sponsored the plan.

The consent judgments ordered the defendants to restore losses to the plan, including lost opportunity costs, remove current trustee O'Brien and appoint an independent fiduciary. Further, the three trustees were permanently barred from serving as fiduciaries or service providers to any employee benefit plan subject to ERISA.

The Labor Department's suit alleged that the plan trustees caused the plan to make nonperforming real estate loans and limited partnership investments that were imprudent and not in accordance with the plan's governing instruments.

The alleged imprudent investments involved projects formed by J.A. Groce Private Placement, Inc., including one that was to be developed by Badger Mountain Partners. Both are Tacoma concerns. Approximately \$533,430 related to these allegedly imprudent investments will be restored to the plan under the consent judgments.

O'Brien and Rosenberger were alleged to have engaged in transactions specifically prohibited by ERISA when O'Brien caused the plan to transfer plan assets to the plan sponsor, to himself, and to Rosenberger, all of whom were parties in interest to the plan. These prohibited transactions also have been corrected, with another \$214,551 restored to the plan.

### **Herman v. Frederick Thacher and Community Care Systems, Inc.**

4-5-99

*South Portland, Maine*

Community Care Systems, Inc. (CCSI), of Wellesley, Mass., and Frederick Thacher, the company's chief executive officer and principal shareholder, agreed to restore nearly \$140,000 to the pension plan accounts of the participants of the CCSI Employee 401(k) Plan as the result of a lawsuit filed by the U.S. Department of Labor.

In June 1998 the agency filed suit against the defendants, who operated a number of behavioral health care facilities in Massachusetts and Maine, alleging, since November 1997, Thacher and CCSI had caused some of these subsidiaries to withhold employee 401(k) plan contributions from employees' paychecks without forwarding the money to the plan.

In a consent judgment and order, reached on April 5, 1999, and modified on May 24, 1999, Thacher and CCSI agreed to restore \$138,036.43 to employees participating in the 401(k) plan who had worked for CCSI, Charles River Health Management, Charles River Hospital East of Wellesley, Charles River Hospital West of Chicopee and Jackson Brook Institute (JBI) of South Portland, Maine. Some of these entities have since changed ownership, gone into bankruptcy or ceased to exist.

According to the modified judgment, \$74,748.81 of the restored amount was paid to the fund from the bankruptcy estate of JBI. The balance of \$63,287.62 will be paid to the plan from an escrow account held by the court. On June 29, 1998, the Department had obtained a preliminary injunction signed by the presiding judge that required the defendants to transfer \$200,000 to an interest-bearing escrow account and appoint an independent plan administrator to determine the exact amounts – plus interest – which had been deducted from plan participants’ paychecks but had not been forwarded to their plan accounts.

The payback amount is the result of the plan administrator’s calculations, and the balance of the escrow account will be retained by the court pending the resolution of another lawsuit involving CCSI.

The Court order also directed the defendants to appoint an independent plan administrator and an independent trustee to the plan at their expense, and prohibited Thacher and CCSI from ever serving as a trustee, plan administrator or service provider to this or any other employee benefit plan.

**Herman v. Nationsbank of Georgia, N.A.**

*5-17-99  
Atlanta, Ga.*

The U.S. Department of Labor obtained a settlement agreement providing for Nationsbank of Georgia, N.A., a subsidiary of Nationsbank of Charlotte, N.C., to

distribute more than \$5 million in cash and stock to the accounts of certain participants covered by the Polaroid Employee Stock Ownership Plan (ESOP).

The ESOP was created in 1988 with \$15 million in cash and \$285 million in loan proceeds to purchase stock of Polaroid. Shortly after creation of the plan, Polaroid was the subject of an unsolicited takeover offer. The company subsequently purchased up to 16 million shares of its own stock at a premium price of \$50 per share at a time when the stock was trading at \$40 per share. Nationsbank’s predecessor, Citizens and Southern Trust Company (Georgia), was trustee of the Polaroid plan.

Under the agreement, the bank will distribute the cash and stock to participants covered by the plan as of April 1989. The settlement resolves a lawsuit filed in June 1992 against the bank and its investment advisor, Sovran Capital Management Corp. — the successor to Citizens and Southern Investment Advisors, Inc. — in connection with Polaroid stock owned by the ESOP.

The Department alleged in the lawsuit that Nationsbank and its investment advisor violated ERISA in connection with tendering the stock to Polaroid. The bank, the lawsuit alleged, did not adequately investigate the merits of tendering the stock owned by the ESOP to Polaroid and failed to monitor the performance of investment advisor CSIA. The lawsuit also alleged that the bank imprudently failed to tender certain stock to Polaroid.

CSIA allegedly failed to adequately analyze the merits of the Polaroid offer to buy back plan shares in order to properly advise the trustee on whether to tender the ESOP shares.

**Herman v. Kenneth Fullerton, et al.; Herman v. Stephen McLane, et al.; and Herman v. Stephen E. McLane**

*3-3-99  
Lexington, Mass.*

The trustee of two Lexington, Mass.-based employee benefit plans and two officers of the now-defunct Auto Engineering Limited Partnership of Lexington have agreed to restore a total of \$115,000 to the company’s employee stock ownership plan (ESOP) in order to conclude several lawsuits filed by the U.S. Department of Labor.

The Department filed a lawsuit in 1996 against Stephen McLane, the trustee, as well as Kenneth Fullerton, William Currie and Charles Henninger, who were officials of the former luxury car dealership. A departmental lawsuit had also named Auto Engineering Limited Partnership and Wainwright Bank and Trust Company, which served as a custodian for the company’s profit sharing plan, as defendants at the time. All were charged with violating or participating in violations of ERISA.

The lawsuits alleged, among other things, that the individual defendants were liable under ERISA for participating in and benefitting from illegal transactions in which McLane engaged that resulted in the misuse of plan money, including: depositing

assets of the profit sharing plan into a non-plan account for purposes of making undocumented and unsecured loans to Auto Engineering; using plan money as collateral for corporate loans and permitting the bank to use plan assets to offset the company's debt to the bank; improperly loaning plan money to a participant without obtaining proper documentation and subsequently using the loan proceeds to offset a personal debt owed by the participant to the company; failing to properly establish the ESOP, to remit employee contributions to the trust and to allocate shares of company stock purchased through the ESOP to the accounts of participants; not paying benefits owed to participants; and allowing the plan's administrator to not file annual financial and other reports required by ERISA.

On December 19, 1997, a partial consent judgment was entered that resolved the profit sharing plan component of this case, following the restoration by Wainwright Bank and two officials of Auto Engineering (Fullerton and Currie) of a total of \$390,000 to the participants of the profit sharing plan.

Two partial consent judgments on March 3, 1999, finally resolved the remaining matters in this case. In one, defendant Stephen McLane agreed to restore to the ESOP a total of \$30,000.

In the other partial consent judgment, defendants Kenneth Fullerton and William Currie agreed to restore to the ESOP a total of \$85,000. In both cases, the restored money was credited to the accounts of plan

participants other than Charles Henninger, William Currie, Kenneth Fullerton and Stephen McLane.

In addition, all of the defendants (except Wainwright Bank and Trust Company) are permanently barred from exercising any authority or control over any employee benefit plan covered by ERISA.

### **Herman v. Health Care Delivery**

*4-20-99*

*Van Nuys, Calif.*

The U.S. Department of Labor announced that a settlement agreement and consent decree was entered in Los Angeles, Calif., settling the Department's lawsuit against Health Care Delivery Services, Inc. and seven individual members of its board of directors who served as fiduciaries of the company's pension plan. A total of \$208,564 in losses resulted from violations of ERISA.

The action resolves allegations raised in the Department's August 1998 lawsuit that, due to financial difficulties that began in July 1995, Health Care Delivery Services President and Chairman Clement Sainten ordered the transfer of pension plan assets totaling \$157,200 into Health Care Delivery Services' accounts to pay business-related expenses, including the organization's payroll.

By engaging in these prohibited transactions, Sainten allegedly breached his fiduciary responsibilities under ERISA, including his duty to act solely in the interests of the retirement plan's participants and beneficiaries.

The settlement agreement and consent decree were entered into by the Department and Health Care Delivery Services, Inc.; Sainten; and by Roy Rodriguez, David T. Feinberg, M.D., Elliott H. Goldstein, Ph.D., Thomas D. Leary, Arthur W. Weiss and V. Charles Charuvastra, M.D., all of whom served as members of the board and as pension plan fiduciaries. They allegedly violated ERISA by failing to monitor Sainten's actions.

Health Care Delivery Services, a California nonprofit organization, operated Pride House, an adolescent residential group home in Van Nuys, and the West Los Angeles Treatment Center, an outpatient drug treatment facility.

Under the terms of the settlement agreement and consent decree, Sainten also was permanently barred from serving as a fiduciary or service provider to any employee benefit plan covered by ERISA; and defendant Roy Rodriguez, for a period of 3 years from the date of entry of the consent decree, is prohibited from participating in any discussions, deliberations, votes or other activities associated with the administration of any employee benefit plan covered by ERISA.

### **Herman v. Carolina Fitness Equipment, Inc.**

*4-7-99*

*Miami, Fla.*

A Federal District Court in Miami, Fla., appointed an independent trustee to manage and terminate the 401(k) plan of Hollywood, Fla.-based



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Carolina Fitness Equipment, Inc., under a settlement agreement obtained by the U. S. Department of Labor.

Under the settlement, the court appointed M. Larry Lefoldt of Lefoldt & Co., located in Jackson, Miss., as the independent manager of the plan with authority to terminate and distribute assets of the 401(k) plan. Harvey Miller and Edwin B. Beam Jr., also were removed from positions as trustees of the plan.

Carolina Fitness, a North Carolina corporation, was a retailer of exercise equipment. Carolina Fitness was sold in February 1994 to Bio-Dyne North Corporation of Atlanta, which relocated the company's operations to Florida. The company ceased operating Aug. 23, 1996.

The company sponsored the 401(k) plan for 58 participants. The plan, which had not been formally terminated, had assets of \$361,929 as of Sept. 30, 1998. According to the lawsuit, no employer or employee contributions had been made to the plan since July 1996.

A December 1998, lawsuit filed by the Department alleged Miller and Beam terminated employment with the company in July 1996 but did not resign formally as trustees of the plan or notify the plan's third-party administrator or group annuity contractor of their resignation. Carolina Fitness also allegedly failed to appoint replacement trustees for Miller and Beam or successor fiduciaries to manage and operate the plan. Participants allegedly were

unable to direct their investments among the different options available under the plan and the company and trustees failed to respond to participant inquiries.

