



AMERICAN ACADEMY *of* ACTUARIES

September 28, 2004

Internal Revenue Service
Attn: SE:OPR [Joint Board regulations]
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Chairman Nuissl:

On behalf of the American Academy of Actuaries,¹ we appreciate the opportunity to present comments regarding possible revisions of your regulations pertaining to the services provided as an enrolled actuary under the Employee Retirement Income Security Act of 1974 (ERISA). The comments below are structured to address the areas in which you requested comments.

Enrollment and Renewal of Enrollment

- In identifying the subjects to be covered by the enrollment exams, the syllabus should be expanded to include the selection of assumptions. This area is one of the major responsibilities of the enrolled actuary, yet the subject has never been examined. We are particularly concerned with selection of assumptions regarding asset rates of return, a key element of a Schedule B filing. We recognize that this subject of selection of assumptions does not readily lend itself to be examined on a multiple-choice examination, and we are available to work with you and the Advisory Committee to develop appropriate exam material.
- Furthermore, the current exams contain questions that often test several concepts in a single question. For example, a candidate could get three of the four concepts right but get no credit for the work. It would be better to break the question down into four questions if the intention is to examine the four concepts. Including additional, shorter questions would yield a better examination process.
- Additionally, members of the Academy believe the definition of core and non-core subject matter for continuing education should be expanded and clarified. Knowledge of ERISA's Titles I and II should have been core from the start, and Internal Revenue Code sections 419, 419A, and 420 should be added as core subject matter because enrolled actuaries may be authorized to practice before the IRS in these areas. In addition, we suggest that pension plan design, investment, finance, risk theory, and pension solvency issues are valuable enough to be core subject matter because these topics will help enrolled actuaries to better understand solvency issues. Non-core subject matter should be expanded to specifically include (1) work dealing with accounting for retirement benefits other than pensions, and (2) consulting skills.
- We suggest the board consider modifying the regulations to allow for flexibility in the number of exams, and clarify whether there is a time limit for completion of these exams.

¹ The American Academy of Actuaries is the public policy organization for actuaries of all specialties within the United States. In addition to setting qualification standards and standards of actuarial practice, a major purpose of the Academy is to act as the public information organization for the profession. The Academy is nonpartisan and assists the public policy process through the presentation of clear actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal and state elected officials, regulators and congressional staff, comments on proposed federal and state regulations and legislation, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualifications and practice, and the Code of Professional Conduct for all actuaries practicing in the United States.

- Finally, the regulations that require enrolled actuaries to maintain paper copies of the outlines for the sessions they have attended should be amended to reflect innovations in record storage. The certificate of attendance from the qualifying sponsor should be sufficient.

Regulations on Continuing Professional Education

- The regulations should be updated to permit using the Web and other delivery methods as alternatives to formal meetings. Many qualifying sponsors are already using these methods. In particular, it would be helpful to clarify ways to substantiate attendance – hopefully with a level of effort comparable to the procedures applying to people attending a session in person. We would also encourage the Joint Board to clarify its requirements for documenting attendance at in-person meetings.
- In our opinion, requiring the current 36 credit hours over a 3-year cycle is appropriate. The current regulations give 4 to 1 credit for preparation to participate in a program, but limit the credits that can be used to one-half, or 18 credits. The regulations should separate the credit between attendance and preparation, thus permitting the use of attendance credits beyond the one-half. Another possibility would be to reduce the preparation credit to 3 to 1 and permitting up to 24 (or two-thirds) of such credits to be used.
- Qualifying sponsors must renew their approval from the Joint Board every cycle; however, there is no guidance on how this should be done. The regulations should provide guidance on renewal of approval for qualifying sponsors.
- The regulations should state that qualifying sponsors may withhold session credit for inattentive or disruptive conduct.
- We also encourage the board to consider giving credit for substantially contributing to relevant articles, even if the actuary is not the primary author.
- The board's current regulations call for qualifying sponsors to be published periodically. Perhaps the Joint Board could consider publishing such a list of on the JBEA website to help actuaries locate programs that might be available in their area, and to verify that the sponsor has been approved by the JBEA.

Waivers of CPE

- We have no changes to suggest regarding this issue.

Types of Enrollment Status

- The regulations should be revised to extend inactive status to six years, because we feel that three years is too short. Enrolled actuaries often leave the workforce for child-rearing or other responsibilities, and they should not be discouraged from resuming their careers. Special “catch-up” requirements may be appropriate in these cases.
- The regulations should also permit waiver of some CPE requirements for an enrolled actuary going from inactive to active status (depending upon the circumstances).

Standards of Conduct, Performance, and Practice

- Since its establishment, the JBEA has not been very active in investigating and disciplining enrolled actuaries whose performance does not meet standards. We recognize that it has been a question of adequate resources.

