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To IRS REG-159704-03
To whom it may concern.

Re: Proposed amendments to 20 CFR 901 published in the Federal Register on September 21, 2009.

This communication contains my comments on the proposed revision to the regulations under 20 CFR 901 published in the Federal Register of September 21, 2009 by the Joint Board for the Enrollment of Actuaries (Joint Board).

I have been an enrolled actuary (EA) in continuous active status since 1980. My employer has been a qualifying sponsor under the Joint Board regulations continuously since 1988. Among my responsibilities to my employer is the verification of probable creditability of learning sessions for EA Core or NonCore purposes and ensuring my employer meets all requirements for maintaining qualifying sponsor status in good standing. I emphasize that my comments are personal and do not necessarily reflect the views of my employer or of any of the actuarial bodies of which I am a member. I am a Fellow of the Society of Actuaries, a Fellow of the Institute of Actuaries, and a Member of the American Academy of Actuaries.

I believe many of the proposed revisions to the regulations are excellent and commend Carolyn Zimmerman and others for these proposed revisions. I believe some of the revisions require clarification, some require modification, and some should not be adopted.

Initial Application for Enrollment

Under 901.1(i), the proposed regulations require an applicant for enrollment to provide information on pension actuarial experience signed by the applicant's supervisor; if the applicant's supervisor is not an EA, then it must be signed by an EA with knowledge of that experience. Nothing in the current or proposed regulations places any obligation on an EA to sign any form to support a candidate for enrollment. During the period that a candidate for enrollment earns the necessary pension actuarial experience, that candidate can work for several different employers, under different supervisors and with different EAs aware of the candidate's experience. It is possible that animosity may arise between a candidate and a supervisor. It is also possible that a supervisor may die, suffer from severe memory loss, or be otherwise inaccessible. To ensure that candidates can present valid support for claimed pension actuarial experience, I believe the regulations must require each EA to sign such a statement verifying the pension actuarial experience. One way to ensure efficient provision of such statements at the time a candidate applies for initial enrollment as an EA would be to require each EA to provide annual certification to a potential candidate, and to provide it for shorter periods on changes in supervisory responsibilities or the candidate's moving from one employer to another.

Renewal Deadline

Under 901.11(d)(1) and 901.11(e), timely renewal requires the EA to submit a signed renewal form by the last day of February preceding the renewal date that certifies completion of the required hours during the three year period ending on the December 31 that precedes the renewal date. The proposed regulations give examples, but none cover the situation where an EA has insufficient hours by 12/31 and earns sufficient hours in the next two months, or next three months.

It seems to me there are two important aspects of efficient timely renewal.
- First, that no credit hours are used for more than one enrollment cycle.
- Second, that renewal forms are received by March 1.

The requirement that hours be earned by 12/31 is irrelevant to ensuring that each EA has the necessary EA credit hours. Many years ago, Les Shapiro, first executive director, wrote me a letter in which he expressed the view that if a candidate for renewal earned the necessary hours by the end of February, the candidate should be allowed to renew timely, provided none of the hours earned after 12/31 were used for a later renewal of enrollment.

Therefore, I recommend that the proposed regulations be changed as follows:
In 901.11(e) December 31, 2010 should be changed to February 28, 2011, December 31, 2013 should be changed to February 28, 2014, and "each three year period" should be changed to "each three year and two month period.". The regulations should stress that credit hours earned during the final two months of such a period can be used once only, either for the period ending on the last day of February or the period beginning on January 1.

The examples should be expanded to show someone who earns the necessary hours by the last day of February who submits a timely renewal notice by the last day of February and who is renewed on April 1.

I recommend that for a candidate who has insufficient hours by the last day of February but who earns enough hours by the last day of March and who submits a completed renewal application by the last day of March, renewal should be granted effective May 1. The examples should also be expanded to show such a person applying for renewal on March 31 and being placed on inactive status from April 1 through April 30, with active status renewed effective May 1.