### **Herman v. Cardillo**

5-5-99

*Howard Beach, N.Y.*

The U. S. Department of Labor obtained a consent order requiring the trustees of the pension, annuity, education and welfare funds of Local 363 of the International Brotherhood of Teamsters located in Howard Beach, N.Y., and TAP Electrical Contracting Service, Inc., a contributing employer to the plans, to pay more than \$1.4 million to the funds as restitution for improper reimbursements made to contributing employers for legal expenses and back wages.

Under the court order, trustees Anthony Cardillo and Eugene Iovine were removed from their positions with the plan, and, along with trustees Patrick Bellantoni and Joseph Canizio, were barred for 10 years from serving as fiduciaries of employee benefit plans governed by ERISA.

In earlier court actions, Thomas J. Carlough was removed from his position with the plan and Douglas Windle was permanently barred from serving as trustee to any plan covered by ERISA.

These court actions resolved a lawsuit filed by the Labor Department in November 1992 against five fund trustees for allegedly transferring

money to several contributing employers, including the TAP Electrical Contracting Services, Inc., to compensate them for legal expenses and back wages. Fund director Carlough, who allegedly received excessive reimbursement for conference and restaurant expenses, previously agreed to have a consent judgment entered against him.

### **Herman v. GMP Associates**

3-16-99

*Honolulu, Hawaii*

The U.S. Department of Labor announced that a settlement agreement and consent order have been entered in the U.S. District Court in Honolulu, which resolves the Department's lawsuit against GMP Associates, Inc., and its president Wagdy Guirguis for alleged violations of ERISA. The violations stemmed from the administration of the GMP Associates, Inc., 401(k) profit sharing plan. GMP Associates, Inc., and its wholly-owned subsidiaries GMP Holding, Inc., GMP Construction, Inc., and GMP Construction Guam, Inc., provided architectural and engineering services to their clients.

Under the settlement agreement and consent order, the defendants will pay the plan at least \$169,235 representing an estimate of the amount of employee contributions, employer matching contributions and participant loan repayments owed to the plan, plus interest, calculated through Feb. 1, 1999.

The action resulted from a December 1998 lawsuit filed by the Department that alleged GMP and Guirguis

breached the fiduciary responsibilities imposed upon them under ERISA by engaging in a pattern of withholding employee contributions from participants' paychecks and then failing to timely forward these contributions to the plan; and by failing to collect for the plan loan repayments that were withheld from employee paychecks and GMP's required 1995 matching pension plan contribution.

In addition to the restoration of any losses suffered by the plan, the defendants agreed to relinquish their positions as plan fiduciaries and to appoint an independent fiduciary with full discretionary authority to administer the plan's assets.

**Herman v. Bertin Steel Processing, Inc.**

3-4-99

*Cleveland, Ohio*

The U. S. Department of Labor obtained a consent judgment requiring Bertin Steel Processing, Inc. of Wickliffe, Ohio, and trustees of its welfare plan to pay \$556,842 as restitution for improper loans made by the plan and to appoint an independent entity to manage the plan.

The Court ordered Bertin Steel and trustees Bernard and Samuel D'Ambrosi to make the restitution to the plan as repayment for delinquent loans made by the plan to Benefit Management Consultants, Inc. (BMCI), its owner Nicholas Vukich and his wife Patricia Vukich.

Under the judgment, trustee Bernard D'Ambrosi, who also serves as president of Bertin Steel, is also

permanently barred from serving in a position of trust or providing services to any plan governed by ERISA.

Trustee Samuel D'Ambrosi, who also is the company's vice president, is permanently barred from servicing plans of Bertin Steel and barred for 10 years from dealing with any plan governed by ERISA.

The defendants also were ordered to guarantee repayment of \$103,626.34 to the plan, representing principal and interest on delinquent loans to Richmond Industries, Inc., as well as the repurchase of Richmond Industries stock owned by the plan for \$223,061.10 by March 31, 1999.

The Department sued the defendants in December for misusing plan assets to make improper loans and transfers to themselves and others, including BMCI and Richmond Industries.

The welfare plan provided health, death, dental and disability benefits to employees of Bertin Steel. At the end of 1996, the plan covered 103 participants and reported \$1,345,313 in assets.

**Herman v. Wellmark, Inc.**

3-2-99

*Des Moines, Iowa*

An Iowa-based insurance company, formerly Blue Cross/Blue Shield of Iowa and South Dakota, agreed to pay \$6.875 million to employers and their workers who were denied discounts they should have received for health services.

The U.S. Department of Labor reached a settlement with Wellmark,

Inc. of Des Moines, which also agreed to pay \$1.375 million in civil penalties. The Labor Department lawsuit, filed simultaneously with the consent order and settlement agreement, alleged that Wellmark, while operating as Blue Cross, improperly overcharged ERISA-covered, self-insured plans during the period from 1990 to 1994. The Department alleged that Blue Cross negotiated discounts with area hospitals but retained the difference between the reduced rates and the full cost charged by hospitals. Blue Cross improperly billed the plans for fees based on the full amount rates rather than the discounted amounts actually paid by Blue Cross.

Blue Cross/Blue Shield of Iowa and South Dakota administered more than 200 private employer self-insured health plans, which are governed by ERISA. In that capacity, the firm provided administrative services for a fee, including claims administration and negotiation of discounts, rebates and charges by area hospitals.

**Herman v. Anand**

2-1-99

*Landover, Md.*

An independent trustee was appointed to manage the 401(k) plan of Applied Research Corp. of Landover, Md., and two of the company's former owners were required to repay \$120,940 in restitution and civil penalties for failure to remit employee and employer contributions owed to the plan, in a consent judgment obtained by the U.S. Department of Labor.

Under the consent judgment, Alan N. Kanter & Associates was appointed to manage and operate the plan. Money returned to the company's 401(k) plan distributed to the accounts of all plan participants except defendant Surendra P. S. Anand, the president of Applied Research.

Anand and defendant Manjit K. Anand were also ordered to pay \$20,156 in civil penalties for violating the prohibited transaction provisions of ERISA. The plan received an additional \$505,000 from Space Applications Corp. as part of Space's 1997 purchase of Applied Research's assets after Applied Research filed for bankruptcy.

The defendants, who resigned as trustees of the 401(k) plan, also are permanently barred from serving in positions of trust to any plan governed by ERISA.

### **Herman v. C. W. Haynes and Co., Inc.**

6-22-99  
*Columbia, S.C.*

The U.S. Department of Labor negotiated a settlement of its lawsuit against Columbia, S.C.-based C.W. Haynes and Company, Inc. and its president. The defendants are required to pay the company's profit sharing plan \$1,093,172 for the plan's 40 percent interest in the Folly Fontaine Commerce Center partnership and for the fair market value of the note payable to the plan by the Fontaine partnership.

The Department's lawsuit alleged the defendants invested imprudently in

real estate and in a related partnership in excess of \$3.3 million. The \$1.4 million figure was the outstanding amount of a loan made by the plan to the Folly Fontaine partnership. According to the lawsuit, the firm invested most of the plan's assets in real estate and property-related partnerships between 1956 and 1990. In 1988, the plan made a loan for a land purchase to the Folly Fontaine partnership, which had 40 percent plan ownership and 60 percent ownership by third-party investors. The loan was subsequently extended until the outstanding loan balance reached \$1,419,825.

C. W. Haynes and Company and trustee W.E. Sellars allegedly failed to collect the outstanding balance of the loan. The company was charged with failing to monitor the activities of Sellars or to remedy the improper transactions with the plan.

The defendants also were required by the settlement to diversify the plan's assets as soon as possible; to refrain from investing in real estate or related ventures unless such investments were deemed prudent and advantageous to the plan; and to amend, effective June 30, 1999, its distribution provisions to allow participants to request and receive distributions at and after termination of employment.

C.W. Haynes was founded in 1934 to conduct investment business with a fire and marine insurance department. It subsequently converted its business to land development and real estate sales. There were 50 participants and \$4.78 million in assets in the plan as of June 30, 1996.

## **Criminal Cases**

### **U.S. v. Pereira**

7-21-99; 1-7-00; 3-30-00  
*Boston, Mass.*

Paul Pereira of Fall River, Mass., was sentenced March 30, 2000, to 24 months imprisonment, 3 years supervised release, and ordered to make restitution of \$880,746 after being charged on July 21, 1999, with health care fraud, embezzlement and making false statements relating to a Federal health program. The defendant allegedly established a phony insurance plan called Ameri-Med and collected premiums through his company. Pereira was not a licensed insurance carrier, and Ameri-Med was not a licensed insurance product, yet Pereira sold the Ameri-Med product largely to small businesses and self-employed individuals, mostly throughout Massachusetts, New Hampshire and Rhode Island. In the scheme, he fraudulently represented 60 Ameri-Med subscribers as his own employees in an attempt to get legitimate health insurance coverage through the Blues of Rhode Island.

It was alleged that between August 1996 and May 1998, he collected more than \$1.6 million in premiums but only paid \$360,000 in claims and diverted more than \$900,000 in premiums to his personal use or to support businesses that he owned.

Pereira plead guilty on Jan. 7, 2000, to health care fraud and to embezzlement from a health care benefit program. This case was investigated by PWBA with assistance from the FBI.

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**U.S. v. Selman**

7-21-99; 12-17-99; 4-3-00  
Charlottesville, Va.

Joe Bob Selman of Charlottesville, Va., was sentenced on April 3, 2000, to 41 months imprisonment, 3 years supervised release and ordered to make more than \$2.3 million in restitution to the 10 victim plans and to Metlife Insurance for his part in a scheme that allegedly netted more than \$2.3 million in embezzled funds. His wife Jeannie Selman pleaded guilty and admitted that she also was responsible for \$1,252,597 in losses to companies that were victims of her fraudulent acts. She was incarcerated in January 1999.

The Selmans were officers of the defunct Duke Benefit Services, Inc., a company designed to administer health care benefit plans for a number of different client companies, involving more than 2,400 participants.

The investigation was conducted by PWBA with assistance from the United States Postal Inspection Service, the FBI and the Virginia State Police.

**U.S. v. Huppe**

7-30-99; 1-25-00  
Buffalo, N.Y.

Allen Huppe, a Canadian national, was sentenced on Jan. 25, 2000, to a 3-year prison term, 3 years supervised release and ordered to make restitution of \$750,000 after being found guilty on July 30, 1999, of embezzling \$750,000 from the Highland Nursing Home Defined Contribution Pension Plan. Huppe served as

investment manager of the nursing home's pension plan, located in Massena, N.Y.

Through a related civil investigation, PWBA was able to restore \$702,740 to the plan. The criminal action is the result of a joint investigation conducted by PWBA, the FBI and the Labor Department's Office of the Inspector General.

