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Solicitation for Comments on the Regulations Governing the Performance of Actuarial Services Under the Employee Retirement Income Security Act of 1974 by the Joint Board for the Enrollment of Actuaries

September 27, 2004

The American Society of Pension Actuaries (ASPA) offers these comments in response to the Solicitation for Comments on the Regulations Governing the Performance of Actuarial Services Under the Employee Retirement Income Security Act of 1974 by the Joint Board for the Enrollment of Actuaries (JBEA).

ASPA is a national society of retirement plan professionals. ASPA's mission is to educate pension professionals and to preserve and enhance the private pension system. Its membership consists of more than 5,000 actuaries, plan administrators, attorneys, CPAs and other retirement plan experts who design, implement and maintain qualified retirement plans. ASPA's membership includes more than 700 enrolled actuaries.

General Comments

ASPA commends the JBEA for engaging in this review of its current regulations in regard to the enrollment and monitoring of enrolled actuaries. At this time when retirement security is foremost on the minds of many Americans, as well as members of Congress and the Administration, ASPA supports the JBEA's efforts to ensure that the provision of actuarial services meets appropriate standards.

ASPA's comments on the existing regulations and our recommendations for modifications are outlined below. The following is a general summary of the items discussed:

- I. ***Actuarial Discipline.*** ASPA believes that the JBEA has not taken a sufficiently strong role in the supervision of the provision of actuarial services and the discipline of enrolled actuaries who do not conform to the prevailing standards of conduct. ASPA encourages the JBEA to become more active in this process, and to modify its rules and regulations as needed to reconstitute itself as a source of actuarial oversight and discipline.

- II. ***Eligibility, Enrollment and Procedures.*** ASPA encourages the JBEA to review its testing procedures and structure, as well as its rules for qualifying experience, to better ensure that only qualified actuaries are obtaining enrollment status. In particular, ASPA recommends that more emphasis be given to the development of appropriate actuarial expertise and judgment, which are critical skill elements for an effective enrolled actuary.
- III. ***Continuing Education.*** ASPA recommends that modifications be made to the continuing education rules to better ensure that enrolled actuaries are up to date on funding issues as well as ethical standards. Furthermore, the regulations should be updated to better encompass new technologies available for the continuing education process. Finally, ASPA encourages the JBEA to permit actuaries to attest in their professional capacities to their completion of continuing education credit, with the establishment of an appropriate audit process to oversee compliance with the rules.

Specific Comments

I. Actuarial Discipline

Current ERISA regulations authorize the JBEA to evaluate the provision of actuarial services by enrolled actuaries and to discipline enrolled actuaries as warranted for not performing such services at the appropriate standard. To a large extent, however, this authority has not been utilized. Although most enrolled actuaries are members of an actuarial organization and are subject to that organization's discipline procedures, ASPA feels that the JBEA should not rely on these organizations in this area. To do so would have several effects. First, unlike other professionals, an enrolled actuary is not compelled to operate within certain standards by the underlying threat that failure to do so will result in the loss of his or her license to practice the profession. While the various actuarial societies have their own forms of discipline, these are not tantamount to the loss of livelihood that is appropriate in extreme circumstances. Furthermore, not all enrolled actuaries are members of societies, and those who are not members are subject to no real oversight.

ASPA Recommendation

ASPA recommends that the JBEA take such action as is needed (including a review and, to the extent necessary, the modification of existing regulations) to reconstitute itself as a source of actuarial oversight and discipline for all enrolled actuaries.

By having the JBEA, which is a segment of the government, be accountable for the monitoring and discipline of actuaries, actuaries will be guaranteed a proper level of procedural due process. Representation of the actuary by legal counsel is permitted, for example, and the burden of proof is consistent between the accused and the accuser. Furthermore, the IRS, DOL and PBGC will be more at ease in making recommendations to the JBEA's disciplinary arm.