Perhaps the regulations, or the JBEA's internal practices, can be changed to permit the JBEA to use the Actuarial Board for Counseling and Discipline ("ABCD") as an independent contractor to investigate complaints against enrolled actuaries. We acknowledge that there are some challenges, such as the need for confidentiality, but we feel that there should be a way to work through these issues in order to take advantage of the experience and availability of the ABCD's resources.

- An alternative would be to require enrolled actuaries to become members of an actuarial organization within one year of attaining enrollment and to maintain that membership as a condition of enrollment. This would have the result of making them subject to the Code of Professional Conduct that all the major actuarial organizations in the United States and Canada subscribe to. If the above idea is not feasible, we strongly recommend that the JBEA incorporate the Code of Professional Conduct into its regulations as applying to all enrolled actuaries. If the JBEA is concerned that referring directly to the Code of Professional Conduct in its regulations would delegate too much authority to private entities, we strongly recommend that the JBEA amend its regulations to include as much of the text of the Code as the JBEA deems relevant and appropriate. We have developed the enclosed comparison of the Code of Professional Conduct and the JBEA's current regulations to facilitate this process.
- Finally, we recommend that the JBEA's regulations require a minimum number of hours of CPE (e.g., three per re-enrollment cycle) be related to professionalism topics to ensure that all enrolled actuaries are exposed and sensitized to the areas where professionalism issues arise in everyday practice.

We appreciate the opportunity to provide these comments, and we would be delighted to discuss our ideas with you at your convenience. Please contact Heather Jerbi, the Academy's pension policy analyst (202.785.7869; Jerbi@actuary.org) if we can be of assistance.

Sincerely,

Kenneth A. Kent, MAAA, EA, FCA, FSA
Vice President, Pension Practice Council
American Academy of Actuaries

Robert J. Rietz, MAAA, EA, FCA, FSA
Vice President, Professionalism Council
American Academy of Actuaries

Carolyn E. Zimmerman, MAAA, EA, FCA, FSA
Chairperson, Pension Committee
American Academy of Actuaries

ATTACHMENT

A Comparison of the Regulations of the Joint Board for the Enrollment of Actuaries and the Code of Professional Conduct

The Joint Board for the Enrollment of Actuaries maintains regulations setting forth standards of performance for enrolled actuaries. The American Academy of Actuaries and its sister organizations¹ maintain a Code of Professional Conduct that sets forth standards of conduct for their members. The Joint Board's regulations and the Code are compared below.

General Observations:

The Joint Board's regulations apply only to enrolled actuaries in the performance of their work under ERISA; the Code is designed for broad application to actuaries practicing in the pension, insurance and financial services industry not only in the United States, but around the world. Consequently, the Code is both broader and less specific in its language than the Joint Board's regulations.

The Code contains annotations that provide "explanatory, educational, and advisory material on how the Precepts [of the Code] are to be interpreted and applied." The Joint Board's regulations contain no such advisory material.

The Academy is a professional organization bound by antitrust law; the Joint Board is a governmental entity that is exempt from antitrust law. The Joint Board, therefore, can absolutely require or prohibit some forms of conduct where the Academy cannot.

Both the Joint Board's regulations and the Code apply to performance of "actuarial services." However, the Joint Board's regulations define "actuarial services" as "performance of actuarial valuations and preparation of any actuarial reports." 20 C.F.R. §901.1(h). The Code defines "actuarial services" as "professional services provided to a [p]rincipal [*i.e.*, client or employer] by an individual acting in the capacity of an actuary. Such services include the rendering of advice, recommendations, findings or opinions based upon actuarial considerations." Arguably, the latter definition is broader than that of the Joint Board's regulations.

The Joint Board's regulations contain some specific requirements that the Academy's Code does not. However, the Code requires actuaries to comply with applicable law. Consequently, the Academy's enrolled actuary members must satisfy the requirements of both the Joint Board's regulations and the Code.

Specific Provisions:

The Joint Board's regulations permit rejection of candidates for enrollment if they have engaged in "disreputable conduct," 20 C.F.R. §§901.12(e) and 901.13(f); the regulations also permit the Joint Board to suspend or terminate an actuary's enrollment if that actuary has engaged in "disreputable conduct ...or other conduct evidencing fraud, dishonesty or breach of trust." 20 C.F.R. §901.31. Precept 1 of the Code requires Academy members to "act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public and to uphold the reputation of the actuarial profession." Although these concepts set forth in the Joint Board's regulations and the Code are similar, they are not identical.

§901.20(a) of the Joint Board's regulations requires an enrolled actuary to "undertake an actuarial assignment only when qualified to do so." Precept 2 of the Code of Professional Conduct requires actuaries to provide actuarial services only when they are "qualified to do so on the basis of basic and continuing education and experience *and* only when the [a]ctuary satisfies applicable qualification standards" (emphasis added). In the U.S., the applicable

¹ The American Society of Pension Actuaries, the Casualty Actuarial Society, the Conference of Consulting Actuaries, and the Society of Actuaries.

qualification standards are the *Qualification Standards for Prescribed Statements of Actuarial Opinion* promulgated by the Academy.