**U.S. v. Goto, et al.**

9-29-99; 11-8-99; 11-29-99  
Honolulu, Hawaii

The owners of a Hawaiian tour company were indicted on Sept. 29, 1999, for conspiring to embezzle \$379,569 from their company's 401(k) plan. Tetsuya Goto, Issac Kuwamura, and Randall Yamane, all of Honolulu, were charged with the fraudulent action. The defendants were principals of U-Me-Enterprises, a Hawaii corporation operating recreational tours in Hawaii. The conspiracy count of the indictment listed 22 overt acts alleging primarily that the defendants failed to deposit funds withheld from employee paychecks by failing to segregate plan assets from the company's assets, by falsely reporting the amount of employer contributions made to the plan, and by failing to disclose that unauthorized withdrawals had been made from the plan. The plan covered 105 employees and had assets of more than \$400,000. Yamane pleaded guilty to conspiracy on Nov. 8, 1999. Kuwarura pleaded guilty to conspiracy on Nov. 29, 1999. At the time of the indictment, sentencing remained pending as of December 1999 for the three

defendants. The investigation in this case was conducted by PWBA.

**U.S. v. McCarthy**

10-13-99  
White Plains, N.Y.

A guilty verdict was returned on Oct. 13, 1999, after a 10-day trial that resulted in the conviction of Robert McCarthy on charges of embezzling \$2.1 million from the Lloyd's Shopping Center, Inc. Pension and 401(k) Plans. McCarthy was the majority owner of Lloyds. The plans covered 288 participants.

This case was jointly investigated by PWBA, the Inspector General's Division of Labor Racketeering, and the Internal Revenue Service's Criminal Investigative Division. Sentencing remains pending.

**U. S. v. Walker**

2-9-99; 9-3-99, 2-28-00  
Portland, Maine

The former Chief Financial Officer for Beacon Cadillac Oldsmobile and Jeep, in Bangor, Maine, Christopher Walker was charged on Feb. 9, 1999, with embezzling \$925,000 from the company's profit sharing plan. Walker allegedly told co-workers he was "remodeling" when he removed furniture and computer equipment for his office. Later, from an untraceable cellular phone, he called the dealership and said he quit. He pleaded guilty to the embezzlement on Sept. 3, 1999. He was sentenced Feb. 28, 2000, to 46 months imprisonment, to be followed by a period of probation and ordered to make restitution of \$505,082. The investigation was conducted by PWBA.



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**U.S. v. Krimsky**

2-11-99; 6-10-99

Cleveland, Ohio

On Feb. 11, 1999, a federal jury in Cleveland, Ohio, convicted Leonard Krimsky, 57, of Englewood, N. J., the sole trustee of his company's defined benefit plan, the IAM Kent Worldwide Machine Plant Retirement Income Plan, of embezzling \$2,195,000 of plan funds through wire transfers from the plan to his company, Kent Worldwide Machine Works. It is located in Stow, Ohio.

He was also convicted of making false statements on documents required by ERISA. The plan covered 240 participants and had assets of \$3,410,355. Kent was purchased in 1990 by Worldwide Process Technologies, of Allendale, N. J., a company solely owned and controlled by Krimsky. In 1993, Krimsky acquired 100 percent of the stock of the financially troubled Kent from its parent corporation. Krimsky named himself as the plan's sole trustee and began to make a series of "loans" from the plan to Kent. When he finished, the plan had lost almost 90 percent of its assets.

He was sentenced June 10, 1999, to 5 years of imprisonment and ordered to make restitution of \$2.2 million. A parallel civil investigation has resulted in the recovery of \$1 million, and the Pension Benefit Guaranty Corporation has taken over the pension plan to assist the workers in getting their benefits.

The investigations in these parallel criminal and civil actions were

conducted by PWBA. Criminal prosecution was brought by the United States attorney for the Northern District of Ohio, and the civil litigation was brought by PWBA.

**U.S. v. Carrico**

3-12-99; 5-18-99, 9-8-99

San Francisco, Calif.

Dan Carrico of Benicia, Calif., the owner of General Industrial Insulation, Inc., was sentenced Sept. 8, 1999, to 60 months probation, fined \$10,000 and ordered to make restitution of \$116,351. He was charged on March 12, 1999, with embezzling \$75,000 from the company-sponsored profit sharing plan. The plan had assets of \$116,350 and covered 16 participants. He pleaded guilty as charged on May 18, 1999. This case was investigated by PWBA.

**U.S. v. Asmus**

3-17-99, 6-9-99

West Haven, Conn.

George Asmus, III, was sentenced on June 9, 1999, to 12 months probation and fined \$5,000 after pleading guilty on March 17 to making false statements on records required under ERISA. Asmus was the owner and president of Asmus Electric, Inc., West Haven, Conn., and the sponsor of the Asmus Profit Sharing and Trust Plan. Between October 1992 and September 1995, he was required to pay into the plan \$286,735 of prevailing wage fringe benefits for the employees of the plan. During that period, he paid a total of \$170,000. At the end of the 1995 plan year, he owed a total of \$116,735 to the plan. He falsified the annual report, Form

5500, saying there were no employer contributions owed to the plan that were overdue, but, at that time, \$20,936, was owed to the plan.

In addition, at the time of filing the 1995 annual report, \$95,759 in contributions required for that year had not been made. As part of the plea agreement, Asmus agreed to make full restitution to the plan, and \$116,735 was paid to the plan. The investigation was conducted by PWBA.

**U.S. v. Kossan**

3-22-99, 6-11-99, 7-2-99

Vienna, Va.

**U.S. v. Parris**

10-15-99, 12-21-99, 3-3-00

Alexandria, Va.

Robert Kossan and Robert Parris, former trustees of the 401(k) plan for Matrix Corporation in Vienna, Va., were sentenced on July 2, 1999, and March 3, 2000, respectively, for embezzling \$653,185 from the company's plan. Part of the theft involved employee contributions deducted from payroll but never forwarded to the trust. The plan covered 51 employees. Kossan pleaded guilty to a criminal information that charged him with theft on March 22, 1999. He was sentenced to serve 18 months in jail followed by 2 years supervised release.

Parris was indicted on Oct. 15, 1999, and convicted on Dec. 21, 1999, on conspiracy to embezzle plan assets, to engage in money laundering and falsification of records required by ERISA. He was sentenced to 21 months imprisonment and 1 year of

supervised release. The criminal investigation and a parallel civil investigation were conducted by PWBA. Restitution of \$400,000 was made to the plan.

**U.S. v. Baker**

*4-19-99, 7-29-99  
Geneva, N.Y.*

Joan Baker, a claims processor for the Carpenters Finger Lake District Health and Welfare Plan in Geneva, N. Y., was sentenced on July 29, 1999, to 3 years probation and ordered to perform 150 hours of community service, after pleading guilty on April 19, 1999, to an ERISA false record charge. Baker submitted false claims resulting in excessive reimbursement of about \$27,000. Restitution of \$24,496 was made to the plan. The plan had assets of \$1.4 million and covered 501 participants. The investigation in this case was conducted by PWBA and the Inspector General's Division of Labor Racketeering.

**U.S. v. Bilyeu**

*4-27-99  
Odessa, Tex.*

Denver Bilyeu, who was employed as Chief Financial Officer for the Holloman Construction Company of Odessa, Tex., was sentenced April 27, 1999, to 18 months imprisonment and 5 years probation. He made restitution voluntarily prior to his guilty plea last October. He had been indicted on pension embezzlement and bank fraud charges.

The scheme was revealed when the plans's bank trustee received a complaint that the bank had sent an IRS Form 1099 to Bilyeu indicating he had received a distribution. The bank was not aware of any such action and notified PWBA, who discovered that Bilyeu, by writing checks against the plan account and negotiating the checks, converted more than \$97,000 of plan funds to his use. PWBA, working together with the FBI, discovered that Bilyeu embezzled upwards of an additional million dollars from the company by using his position to siphon off corporate funds through a web of bank accounts under his control.

The plan, known as the Jack Whisler Company Pension Plan, covered 36 participants and had assets of \$171,000. Holloman had once owned the Jack Whisler Company but sold it in 1992; however, Bilyeu improperly continued to exercise control over the pension plan. The joint investigation was conducted by PWBA and the FBI.

**U.S. v. Kaplan, et al.**

*5-7-99, 1-28-00  
Uniondale, N.Y.*

Harold Kaplan, owner of Halpack Plastics Inc. on Long Island, N.Y., was sentenced on Jan. 28, 2000, to 6 months home detention, 4 years probation and 100 hours of community service. He pleaded guilty on May 7, 1999, to one count of embezzling \$170,000 from the company's defined benefit plan and \$48,000 from its 401(k) plan. He was also

ordered to make restitution of \$7,299.02 to the 401(k) plan and to pay \$25,000 to the U.S. Attorney's Office. His wife, Sandra Kaplan, was sentenced on Feb. 4, 2000, to 6 months home detention, following her husband's term of home detention and 2 years probation. She was also ordered to make restitution of \$7,228.02 to the 401(k) plan and to pay \$12,500 to the U.S. Attorney's Office.

Sandra Kaplan pleaded guilty to one count of failing to keep, disclose and maintain plan records required under ERISA's reporting and disclosure provisions. The case was based on a tip from a participant who alleged that 401(k) employee contributions were not being forwarded to the trust. The case was investigated by PWBA.

**U.S. v. Herman**

*5-7-99, 8-3-99  
Houston, Tex.*

Dr. James Herman, M.D., of Houston, was charged in a two-count criminal information with falsely representing plan assets on the plan annual report and with falsifying his tax returns, after pleading guilty on Aug. 3, 1999. The fraud involved a profit sharing plan that he sponsored through his practice, which covered 23 participants. He was immediately sentenced following the plea to 5 months incarceration, 5 months home detention, 2 years supervised release scheduled to run concurrent with home detention, and ordered to make \$371,538 restitution to plan participants. He made an immediate installment payment of \$50,000.

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The investigation was jointly conducted by PWBA and the Internal Revenue Service's Criminal Division of Investigation.

**U.S. v. Taylor, et al.**

5-25-99, 7-7-99, 9-17-99

*Dallas, Tex.*

James Taylor, a former Dallas insurance entrepreneur, was sentenced Sept. 17, 1999, to 15 months imprisonment as a result of failing to appear for a prior sentencing. The sentence was in addition to a 10-year sentence imposed in May 1998. He was previously convicted on charges of mail and wire fraud, and money laundering related to the theft of millions of dollars from Kentucky coal mine companies and workers' compensation programs. The funds were supposed to be used for worker compensation benefits, which included medical insurance. He was arrested in Houston by U.S. marshals and charged on May 25, 1999, with failing to appear for sentencing. His wife, Vena Vines, was charged with aiding a fugitive. She also pleaded guilty and was sentenced to 36 months probation and fined \$3,200.