While the JBEA is not made up entirely of pension actuaries, the advisory committee is, and it includes representatives from all actuarial societies. Therefore, the committee is perfectly poised to provide the appropriate level of input as to actuarial standards and the proper disciplinary result for a violation of those standards. This committee can be the reviewer for

all disciplinary issues or, if necessary, it could appoint one or more subcommittees for this purpose. The committee or its delegates could then make appropriate disciplinary recommendations to the JBEA for action.

As the grantor of enrollment status, the JBEA is the appropriate body for determining when an errant actuary's activities cross the professional line, making suspension or disenrollment the proper remedy. In this manner, the JBEA can protect the professional status of the actuarial community, as well as the public in this time of retirement insecurity.

Finally, ASPA recommends that the JBEA periodically publish information as to the number of complaints received, the type of complaints, the number of actuaries exonerated after investigation, the number of actuaries disciplined and the nature of the discipline in relation to the type of complaint. By advising the community of the disciplinary process, the JBEA will accomplish two tasks: (a) reassuring the public that complaints to the JBEA are being acted upon; and (b) encouraging actuarial compliance with professional standards and ethics through communication of the ramifications of noncompliance.

II. *Eligibility, Enrollment and Procedures*

A. Qualification Testing

Under current JBEA regulations, there are two tests that must be passed in order for a candidate to become an enrolled actuary. One test demonstrates knowledge of actuarial mathematics and the other demonstrates pension actuarial expertise. The regulatory requirements of these two enrollment examinations have not been modified over time to accommodate the changing pension environment. In addition, this two-exam structure has caused a confusing illusion under which having examinations that are named EA-1, EA-2A and EA-2B constitutes having two (not three) tests.

ASPA Recommendation

ASPA recommends that Regulation Sections 901.13(c) and (d) be modified to remove the specific references to material covered in examinations and to transfer that responsibility to the JBEA. This modification will provide more flexibility to the JBEA to structure the number and subject breadth of the enrollment examinations so that the objective of ensuring that candidates have sufficient knowledge of both actuarial science and pension mathematics is fulfilled.

This issue is particularly acute in the area of pension law and mathematics as actuaries are increasingly involved in matters that are not directly related to defined benefit plans, such as general testing and cross-testing under Internal Revenue Code Section 401(a)(4). As the law and the pension environment change, and actuaries are called upon to make professional contributions in non-defined benefit plan areas, the JBEA should be able to modify the examination program to require that candidates demonstrate the appropriate knowledge.

For example, the following language could be substituted for Regulation Sections 901.13(c)(1) and (d)(1):

The director should establish examinations that test (1) actuarial mathematics as it applies to qualified retirement plans; and (2) ERISA and related regulations as necessary for the performance of the duties of the enrolled actuary.

This broader language should give the JBEA the flexibility it needs as things change.

B. Qualifying Experience

Under Regulation Section 901.13(b), to become an enrolled actuary, a candidate must have either: (a) 36 months of “responsible pension actuarial experience” or (b) 60 months of “responsible actuarial experience,” including at least 18 months of “responsible pension actuarial experience.”

It is common for actuarial candidates to be denied any involvement in the analysis and decision making that is necessary for an enrolled actuary to perform his or her professional tasks. These budding actuaries tend to work solely on the mechanics of actuarial work, without developing the necessary professional judgment.

ASPA Recommendation

ASPA recommends that the JBEA modify its regulations to require that the experience gained by an actuarial candidate be reviewed and certified by an enrolled actuary. This requirement, similar to that generally in existence for certified public accountant candidates, will ensure that the enrolled actuary candidate receives the proper training, not just in the mathematics of actuarial calculations, but also in the judgment and decision-making requirements of the profession.

III. ***Continuing Education***

A. Amount of Continuing Education

Current Regulation Section 901.11(e) requires that enrolled actuaries complete 36 hours of continuing education for each three-year cycle, of which 18 hours must be comprised of core subject matter.

The amount of continuing education required of enrolled actuaries is significantly less than that needed for other business professionals and is not sufficient to ensure that enrolled actuaries remain educated in their profession.