Required Physical Attendance

As currently written, one third of the required hours must be earned by being physically present in the same location as the speaker at Formal Programs defined in 901.11(f)(2)(ii)(A). I have attended many programs in the same room as a speaker and many webcasts in which I have been able to interact with the live speaker by asking questions or making comments on the phone or by other communication technologies, for example, email and web conversations. Physical presence in the same room as the speaker provides no enhancement of the learning process. What matters is the ability to interact with the speaker.

I recommend the regulations be rewritten to provide for two different kinds of webcast, Live webcasts, and Library webcasts. A Live webcast is a presentation that includes teleconferencing in which each audience member can interact live with the speaker through telephone or other live communication. A Library webcast is a presentation that includes teleconferencing in which audience members cannot interact live with the speaker through telephone or other live communication. Audience members at a Live webcast should be treated for all purposes as meeting the physical presence requirements of 901.11(f)(2)(ii)(A). Audience members at a Library webcast should earn credit under 901.11(f)(2)(ii)(C).

If final regulations require EAs to be physical present in the same room as a speaker to earn any portion of the necessary credit hours, such a requirement would impose a significant burden on EAs who work in small firms or whose employers impose strict limits on live conference attendance. At a time when everyone is encouraged to have as small a carbon footprint as possible, it is inappropriate for the Joint Board to impose a rule that would require many EAs to travel to conferences to earn some hours of EA credit in the same room as the speaker.

Three person rule

The only purpose envisaged when the three person rule was adopted in 1988 was that such a rule would prevent an EA from earning credit for a presentation made to people who were not actuaries, but which included one actuary and which could, tangentially, be regarded as having creditable content. Since its adoption, some sponsors have used the rule as a method of validating attendance – by requiring an attendance sheet that shows the names of each attendee and that is signed by three attendees who attest to the attendance of all persons named on the sheet.

I urge that the proposed regulations be modified to clarify the three person requirement for physical attendance, Live Webcasts, Library Webcasts, and combinations thereof.. I recommend this clarification be as follows:
A live presentation meets the three person rule if the live audience includes three people engaged in substantial pension actuarial work (TPEISPAW).
A Live webcast meets the three person rule if the total logged in audience includes TPEISPAW.
A Library webcast meets the three person rule if the total logged in at any time during the current cycle includes TPEISPAW.
A presentation that includes a live audience in the same room as the speaker and a Live webcast meets the three person rule if the total live audience in the same room as the speaker and the logged in audience to the live webcast together includes TPEISPAW.
A presentation that includes a live audience and that is later available as a Library webcast meets the three person rule if the total live audience and the total audience logged in to the library webcast includes TPEISPAW.

Transmission Problems

The proposed regulations provide no guidance on how to handle credit for a web-based session if technical problems prevent continuous live attendance by some audience members. I recommend that the regulations be expanded to provide that if any of a live webcast is attended live, and transmission is curtailed or interrupted, then full credit for the intended length of the live webcast should be earned by an attendee who was logged in for the whole period of transmission, and who logged in to a library webcast of the same program at a later date.

Record retention

The preamble to the proposed regulations provides that any EA subject to audit of EA credit need provide the executive director with only the attendance certificate(s) for the claimed EA credit sessions, and the sponsors would have to provide documentation of the creditability of such sessions. This presents no problem for sponsors when they use material developed by their own in-house speakers. It may present a problem to sponsors where speakers are not in-house speakers, and for sponsors who use third party webcasts with clear creditworthy content, but have a temporary license that permits transmission of the webcast material to a live audience, but does not permit retention of the webcast or right to access it at a future date. I urge the executive director to develop appropriate document retention requirements with existing qualifying sponsors so as to permit the widest possible availability of creditable sessions, while not imposing obligations to retain access to third party web portals or proprietary presentation materials.

Speaker Credit

Under 901.11(g)(2)(i) extra credit is provided for discussion leaders and speakers, while under 901.11(g)(2)(iv) extra credit is not provided for panelists, moderators, or others who are not required to prepare substantive subject matter for their portion of the program. The use of designations such as "panel members" and "speakers" to distinguish between those who get extra credit and those who do not can unreasonably penalize some panel members and unreasonably reward some speakers. I have attended session where each panel member had to prepare substantial background notes to answer an array of potential questions; I have also attended sessions at which the speaker prepared no background notes but just showed slides of the pages of a Schedule B(Form 5500) and discussed each entry from the instructions.