They had purchased a car under a bogus name and resided in a home that was paid in full under the name of an alias. This case was jointly investigated by PWBA and the FBI.

**United States v. Stetler**

6-9-99, 12-10-99

*Chicago, Ill.*

Daniel Stetler was sentenced Dec. 10, 1999, to 24-months imprisonment, 5 years probation and ordered to make

restitution to the bank, following his release from incarceration, at \$200 per month. The sentence stemmed from a charge on June 9, 1999, that Stetler made false statements to a bank in order to get a larger line of credit. Stetler was the former president of the bankrupt Louis Allis Co., in Milwaukee. Allegedly, he directed employees to manipulate the firm's production records, which resulted in the company's accounts receivable being overstated by \$4.7 million. The loss attributed to his actions is between \$1.5 and \$2.3 million. The Louis Allis Co., which was a manufacturer of electric generators, closed its doors in October 1992 and filed for liquidation under Chapter 7 of the U.S. Bankruptcy Code. More than 230 workers lost their jobs.

In a civil action, the Department of Labor alleged that nearly \$203,000 in contributions to the employee retirement plans, including \$176,000 that was deducted from payroll checks, never made it to the plans' investment managers. The judge also ordered Stetler to cooperate with the Department of Labor in their civil action. The investigation into the criminal allegations was conducted by PWBA and the FBI.

**U.S. v. Woods**

6-28-99, 9-17-99

*Dallas, Tex.*

Pam Woods, a legal compliance claims auditor, pleaded guilty on June 28, 1999, to stealing \$95,000 from the South Central United Food and Commercial Workers Union Health and Welfare Trust, and was sentenced

Sept. 17, 1999, to serve 15 months in a federal penitentiary. The union-sponsored health plan provided medical coverage for more than 25,000 union members who worked primarily in grocery stores in Texas, Arkansas, Louisiana, Missouri and Oklahoma. The investigation was handled by PWBA, the Inspector General's Division of Labor Racketeering and the FBI.

**U.S. v. Moore**

6-2-99

*Hartford, Conn.*

On June 2, 1999, the Second Circuit Court of Appeals added an additional 14 months to the prison sentence of Gary Moore, who had been sentenced last October 1998 to 51 months imprisonment for embezzling more than \$1.5 million from the Emergi-Lite 401(k) plan.

The sentencing judge ruled that the "abuse in this case involved a continuous course of conduct persisting over a period of 10 years or more" and that the conduct could have continued indefinitely if the illegal acts hadn't been discovered. In imposing the sentence, he also maintained the defendant should have foreseen that his embezzlement would cause the company's employees "significant financial hardship."

This case was investigated by PWBA with assistance from the FBI and the Inspector General's Division of Labor Racketeering. In a parallel civil case, the Boston office was able to recover \$2,031,000 for the plan.

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**U.S. v. Sander**

6-29-99

*Kansas City, Kan.*

Barry Sander, the former owner of an Overland Park, Kan., company pleaded guilty to a one-count information charging him with embezzling assets from his company's 401(k) plan in 1999. His sentence was postponed when it was discovered he was involved in an earlier investment

scam involving a golf course development, where he pleaded guilty to wire fraud.

Prior to sentencing, the government and defense had agreed to an 18-month sentence total for both crimes to be served concurrently.

The sentencing judge ruled that such a sentence would send the wrong message, and sentenced Sander,

instead, to 12 months for the embezzlement plea and 12 months for the wire fraud plea, with the sentences to be served consecutively. The longer sentence was based on the fact that employees' retirement security was significantly compromised, according to the judge. This investigation was conducted by PWBA and the FBI.



# Participant Assistance/ Public Education and Outreach

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## *25<sup>th</sup> Anniversary Milestones in Participant Assistance/ Public Education and Outreach*

- PWBA created the Division of Technical Assistance and Inquiries in the 1980s to answer consumers' questions about pension, health and other workplace-based benefits. The Office was initially staffed with 10 analysts.
- From 1995-1999, customer service staff responded to approximately 900,000 inquiries and recovered more than \$147 million in pension benefits (see Figures 2 and 3).
- Increased consumer inquiries required increased staff. From 1995-1999, the agency's customer service staff expanded from 12 to 84 benefits advisors located in the national and regional offices throughout the country.
- PWBA launched in 1995 the Retirement Savings Education Campaign to educate working Americans about the importance of saving for retirement.
- A second education effort, the Health Benefits Education Campaign, was launched in 1998 to inform workers of their health benefits rights.
- By 1999, PWBA's roster of publications had grown to more than 45, with a distribution of 800,000 a year. The Agency promoted its issuances through a toll-free 1-800 number, print and broadcast public service announcements and through its Web site.

## **1999 Accomplishments**

### **Education and Outreach**

PWBA used the occasion of ERISA's 25<sup>th</sup> anniversary to renew its commitment of service to the public. The Agency initiated a year-long education and outreach campaign to help workers and their families understand their rights under the Federal pension and health laws and to obtain benefits to which they are rightfully entitled. Its goal was to increase the public's awareness of PWBA as their first resource for information on pension and health benefits plans and their rights.

To meet this objective, the Agency:

- Published a kick-off interview by Secretary Alexis Herman with a syndicated columnist from the *Los Angeles Times* that reached 22 major newspapers nationwide, in which Secretary Herman answered the most commonly asked questions about pensions and health benefits;
- Held regional seminars in Atlanta, Boston, San Francisco and Philadelphia to educate practitioners and consumers about the Agency's services;
- Published a news column, *How to Learn More About Your Benefits*, authored by Secretary Herman and circulated to more than 1 million readers of medium and small newspapers nationwide;

- Connected the general public with specific regional offices, where they could obtain assistance or answers to inquiries; produced a series of public service announcements; and
- Wrote news releases on enforcement actions for regional media organizations' use.

In addition to specialized educational and outreach campaigns, PWBA maintained its ongoing educational, outreach and customer assistance initiatives developing and distributing new publications; continuing to promote the goals of the Retirement Savings Education and Health Benefits Education Campaigns; and continuing to assist plan participants by answering a record number of consumer inquiries and obtaining benefit recoveries.

The Agency produced several new publications in 1999, and continued to maintain and update an array of booklets and pamphlets that educated consumers, pension plan participants and their beneficiaries, businesses, service providers and legal professionals. Last year's popular consumer publication, *For Employees ... A Look at 401(k) Plan Fees*, was followed by a similar publication for employers.

*For Employers ... A Look at 401(k) Plan Fees* was released by Secretary Herman in conjunction with a new *401(k) Plan Fee Disclosure Form*. Employers may use the 401(k) fee disclosure form to obtain information from prospective plan service providers to help them make a selection. The new booklet lists 10 basic

questions employers should answer in considering fees and expenses for services in both selecting and monitoring plan service providers.

As part of PWBA's outreach to minority audiences, the Agency produced three additional publications in Spanish. The three most recent publications educate the nation's Spanish-speaking population about health benefits. They are:

- *Las 10 mejores maneras de hacer que sus beneficios médicos funcionen para usted (Top 10 Ways to Make Your Health Benefits Work for You);*
- *Los cambios de vida requieren tomar decisiones médicas ... Conozca sus opciones de*

*beneficios (Life Changes Require Health Choices ... Know Your Benefit Options); and*

- *Los cambios de condición laboral requieren hacer elecciones médicas ... Proteja sus derechos (Work Changes Require Health Choices ... Protect Your Rights)*

In addition, the Agency issued several other revisions to publications in the health area that included an interim revision to *Health Benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA)*; and an expansion of *Questions and Answers: Recent Changes in Health Care Law*, to provide an overview of the benefits and requirements under the Health Insurance Portability and Accountability Act, the Mental

### Total Inquiries Handled

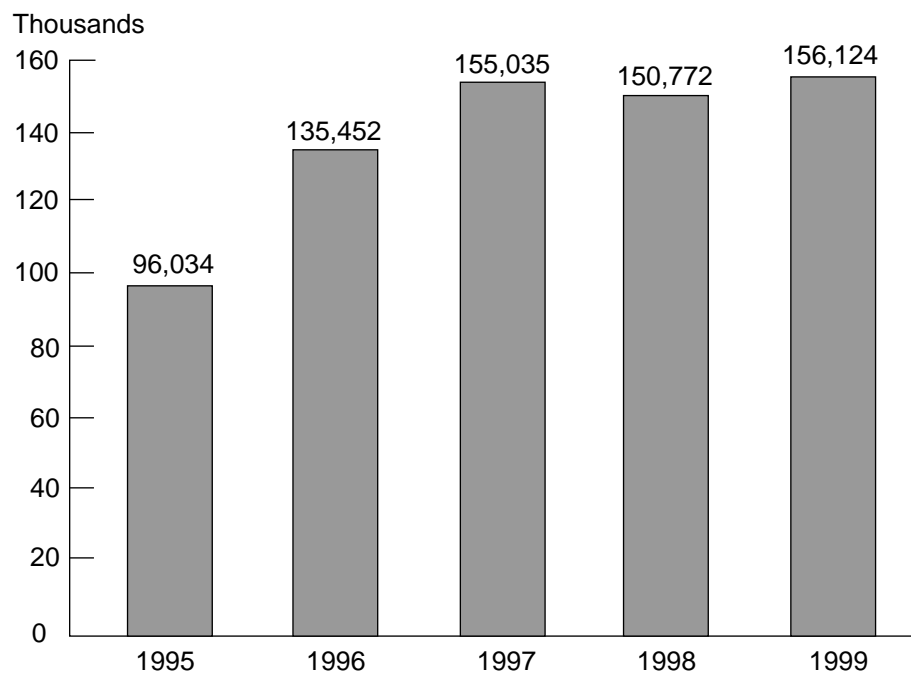


Figure 2.

Health Parity Act, the Newborns' and Mothers' Health Protection Act and the Women's Health and Cancer Rights Act.

Other publication reprints and revisions included: *Women and Pensions ... What Women Need to Know and Do*; *Keeping an Eye on the Future* (the Agency's recruitment brochure); *Customer Service Standards: Our Commitment to Quality*; *In Brief: New Form 5500*; and *In Brief: Can the Retiree Health Benefits Provided by Your Employer Be Cut?*. In addition, the Agency continued to produce its in-house, bimonthly newsletter *Panorama*.