ASPA Recommendation

ASPA recommends that the regulations be modified to require at least 45 hours of continuing education per enrollment cycle. This change should be effective as of the beginning of the next enrollment cycle, so as not to disturb continuing education processes at the time that the regulation modification is adopted.

B. Composition of Continuing Education

Under current JBEA rules, continuing education is divided into three categories: core, non-core and no credit. The third category does not count for an enrolled actuary's continuing education.

ASPA members have found the categorizations of core and non-core to be confusing. Furthermore, ASPA, itself, has found that categorizing the continuing education programs it offers for JBEA credit has been difficult.

When the various areas of continuing education are examined, it appears that there are three types of programs that should generate continuing education credit for enrolled actuaries:

Category 1: retirement plan rules of any sort (including, but not limited to, issues covered under Code Sections 401 through 420 and ERISA, including DOL rules).

Category 2: funding issues in relation to defined benefit plans.

Category 3: actuarial ethics.

All three of the above areas of education should be required of enrolled actuaries each enrollment cycle. The first category permits actuaries to stay abreast of all qualified plan issues, including those for defined benefit plans and those for the ever-expanding categories of non-defined benefit plans in which actuaries are called upon to give advice. The second category provides actuaries with the knowledge that they need to perform the core tasks of pension actuarial science, such as developing contributions for defined benefit plans. The final category, which is often ignored by many actuaries at the current time, gives actuaries an understanding of what constitutes actuarial professionalism and provides a structure in which the actuary makes his or her professional decisions. This last category is particularly critical as the public becomes more aware of plans' funding status, especially in the more unstable industries of any given economic time.

ASPA Recommendation

Categories 2 and 3 above are critical educational areas for enrolled actuaries, and must be part of the makeup of continuing education each and every enrollment cycle. Therefore, ASPA recommends that each enrolled actuary be required to spend three hours of the required 45 hours each enrollment cycle in each of those two categories. Furthermore, the regulations should permit the designation by the JBEA of additional mandatory areas of continuing education as it deems appropriate.

The balance of the 45 hours requirement may be spent in any of the three listed categories, thereby ensuring a more well-rounded actuarial community.

C. Means of Obtaining Continuing Education Credit

ASPA is appreciative of the difficulties faced by the JBEA in ensuring that the continuing education requirement is actually met. Clearly, this may be an area of significant abuse by less scrupulous individuals.

On the other hand, ASPA is respectful of the professional integrity of enrolled actuaries, and the treatment of this issue by comparable professions. An overly aggressive micro-management of the continuing education monitoring process creates an atmosphere in which no one—enrolled actuaries included—believes that the affected individuals should be required to maintain their own standards of reliability and professionalism.

As a result, it is appropriate for actuaries to take on the ethical responsibility for attesting to their completion of continuing education credit.

ASPA Recommendation

ASPA recommends that actuaries be required to sign in at seminars they attend. This sign-in can be done at the beginning or the end of the session. In addition, actuaries should be responsible for retaining records and handouts relating to the continuing education programs they attend. At the end of the enrollment cycle, the actuary will be required to attest to his or her completion of the continuing education requirements. This attestation is the individual's professional oath and, if it is discovered to be incorrect on audit, that individual's enrollment status would be subject to revocation.

ASPA further recommends that the JBEA undertake random audits of continuing education records of enrolled actuaries to ensure compliance with the underlying ethical standards of the attestation.

The risk of fraud in this area is minimized by requiring a certain portion of the continuing education process to be fulfilled in "active" education. This would include attending seminars or classes in person, as well as through webcasts and telecasts. ASPA recommends that no more than twelve hours of the 45 hours of required continuing education credit to be fulfilled in "passive" programs, such as listening to audio tapes. The proof of the actuary's completion of passive programs should be his or her attestation of completion.



ASPA's Task Force for the Review of the Joint Board Regulations of the Government Affairs Committee prepared these comments. Please contact us if you have any comments or questions regarding the matters discussed above.

/s/

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