§901.20(b) of the Joint Board's regulations prohibits enrolled actuaries from performing actuarial services "for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law." Precept 8 of the Code requires actuaries to "take reasonable steps to ensure that [actuarial] services are not used to mislead other parties." This obligation is clarified in Annotation 8-1, which calls for actuaries to recognize the risk that actuarial communications may be misunderstood or misused and, therefore, to take reasonable steps to present such communications clearly and fairly and to include appropriate limitations on their distribution and use.

§901.20(c) of the Joint Board's regulations requires the enrolled actuary to provide supplemental advice or explanations about actuarial reports signed or certified by the enrolled actuary in response to a reasonable request from the trustee. Precept 4 of the Code, as explained by Annotation 4-2, requires the actuary to indicate in an actuarial communication (a term that is broader than the Joint Board's term, "actuarial reports") the *extent* to which the actuary or other sources are available to provide supplementary information and explanation.

§901.20(d) of the Joint Board's regulations prohibits an enrolled actuary from performing actuarial services in any situation in which the enrolled actuary has a conflict of interest (suggesting that this section applies only to actual conflicts of interest) "except after full disclosure has been made to the plan trustees, any named fiduciary of the plan, the plan administrator and, if the plan is subject to a collective bargaining agreement, the collective bargaining representative." Precept 7 of the Code prohibits the actuary from knowingly performing actuarial services involving an *actual or potential* conflict of interest unless:

- a) the actuary's ability to act fairly is unimpaired;
- b) there has been disclosure of the conflict to apply present and known prospective principals; and
- c) all such principals have expressly agreed to the actuary performing the actuarial services.

§901.20(e) of the Joint Board's regulations requires the enrolled actuary to "exercise due care, skill, prudence and diligence" with respect to assumptions, calculations and recommendations. Precept 1 of the Code requires the actuary to "act honestly, with integrity and competence" and, as explained by Annotation 1-1, to perform actuarial services "with skill and care."

§901.20(f) of the Joint Board's regulations requires the enrolled actuary to disclose in "any report or certificate stating actuarial costs or liabilities a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed." Precept 4 of the Code requires the actuary, when issuing an actuarial communication, to "take appropriate steps to ensure that the [a]ctuarial [c]ommunication is clear and appropriate to the circumstances and its intended audience and satisfies applicable standards of practice."

§901.20(g) of the Joint Board's regulations prohibits the enrolled actuary from advertising his or her enrolled status except on letterhead, business cards and telephone directory listings. Precept 11 of the Code prohibits the actuary from engaging in advertising or business solicitation activities that the actuary knows or should know are false and misleading. Additionally, Precept 12 of the Code requires actuaries to use designations and titles of the Academy and its sister organizations only in a manner consistent with the organizations' authorized practices. The Code makes no reference to advertising enrolled actuary status.

§901.20(h) of the Joint Board's regulations requires the enrolled actuary to provide written notice to the appropriate federal agency upon discovering that any actuarial document he or she has signed was not filed. The Code contains no comparable requirement.

Additional Code provisions

The Code contains some requirements for which the Joint Board's regulations appear to contain no comparable language:

Precept 3 requires actuaries to ensure that work performed by them or under their direction meets applicable standards of practice (in the U.S., the Actuarial Standards of Practice promulgated by the Actuarial Standards Board).

Precept 5 requires an actuary issuing an actuarial communication, as appropriate, to identify the principal(s) for whom the communication is issued and describe the capacity in which the actuary serves. Please note that enrolled actuaries typically use such language in making ERISA certifications.

Precept 6 requires the actuary to appropriately and timely disclose to present and prospective principals the sources of all direct and indirect material compensation the actuary or the actuary's firm has or will receive from another party in relation to an assignment that the actuary has performed or will perform for the principal. (With respect to compensation received by the firm, the actuary need only disclose sources of compensation that are known to, or reasonably ascertainable by, the actuary.)

Precept 9 requires the actuary to refrain from disclosing confidential information to another party unless authorized to do so by the principal or required to do so by law.

Precept 10 requires the actuary to perform actuarial services with courtesy and professional respect and to cooperate with others in the principal's interest.

Precept 13 requires the actuary, upon learning of another actuary's apparent, material violation of the Code, to either resolve the apparent violation with the other actuary or report it to the appropriate counseling and discipline body (in the U.S., the ABCD).

Precept 14 requires the actuary to cooperate with the appropriate counseling and discipline body (in the U.S., the ABCD), subject to applicable restrictions on confidential information and those imposed by law.