Through an existing partnership with the General Services Administration's Consumer Information Center and the Internal Revenue Service (IRS), a notice about the Agency's most widely read publication, *Top 10 Ways to Beat the Clock and Prepare for Retirement*, was included with 2 million randomly selected tax return checks mailed by the IRS. The brochure was one of several publications mailed in response to taxpayer requests, and the marketing strategy allowed the Agency to reach thousands of consumers at a critical moment — with their tax refund check in hand — urging them to “save for retirement”.

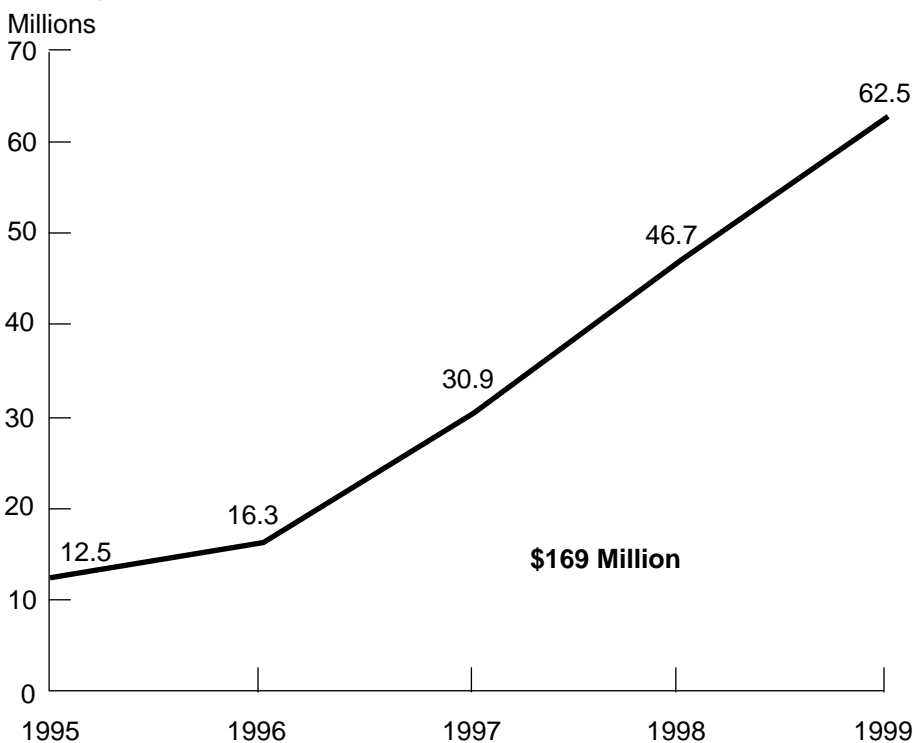
PWBA continued to produce, in an easy-to-read format, its list of publications and field office contacts. This format was used in developing marketing materials for a popular publication, *Pension and Health Care Coverage ... Questions and Answers for Dislocated Workers*, and in presenting a summary of the benefits of legislation under *The Mental Health Parity Act*. Another marketing tool, *Workers' Pension and Health Benefit Plans ... Where to Go for Information*, was produced to promote the services of the Agency's field offices.

**Health Benefits Education.** By the end of 1999, staff members of the Health Benefits Education Campaign had met with its 65 partner organizations in an effort to educate consumers about their rights and about how to obtain quality health care benefits under their employer-provided health plans. They also informed employers — particularly small employers — about the value of providing quality health benefits to employees.

In the Campaign's first year, the partners worked together to create the mission statement and set general Campaign goals. Three working committees were established to begin research, design and development of future Campaign products.

The Campaign conducted focus groups in different areas of the country throughout the year to determine consumers' knowledge of their current health benefits rights and responsibilities. This information will be used to develop additional educational materials and messages as the Campaign progresses.

### Participant Assistance – Individual Benefit Recoveries



Note: These recoveries were obtained by PWBA benefit advisors in response to participants' complaints. These recoveries are in addition to those recoveries by investigators through the ongoing Enforcement program.

Figure 3.

Staff members from PWBA's national and regional offices gave presentations at seminars in several states, working with the Georgetown University Institute for Health Care Research and Policy, as part of its Consumer Health Care Education project. These seminars provided information about federal laws that affect employer-provided health benefits.

**Retirement Savings Education.** In 1999, PWBA continued to build on the outreach initiatives developed since its signature savings campaign was launched in 1995. Some of the major highlights of the Campaign included the following outreach activities:

- Produced a news segment on women and retirement savings for CNBC's *Today's Health*, which aired in syndication for a year and reached 55 million households;
- Produced a news segment for *Parenting in the 90s and Beyond* to encourage parents to teach their kids to save, which aired in syndication for a year;
- Developed a new series of print public service ads targeting women and minorities that reached millions of readers;
- Worked in partnership with the U.S. Securities and Exchange Commission to exhibit retirement savings materials at SEC Town Hall meetings throughout the country;

- Collaborated with the Certified Financial Planner Board of Standards to develop *Savings Fitness: A Guide to Your Money and Your Financial Future*; and
- Distributed more than 600,000 copies of the Labor Department's retirement savings brochures and booklets through the Consumer Information Center, the Agency's 1-800 number and through other sources.

### Participant Assistance

Education and outreach activities continued to increase the volume of consumer inquiries. In 1999, PWBA's benefits advisors handled more than 156,000 inquiries, with benefit recoveries of more than \$62.5 million. More than 91,000 inquiries were made on behalf of participants about health and welfare plans, more than 70,000 inquiries were made about pension plans, and more than 11,000 were made concerning other plans (see Figures no. 4 and 5).

### Summary of Inquiries Calendar Year 1999

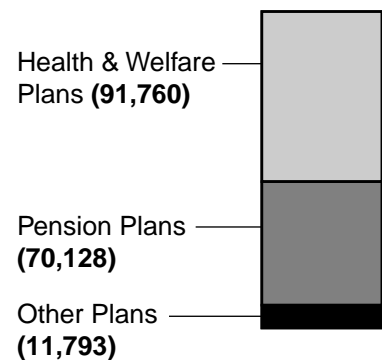
**Total = 156,124**

Telephone	132,877
Written	22,201
Visitors	796
Electronic Mail	250

**Benefit Recoveries  
\$62.5 million**

Figure 4.

### Summary of Inquiries Calendar Year 1999



Some inquiries cover more than one subject.

Figure 5.

# Exemptions

## *25<sup>th</sup> Anniversary Milestones in Exemptions*

- The first Prohibited Transaction Class Exemption (PTE 75-1), covering certain transactions in the securities industry, was issued in 1975 by PWBA and the Internal Revenue Service (IRS).
- A Prohibited Transaction Exemption (PTE 84-14) was issued in March 1984 for transactions that involved plan assets managed by an independent qualified professional assets manager or QPAM. This class exemption allowed plans managed by QPAMs to engage in a number of transactions with related parties without first having to seek an individual prohibited transaction exemption.
- Prohibited Transaction Exemption (PTE 96-62) was issued in July 1996. Under this class exemption, PWBA offered a faster exemption process where the transactions involved are substantially similar to at least two previously granted individual exemptions (EXPRO).

## 1999 Accomplishments

In 1999, PWBA received 187 exemption applications, granted 109, 86 were denied or withdrawn and 183 were pending at year's end. The following listing summarizes the exemptions granted, amended and proposed during the year.

### Class Exemptions Overview

- Received three applications for class exemptions in 1999. PWBA granted two and had 11 under consideration at the end of the year.

### Amendments to Existing Class Exemptions

- Granted two significant amendments to existing class exemptions, PTEs 93-33 and 97-11. These class exemptions permit individu-

als with IRAs or Keogh plans to receive certain services, at reduced or no cost, from a bank or broker-dealer. The account balance in the IRA or Keogh plan is taken into account to determine eligibility.

- Proposed amendments to PTE 80-26, a class exemption that permits related parties to make interest-free loans to plans. The temporary amendment would expand the current exemption to cover circumstances in which a loan would be made to a plan to address Y2K liquidity problems.

### Proposed Class Exemptions

- Proposed a class exemption to permit cross-trades of securities by index and model-driven funds, as well as between such funds and certain large accounts, in connection with a portfolio restructuring program for such accounts.

## EXPRO Exemptions Overview

- Received 51 applications submitted pursuant to EXPRO. PWBA granted 32 exemptions and had 10 under consideration at the end of the year.

## EXPRO Grants for Securities Lending

- **Morgan Stanley & Company Inc., (MS&Co.)** received authorization for employee benefit plans to lend securities to Morgan Stanley & Co. International Ltd. or any other MS&Co. affiliate based in the United Kingdom, Japan or Switzerland. Morgan Stanley Trust Company (MSTC), an affiliate of MS&Co., acts as securities lending agent (or sub-agent) for the plans. The exemption permits MSTC or other affiliates of MS&Co. to receive compensation as a lending agent (PTE 99-01E; January 4, 1999).
- **Merrill Lynch Pierce Fenner & Smith, Inc. (Merrill Lynch)** received authorization to permit: 1) purchases or sales of securities (including options thereon) between certain affiliates of Merrill Lynch, which are foreign broker-dealers or banks (Foreign Affiliates), and employee benefit plans for which the Foreign Affiliates are parties in interest; 2) extensions of credit to the plans by the Foreign Affiliates to permit short sales or the settlement of securities transactions (regardless of whether such transactions are affected on an agency or a principal basis), or in



connection with the writing of options contracts; and 3) the lending of securities to the Foreign Affiliates by the plans (PTE 99-21E; Sept. 8, 1999).

### ***EXPRO Grants for Asset-Backed Securities***

- **Bank of America, N.A., and Bank One Corporation** received authorizations to allow employee benefit plans to acquire and hold asset-backed securities representing equity interests in trusts holding credit card receivables (PTE 99-11E; March 26, 1999).
- **Ironwood Capital Ltd.** received authorization to allow plans to acquire and hold asset-backed securities issued by trusts holding secured receivables or obligations that have prefunding arrangements (PTE 99-31E; Dec. 20, 1999).

### **Individual Exemptions Overview**

- Received 133 applications for individual exemptions. PWBA granted 75 exemptions and had 162 under consideration at the end of the year.

### **Individual Exemptions for Securities Lending**

- **Citibank, N.A. (Citibank)**, including Salomon Smith Barney (SSB), was granted an exemption to permit the lending of securities by employee benefit plans to affiliated U.S. registered broker-dealers of SSB or Citibank, and

affiliates of SSB or Citibank that are based in the United Kingdom, Japan, Germany, Canada and Australia. The exemption granted to Citibank, or any U.S. affiliate of Citibank, is applicable in situations where these institutions act as securities lending agents (or subagents) to plans, which includes those plans for which Citibank also acts as directed trustee or custodian of the securities being lent (PTE 99-21; May 27, 1999).

- **The Chase Manhattan Bank** received an exemption to permit the lending of securities to affiliates of Chase Manhattan Corporation (CMC) by employee benefit plans for which CMC acts as directed trustee or custodian and for which CMC, through its Global Securities Lending division or a U.S. affiliate of CMC, acts as securities lending agent (or subagent) and thereby receives compensation as the lending agent (PTE 99-34; Aug. 25, 1999).
- **Bankers Trust Company (BTC)** also received an exemption to permit the lending of securities by employee benefit plans to affiliates of BTC, a wholly owned subsidiary of Deutsche Bank AG (DB), that are either 1) banks supervised by the U.S. or by a state within the U.S., or broker-dealers registered under the Securities Exchange Act of 1934; or 2) foreign affiliates of BTC and DB that are broker-dealers or banks in certain specified jurisdictions. Under the exemption, BTC, DB or their affiliates may act as a securities

lending agent (or subagent) for the plans involved and may receive compensation as the lending agent (PTE 99-50; Jan. 5, 2000).

- **Donaldson, Lufkin & Jenrette Securities Corporation (DLJ)** was granted an exemption to permit: 1) purchases and sales of securities, and options between certain affiliates of DLJ, which are foreign broker-dealers (Foreign Affiliates), and employee benefit plans with respect to which the Foreign Affiliates are parties in interest; 2) any extension of credit to the plans by the Foreign Affiliates to permit the settlement of securities transactions (regardless of whether such transactions are affected on an agency or principal basis), or in connection with the writing of options contracts; and 3) the lending of securities to the Foreign Affiliates by the plans (PTE 99-45; Nov. 9, 1999).

### **Individual Exemptions for Demutualizations**

- **MONY Life Insurance Company (MONY)** received an exemption to permit the receipt of common stock of the MONY Group, Inc., a holding company and the parent corporation of MONY, or the receipt of cash or policy credits, by any eligible policyholder of MONY that is an employee benefit plan other than a plan maintained by MONY or an affiliate for its own employees, in exchange for such policyholder's membership interest in MONY, in accordance with the terms of a plan of reorganization adopted by MONY and

implemented according to New York state insurance law (PTE 99-14; April 5, 1999).

- **Manufacturers Life Insurance Company (Manulife)** was granted an exemption to permit the receipt of common stock of Manulife Financial Corporation, the holding company for Manulife, or the receipt of cash or policy credits, by any eligible policyholder that is a plan other than a policyholder that is a plan maintained by Manulife or an affiliate for its own employees, in exchange for such policyholder's membership interest in Manulife, in accordance with the terms of a plan of reorganization adopted by Manulife and implemented under the insurance laws of Canada and the State of Michigan (PTE 99-41; Oct. 4, 1999).

### Individual Exemptions for Asset-backed Securities

- **Mellon Financial Markets, Inc.** received an exemption for transactions relating to the acquisition and holding by plans of asset-backed securities representing equity interests in trusts that hold specified types of secured receivables or obligations. The exemption is limited to trusts that have a fixed pool of assets, but permits a prefunding arrangement for additional receivables acquired during a prefunding period of no more than 90 days (PTE 99-11; March 8, 1999).
- **Fleet Bank, R.I.**, was granted an exemption to permit employee

benefit plans to acquire and hold asset-backed securities representing equity interests in trusts holding credit card receivables. Such assets may be added to and/or removed from the trust during a so-called "revolving period". The exemption contains special conditions designed to safeguard the investment interests of plans against additional risks from a decline in the quality of the assets. Among other things, the trusts are allowed to enter into certain types of notional principal contracts (i.e., swap transactions) with counterparties that are highly rated as a means for facilitating timely payments of interest and principal that are due to the holders of these securities (PTE 99-39; Oct. 4, 1999).

### Individual Exemption for QPAM-Related Relief

- **Bankers Trust Company (BTC)** was granted a significant individual exemption so that BTC and its affiliates, including Deutsche Bank AG, would not be precluded from functioning as a "qualified professional asset manager" (QPAM), pursuant to Prohibited Transaction Exemption 84-14. PTE 84-14 is a class exemption that permits certain transactions between plans and parties in interest, where the assets of the plan involved are managed by a QPAM. The individual exemption for BTC is effective for the period beginning on the date of sentencing for the charges to which BTC pled guilty on March 11, 1999, until the date that is exactly 5

years from the date of publication of the exemption in the *Federal Register* (PTE 99-29; July 27, 1999).

### Individual Exemption for "Synthetic" GICs

- **Pacific Life Corporation** was granted an exemption to permit the sale of certain "synthetic" guaranteed investment contracts (GICs) to employee benefit plans for which Pacific Life is a party in interest. This exemption covers transactions where an affiliate of Pacific Life manages the assets of the plan relating to the "synthetic" GIC, as well as where such assets are managed by an unaffiliated investment manager (PTE 99-44; Nov. 9, 1999).

### Individual Exemption for Performance Fees

- **RREEF America LLC (RREEF)** received an exemption to permit the payment of certain investment fees, asset management fees and performance fees to RREEF by employee benefit plans for which RREEF provides investment management services for certain real estate investments (PTE 99-32; Aug. 5, 1999).

### Individual Exemption for Asset Allocation

- **Salomon Smith Barney (SSB)** was granted an exemption that amended PTE 94-50, an exemption that was granted to Smith Barney, Inc., the predecessor of SSB, for the operation of the TRAK asset

allocation program. The new exemption updates and modifies PTE 94-50, and implements a record-keeping reimbursement offset system and an automated reallocation option (PTE 99-15, that amends PTE 94-50; April 5, 1999).

## **Additional Individual Exemptions**

### **Exemption for Securities Lending:**

PTE 99-04 Jan. 27, 1999  
Salomon Smith Barney, Inc.

### **Exemption for Insurance Contracts:**

PTE 99-36 Sept. 29, 1999  
Aetna, Inc.

### **Exemption for Transfers of Properties to Separate Accounts:**

PTE 99-49 Jan. 5, 2000  
Massachusetts Mutual Life Insurance Company

### **Exemptions for Credit Facilities:**

PTE 99-08 Feb. 19, 1999  
Bankers Trust Company

PTE 99-47 Dec. 17, 1999  
Bankers Trust Company

### **EXPRO Grant for Reinsurance:**

PTE 99-22E Sept. 28, 1999  
Union Cabide Corporation

### **EXPRO Grant for Asset-Backed Securities:**

PTE 99-27E Oct. 30, 1999  
Bank One

## **Significant Proposed Individual Exemptions in Connection with Demutualizations**

### **John Hancock Mutual Life Insurance Company (John Hancock).**

This proposed exemption would permit the receipt of common stock of John Hancock Financial Services, Inc., the holding company for John Hancock, or the receipt of cash or policy credit, by eligible policyholders of John Hancock that are employee benefit plans, other than plans maintained by John Hancock or an affiliate for its own employees, in exchange for such policyholders' membership interest in John Hancock in accordance with the terms of a plan of reorganization adopted by John Hancock and implemented pursuant to Massachusetts state law.

### **Metropolitan Life Insurance**

**Company (MetLife).** This proposed exemption would permit either: 1) the receipt of an interest in a trust whose corpus consists of common stock issued by MetLife, Inc., the parent company of MetLife by eligible policyholders that are employee benefit plans, including plans covering employees of MetLife or its affiliates; or 2) the receipt of cash or policy credits by such plans, in exchange for such plans' membership interests as policyholders in MetLife, according to a plan of conversion adopted by MetLife and implemented in accordance with New York state insurance law.

## **Other Significant Exemption Requests under Active Consideration**

**UBS/Swiss.** This exemption application requests relief for the sale to plans of certain "synthetic" GICs by UBS AG, UBS Brinson, and ongoing operations between the parties with respect to such GICs. A similar exemption request is also pending for Bankers Trust Company.

**Merrill, Lynch & Co., Inc.** This exemption application requests relief for the purchase by plans of certain debt instruments issued by Merrill, Lynch & Co., Inc. A similar exemption request is also pending for Citigroup, Inc. Masters, Mates and Pilots (MMP) pension and individual account plans. This exemption application requests relief for the sale of certain employer stock by the MMP pension and individual account plans to an ESOP being established by a contributing employer in exchange for a promissory note.

**Columbia Energy Group.** This exemption application requests permission for an insurance company subsidiary of the Columbia Energy Group, which is located in Bermuda, to reinsure the risks covered by a long-term disability insurance policy sold to the Columbia Energy Group's disability plan by Employers Insurance of Wausau, a third-party insurer.



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**J. P. Morgan.** This exemption application requests relief for plans to acquire securities in an initial public offering (IPO) where the underwriting syndicate for the IPO is being managed by an underwriter that is affiliated with the plans' investment manager. Similar exemption requests are pending for Goldman Sachs, Citigroup, Chase Manhattan and Morgan Stanley.

**New York Life Insurance Company (NYL).** This exemption application requests relief for: 1) sales of insurance and annuity contracts, including a certain synthetic GIC, issued by New York Life Insurance Co.(NYL), and shares of mutual funds underwritten by NYL to plans that participate

in a collective investment trust maintained by an affiliate of NYL; and 2) the receipt of commissions and other fees, including 12b-1 fees, by NYL, its employees, brokers and agents in connection with the sales of such insurance contracts and mutual funds to plans.

**General Motors Investment Management Company ( GMIMCO).**

This exemption application requests relief for the GMIMCO that is similar to that provided in Part I of PTE 84-14, the QPAM class exemption. The plans affected by the exemption would include: 1) the Delphi plans; 2) any plan whose assets have been managed by GMIMCO, as an in-house asset manager; 3) any plan that

is sponsored by a former affiliate of GMIMCO; and 4) any plan that engages GMIMCO as investment manager for which QPAM relief would be available but for the exclusion of in-house assets from the definition of client assets under management for purposes of Part I(e) of PTE 84-14. A similar exemption request is pending for DuPont Capital Management Corporation.

**Good Faith Waivers**

- The Agency processed more than 40 petitions requesting a “good faith” waiver of the civil penalty imposed by Sec. 502(1) of ERISA.

# Regulatory Activities

## *25<sup>th</sup> Anniversary Regulatory Milestones*

- Mid-late 1970s: Published minimum standards for compliance with the participation, vesting and benefit accruals rules applicable to pension plans. Adopted a uniformed annual reporting form (Form 5500) by the Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation.
- 1980s: Published guidance defining what constitutes “plan assets” for purposes of ERISA’s fiduciary rules. Published rules defining when participant contributions constitute “plan assets”. Adopted rules governing participant loans.
- 1990s: Published rules describing the circumstances under which participants will be viewed as having control over the investment of their pension plan individual accounts. Published guidance on the provision of participant investment education. Adopted voluntary compliance programs for violations of the annual reporting and fiduciary responsibility rules. Adopted streamlined annual reporting forms (Form 5500) and developed a new annual reporting system.

## **1999 Accomplishments**

### **During 1999, PWBA took the following regulatory actions:**

- Published proposed rules on the electronic disclosure of plan information. These rules are intended to facilitate plan administration through the use of electronic media for communicating plan information to participants and beneficiaries.
- Published proposed rules designed to enhance the security of assets held by small pension plans.
- Published proposed rules establishing a National Medical Child Support Notice. These rules are intended to facilitate state agency efforts to secure health care coverage for children.
- Published an interpretive bulletin defining the circumstances under which an employer can assist employees in saving for retirement without establishing a formal pension plan under ERISA.
- Conducted a public hearing on proposals to streamline the annual return/report forms (Form 5500).

- Conducted a public hearing on proposals to update ERISA’s claims procedure requirements.
- In conjunction with the American Bankers Association, Investment Company Institute and the American Council of Life Insurance, made available a 401(k) Fee Disclosure Form to enable employers, particularly small employers, to easily compare fee and expense information from various service providers relating to their 401(k) plan.
- Published proposed rules relating to the elimination of the Summary Plan Description filing requirement, the requirement to furnish plan documents to the Secretary upon request, and the assessment of civil penalties for failures or refusals to provide requested documents to the Secretary. These rules serve to enable the Department to respond to requests from participants and beneficiaries for copies of Summary Plan Descriptions.

# Policy and Research

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## *25<sup>th</sup> Anniversary Milestones in Policy and Research*

- Published in 1985 the *Handbook of Pension Statistics*, a compendium of articles and statistical data that tracked growth and trends in pension coverage.
- Published in 1989, and updated in 1992, *Trends in Pensions*, a comprehensive study that analyzed the status of pensions in the U.S. and abroad.
- Published in 1992 *Health Benefits and the Workforce*, a compendium of 16 studies that provided a range of information from health insurance mandates to health portability reform.
- Developed the initiative that became the Multiple Employer Welfare Arrangement (MEWA) Enforcement Improvement Act of 1992, which enhanced the soundness and stability of MEWAs.

## **1999 Accomplishments**

PWBA was a leader in benefits policy in tracking patterns and trends that pertained to plan sponsors and plan coverage, the design and adequacy of benefit plans, the costs of maintaining a plan, and the behavior and attitudes associated with retirement decisions.

The Agency published its *Private Pension Plan Bulletin*, which covers Form 5500 Annual Reports for the 1996 plan year. The bulletin reported that the number of 401(k)-type plans increased by 15 percent to 231,000 plans from 201,000 plans, while the number of active participants in these plans increased by 10 percent to 30.8 million. The increase in 401(k)-type plans resulted not only from new plans being established, but also from existing defined contribution plans being amended to include a cash or deferred arrangement.

The Agency initiated or completed under existing, multiyear contracts a number of major health and pension benefit studies. Topics addressed include trends in self-insurance and pooled purchasing of employment-based health benefit plans, managed care issues, integration of pension benefits with Social Security, lump-sum cash outs of pension benefits and employee benefits' effect on earnings inequality.

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PWBA also continued developing simulations models of workers' retirement benefit accumulations and employers' and workers' health insurance purchasing decisions.

PWBA participated with other agencies in developing pension legislative proposals.

## **Key Testimony**

### ***February***

Acting Assistant Secretary Leslie Kramerich appeared before the House Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, to testify on the role of the Employee Retirement Income Security Act in providing health care to millions of the nation's workers.

### ***March***

Leslie Kramerich testified before the House Ways and Means Committee, Subcommittee on Oversight, on the private pension system.

### ***June***

Leslie Kramerich testified before the Senate Special Committee on Aging on creative initiatives by the government, private-sector organizations and companies that encourage retirement savings.

# Accounting and Auditing

## *25<sup>th</sup> Anniversary Accounting Milestones*

- The Office of the Chief Accountant was established in 1988.
- To alleviate the employee benefit community's concerns that late filing deficiencies would result in substantial penalties under ERISA, the Agency launched in 1995 the Delinquent Filer Voluntary Compliance Program (DFVCP). A 1992 grace period program that preceded the DFVCP resulted in the filing of more than 40,000 delinquent reports.
- During the 1990s, the Agency built alliances with various associations and industry groups and developed various accounting initiatives to encourage industry practitioners to comply with the Agency's filing requirements:
  - A national outreach program aimed at providing guidance on preparing the Form 5500 Series Annual Report;
  - A program aimed at the various state societies of certified public accountants to assist independent auditors on audits of employee benefit plans; and
  - One-day workshops to instruct plan professions on how to complete the Form 5500.
- The Agency developed the Federal Employees' Retirement System Act (FERSA) Audit Program in 1987 to determine the level of compliance with the requirements of FERSA relating to fiduciary responsibilities and prohibited activities of fiduciaries.

## **1999 Accomplishments**

### **Reporting Compliance Program**

The reporting compliance program is divided into three groups: 1) deficient filers, 2) late-filers, and 3) non-filers. Penalties are imposed on plan administrators for their failure to submit timely, complete and accurate Form 5500 Series annual reports with the Department. Almost \$15 million in civil penalties was assessed under the Agency's reporting compliance program for filing unsatisfactory Form 5500 Series annual reports in 1999. More than \$8 million was assessed for late filings and nonfilings.

In 1999, approximately 2,900 plans chose to take advantage of the DFVCP, which collected more than \$8 million in civil penalties.

### **Coordination with the Accounting Profession**

The Agency continued its work with the American Institute of Certified Public Accountants (AICPA) to revise the AICPA's guide for auditing employee benefit plans. The updated guide published in May 1999 incorporated new audit and accounting requirements. The guide is expected to help improve compliance with ERISA's audit, reporting and disclosure provisions.

### **New Form 5500**

PWBA continued to prepare for major changes in the 1999 Form 5500. The Department will assume responsibilities from the Internal

Revenue Service for processing the form. EFAST, the streamlined, electronic processing system, includes new data collection, filing requirements for direct filing entities, computer scannable forms and an electronic filing option. Under EFAST, PWBA's new responsibilities will include a help desk for responding to questions from the public regarding the new system and proper completion of the Form 5500 Annual Report, and the processing of filings. The new system will generate letters to filers whose reports fail certain edit tests. The IRS currently handles these inquiries. To prepare, the Agency is developing an outreach program, new technical guidance, monitoring systems, training manuals and processing systems.

### Educational Outreach

Under the sponsorship of the International Foundation of Employee Benefit Plans, PWBA continued an educational outreach program. The program, which consisted of workshops, covered both the Form 5500 filing requirements and an overview of the Department's enforcement program. Through December 1999, PWBA conducted four such workshops in Boston, Chicago, Dallas and San Francisco. An additional 15 workshops are planned for 2000 to acquaint filers with the new Form 5500 requirements.

### Referral of Substandard Audit Work

Through December 1999, PWBA had referred 311 cases of potential

deficient accounting and auditing work to the AICPA's Professional Ethics Division. Of the 311 cases: 90 were either referred to the AICPA's trial board, or the accountant reached a voluntary settlement agreement; 163 cases resulted in remedial corrective action letters; 19 resulted in no violations; and 26 cases were closed for other reasons. Additionally, 80 cases were referred to state boards of accountancy in instances where the AICPA lacked enforcement jurisdiction over the accountant or the accountant was not properly licensed.

### Performance of On-site Workpaper Reviews

The Agency continued its quality control program for improving the audit work performed by independent qualified public accountants. PWBA performed 52 on-site reviews and analyses of audit workpapers during 1999.

### Thrift Savings Plan Audits

PWBA conducted fiduciary compliance audits of the Thrift Savings Plan (TSP) as required by the Federal Employees' Retirement System Act. During 1999, the TSP reengineered its recordkeeping system with many enhancements. These included implementing a completely new TSP recordkeeping software; replacing the TSP bookkeeping system by converting from monthly to daily account valuations with new individual account unit valuations; establishing two new TSP investment funds (an international fund and a small cap fund) as required by Congress; and ensuring Y2K compliance.

Audits performed were designed to ensure that the Thrift Savings Board met its fiduciary requirements to strengthen the security of more than \$91 billion held in 2.4 million TSP accounts of Federal workers, and to enhance opportunities for greater net earnings by recommending improvements in the TSP system.

### Plan Audit Reviews — 1999

Number of reporting compliance cases	2,592
Reviews of auditor's work papers	52
<i>Plan Audit Reviews Cumulative through 12/31/99</i>	
Total Audits Referred	391
State Licensing Boards	80
AICPA	311
Resolutions-AICPA	298
Referred to AICPA Trial Board or Settlement	90
Letters for Corrective Action	163
No Deficiencies	19
Closed for Other Reasons	26



# Health Plan Standards and Compliance Assistance

## *Milestones in the History of Health Plan Standards and Compliance Assistance*

- The Health Care Task Force was established in 1996 to provide technical expertise relating to legislative, policy and regulatory issues pertaining to health care benefits.
- In December 1999 a permanent Office of Health Plan Standards and Compliance Assistance was established to replace the Health Care Task Force.
- Since 1996, policies and regulations have been developed for new health laws:
  - The Health Insurance Portability and Accountability Act (HIPAA);
  - The Mental Health Parity Act (MHPA);
  - The Newborns’ and Mothers’ Health Protection Act (NMHPA); and
  - The Women’s Health and Cancer Rights Act (WHCRA).

## 1999 Accomplishments

Following is a summary of the most significant activities of PWBA in the area of health plan standards and compliance assistance.

### Memorandum of Understanding

PWBA, in conjunction with the Departments of the Treasury and Health and Human Services, developed a Memorandum of Understanding (MOU). The MOU codifies the current practices that have developed among the three Departments while working on implementing HIPAA, MHPA, the NMHPA and WHCRA. These health care laws create shared jurisdiction and shared regulatory responsibility for the three Depart-

ments. The Departments formed an interagency working group to develop regulations under these provisions.

### Request for Information under WHCRA

The Agency published a Request for Information (RFI) to provide the public and the regulated community with the opportunity to submit comments and provide input prior to the issuance of regulations under WHCRA. WHCRA specifies that group health plans and health insurance issuers offering mastectomy coverage must also provide coverage for reconstructive surgery and for prosthesis and physical complications under certain circumstances. Its provisions also specify the type of

coverage that group health plans and issuers must provide, establish standards for deductibles and coinsurance, and restricts certain provider incentive and reimbursement arrangements.

## Development of MEWA Reporting Regulations and Form M-1

PWBA developed three regulations implementing an annual reporting requirement for multiple employer welfare arrangements (MEWAs). For many years, MEWAs have been marketed to employers as a means of providing health benefits to their employees. Sponsors and promoters of MEWAs typically have represented to employers and state regulators that the MEWA was an ERISA-covered plan and, therefore, exempt from state insurance regulation under ERISA’s broad preemption provisions. By avoiding state insurance reserve, contribution and other requirements applicable to insurance companies, MEWAs often have been able to market insurance coverage at rates substantially below those of regulated insurance companies, thus, making the MEWA an attractive alternative for small businesses. In practice, however, a number of MEWAs have been unable to pay claims as a result of insufficient funding and inadequate reserves, or in the worst situations, they were operated by individuals who drained the MEWA’s assets through excessive administrative fees and outright embezzlement. In 1992, in a report entitled “*States Need Labor’s Help Regulating Multiple Employer Welfare Arrangements*”, the General Accounting Office (GAO) recommended a MEWA

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registration requirement. However, the Department did not have authority to implement such a requirement until HIPAA was enacted in August of 1996. In 1999, the PWBA developed three regulations (published in February 2000) that implemented a reporting mechanism to help identify MEWAs and respond to the 1992 GAO report.

### **Request for Information under HIPAA**

PWBA began developing final regulations under HIPAA. In 1997 the Agency issued interim regulations implementing HIPAA's provisions. These provisions set forth federal requirements relating to portability, access and renewability of group health plans and group health insurance coverage. The provisions also include several other protections, such as special enrollment rights for individuals. As part of the process of developing final regulations, the Agency published a Request for Information to provide the public and the regulated community with the opportunity to submit comments reflecting the experience interested parties have had with the nine interim

regulations and to provide input prior to the issuance of final regulations.

### **Development of Health Plan Compliance Guide**

PWBA developed an extensive compliance guide to assist the Agency's benefits advisors in answering calls and investigators in reviews of health plans to determine whether there is compliance with the new health care laws. As part of PWBA's efforts to ensure that workers and their families are not denied any protections provided under HIPAA and other new health care provisions, PWBA investigators implemented a nationwide enforcement pilot project during FY '99 to test the compliance guide as an investigative aid to determine how it can best be used in future investigations of health plans.

### **Coordination with State Insurance Departments**

The Agency expanded its state coordination program to ensure effective implementation of federal health care reforms including HIPAA, MHPA, NMHPA and WHCRA. Agency staff trained state insurance

regulators on the new federal laws and developed training material for the states. The Agency assisted state regulators in developing information for consumers and the regulated community by providing sample materials and by reviewing pamphlets developed by the state regulators. The Agency also continued to send representatives to quarterly meetings of the state insurance commissioners. At these meetings, the Agency updated the commissioners on regulatory, outreach and compliance initiatives. These meetings also gave both the Federal and state regulators an opportunity to share information, to discuss ERISA issues, and to identify areas for future coordination. To ensure effective coordination, the Agency maintained a contact-person network among individuals in the Agency's national and field offices, and the various state insurance commissioners' offices who are the "point-people" responsible for developing responses on the provisions of HIPAA, MHPA, NMHPA, WHCRA, and other health care laws affecting group health plans. Initiatives, such as working closely with states, have helped ensure successful implementation of Federal health care reforms.



# ERISA Advisory Council

## *25<sup>th</sup> Anniversary Milestones in the ERISA Advisory Council History*

- Sec. 512 of ERISA created the Secretary’s Advisory Council on Employee Welfare and Pension Plans, also known as the ERISA Advisory Council.
- Issues the Council has addressed include:
  - Selecting and monitoring of service providers;
  - Examining fiduciary liability, and of employee stock option plans (ESOPs);
  - Examining retirement plan leakage; and
  - Exploring the possibility of using surplus pension assets to secure retiree health benefits.

## **1999 Accomplishments**

In 1999, the ERISA Advisory Council tackled three major study topics: the benefit implications of the growing contingent workforce, using pension surplus money to fund retiree health care, and the trend in the defined benefit market toward hybrid plans (cash balance plans). The following is a synopsis of the Council’s final recommendations.

*Note: The views of the Advisory Council’s working groups do not necessarily reflect those of the Department.*

### **Contingent Workforce Working Group**

- Continue vigorous enforcement by the Labor Department and the Internal Revenue Service of

existing laws to prevent the denial of fringe benefits to statutory employees misclassified as contingent workers.

- Modify existing labor and antitrust laws that prevent contingent workers’ access to multi-employer plans that have traditionally served employers and contingent workers in the construction and garment industries.
  - Permit independent contractors to organize and collectively bargain on a single or multi-employer basis;
  - Permit temporary and contract company employees to organize and bargain with their employers under the “community of interest” standards developed by the National Labor Relations

Board to define appropriate units of workers for collective bargaining; and

- Extend to independent contractors, temporary agency employees and contract company workers the provisions of labor law that permit employers and employees in the construction and garment industries to enter into pre-hire agreements setting the terms and conditions for employment.
- Expand to the contingent workforce the multi-employer plan model, facilitating the availability of health and retirement benefits for small employers with temporary and intermittent workforces. In addition to the construction and garment industries, successful examples of such plans are found in state and local government and in rural electrical cooperatives.
- Facilitate purchasing coalitions that permit contingent workers to obtain health and retirement benefits at group rates.
- Require the Department to review current statutory impediments to group purchasing of health benefits along the multi-employer model with strong safeguards to assure the adequate funding of such arrangements.
- Ask the Internal Revenue Service to review the Internal Revenue Code Section (IRC) 403(b) retirement plan model for use as a vehicle to permit employers of contingent workers to contribute to

retirement accounts of those workers.

- Require the Departments of Labor and of the Treasury to review whether removing the provision of employee benefits as one of the factors in the current 20-factor test for determining employee status would enhance the ability of contingent workers to secure health and retirement benefits, without unacceptable offsetting losses to the critical health and retirement systems funded through employment taxes, or other fundamental worker protections.
- Recommend that the Department of the Treasury review the Voluntary Employees' Beneficiary Association (VEBA) rules of IRC Section 501(c)(9) and consider allowing the inclusion of a greater percentage of nonemployee workers.
- Recommend that the Internal Revenue Service amplify its instructions and conduct public information and education activities for taxpayers concerning the deductibility of individual health insurance costs.

### **Surplus Pension Assets Working Group**

- Extend permanently the provisions of IRC Section 420, scheduled to expire at the end of 2000. This extension would continue to allow for transfers of surplus pension assets to fund current year medical obligations when pension assets exceed the greater of the full

funding limit and 125 percent of current liability.

- Continue allowing for transfers of surplus pension assets to fund current year medical obligations when pension assets exceed the greater of the full funding limit and 125 percent of current liability.
- Replace the 5-year maintenance of benefit requirement in the current IRC Section 420 with a 5-year maintenance of cost requirement. While a majority of the working group voted in favor of this recommendation, a significant minority felt strongly that the maintenance of benefits provision should be preserved. The minority was concerned that a substitution of a maintenance of cost provision would effectively permit or encourage a reduction in retiree health benefits over time, particularly considering anticipated higher health care costs in the future.
- Expand IRC Section 420 to allow for prefunding of medical obligations up to the present value of post-retirement medical benefits for current retirees when pension assets exceed the greater of the full funding limit and 135 percent of the current liability.
- Expand the group for which retiree medical benefits may be prefunded by including active employees who are eligible to retire (the majority of the working group felt this issue should be considered).
- Allow the use of future health care inflation in determining the present

value of post-retirement medical benefits.

- Require a qualified actuary to certify that the present value of post-retirement medical benefits was determined using sound actuarial assumptions and methods.
- Allow surplus pension assets to be transferred either to a special IRC 401(h) sub-account within the pension plan or to a VEBA established under IRC Section 419.
- Stipulate that investment income on surplus pension assets transferred to a VEBA will not be subject to unrelated business income tax.
- Refer to a future working group or other forum for additional study: current law provisions on funding of retiree health benefits and their effect on the security of retiree health plans; and current full funding limits for defined benefit pension plans and their impact on the level of employer contributions to pension plans.

### **Hybrid Plan Working Group**

- Develop clearer, more candid disclosure when a fundamental change is made in a pension program.
- Emphasize in enhanced disclosure requirements information that employees can understand and that is likely to be useful to them; distributing too much technical information can defeat the purpose

as effectively as distributing too little.

- Make it possible for employees affected by a cash balance conversion to obtain information about the specific impact on them that will enable them to make a reasonable comparison between the old and new plan formulas, on a practical basis and within a reasonable time frame either before or after the change.
  - Include in any new disclosure requirements safe harbors and model language to ease the burden on plan sponsors, and to protect them and their plans from future liability based on an employee's misunderstanding, as long as the representations that are given comply with legal and regulatory standards.
  - Encourage plan sponsors to include plan design features when traditional pension plans, especially those with surplus assets, are converted to account-based plans. These plan design features, to the greatest extent possible, protect the reasonable expectations of the long-service participants in the prior plan and their likely reliance on those reasonable expectations.
  - Clarify the legal and regulatory basis for operating cash balance and other hybrid pension plans, and for converting traditional plans to account-based plans. The rules should fit the character of the plans, so that all parties know the "rules of the game".
- Examine and revise technical provisions in current law that are specifically designed for annuity-based defined benefit plans, to the extent it is demonstrated that they inhibit plan provisions that would provide equitable, broad-based retirement income through account-based defined benefit plans.
  - *The Advisory Council takes no position on the legal issues presented in the current litigation over cash balance conversions.*
  - The Labor Department should:
    - Develop and publish explanatory materials for employees and for plan sponsors about account-based defined benefit plans, identifying in particular the questions concerning the impact on employees that need to be considered in connection with a conversion;
    - Train its staff in the practical, legal and actuarial aspects of cash balance conversions, so that they are equipped to field questions from employees, employers and the general public; and
    - Publicize the Department's availability to assist the public in coming to grips with this new phenomenon.
  - Have policy makers consider the concerns addressed by this Advisory Council's 1998 Leakage Report, which are more urgent, given the increased availability of lump sum payments that hybrid plans offer.

- Absent a position on legislative or regulatory steps beyond the cash balance conversion issues discussed above, any steps considered should be targeted to conversion-type transactions and not extended to other types of changes to defined benefit plans that would further discourage the maintenance and enhancement of broad-based defined benefit plans as a basic source of secure, lifetime retirement income for American workers.

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