Proper recognition of the extra time and work required of a speaker or panel member should be achieved by revising 901.11(g)(2) to provide four extra credit hours to speakers, panel members and others who personally prepared substantial material for the presentation, either as a handout, slideshow, or as background material for use in answering potential questions if the sponsor is provided with a copy of such material.

I recommend that only one extra speaker credit hour be granted to anyone who gives a presentation, or who was available as a panel member, but who does not prepare substantial background material. This extra hour would reflect the extra effort needed to be prepared to give the presentation or answer questions. That would leave only moderators as those who earned no extra speaker credit.

The language of 901.11(g) should clarify that the extra speaker credit does not count as extra hours personally present at a Formal Program under 901.11(f)(2)(ii)(A).

The Snitch Rule

Under 901.20(b)(3) an EA, upon learning of another EA's material violation of this section, shall report the violation to the Executive Director. For the reasons set out below, this paragraph should be deleted entirely.

This is an example of the road to hell being paved with good intentions. We all agree that the profession would be better if bad apples were removed. At first glance, the rule seems so innocuous and well meant. But it is the rule that the STASI and Erich Honnecher imposed throughout East Berlin, in which everyone had to spy on everyone else – for the good of the city. It is the rule adopted by Himmler, on taking over the Gestapo, and by Felix Dzerzhinski on founding the KGB.

Even if one ignored its ignoble pedigree, it clearly breaches basic constitutional rights and religious freedoms.
Consider an attorney who is also an EA and who is hired by an EA client, who tells the attorney about wrongdoing by the client and others. This rule would destroy the constitutionally mandated attorney client privilege.
Consider a Catholic priest who is also an EA and who hears a confession from an EA who admits to serious wrongdoing and mentions other EAs who also did wrong. This rule would destroy the sanctity of the confessional.
Consider a member of the ABCD, who is an EA, and who learns of serious wrongdoing. Members of the ABCD are required to maintain absolute secrecy on matters before them. This rule would place each ABCD member who was also an EA in the impossible position of breaching the confidentiality required of the ABCD position in order to maintain EA status.
Consider two EAs who are married to each other. If one spouse tells the other of serious wrongdoing, this rule would destroy the constitutionally guaranteed spousal protection that prevents one spouse from being required to testify against the other spouse..

Nothing in the proposed rule indicates the standard by which one is to measure "learning" of a "material violation." At what level of knowledge does an EA become sufficiently aware of the nature of the action to form an opinion on it having been performed and being a material violation? Suppose at an EA meeting, someone stands up and admits performing a certain act – which might appear to be a material violation. The proposed regulation would oblige every EA who heard the statement to notify the Executive Director. If the Executive Director has a list of attendees at that EA meeting session, presumably anyone who failed to report the potentially rogue EA would themselves be subject to discipline for failure to comply with 901.20(b)(3). It is comparable to requiring everyone of the live television audience who saw Jack Ruby shoot Lee Harvey Oswald to submit a witness report to the Dallas police department. The resources of the executive director cannot possibly handle the potential reports called for by this proposal. I strongly recommend that 901.20(b)(3) be deleted and suggest the executive director limit the call for reports to those readily available from the IRS, DOL, and PBGC..

Conflict of Interest

Under 901.20(d), written consent must be given by every known prospective principal for an EA to work in a situation that contains real or potential conflict of interest. This is absurd. It grants veto power to any principal. The rule should be changed to provide either for consent by a simple majority, or stated super majority of known principals, or should provide for the principals to agree on the majority required for the EA to perform services, and permit performance of services by an EA with a real or potential conflict of interest if that agreed majority has consented.

Solicitations

Under 901.20(g), the proposed regulation eliminates the provision in the current regulation that specifically permits use of the EA designation on a business card, letterhead, and listing of employees of a firm. I urge that specific permission for such forms of solicitation to be retained.

ERISA is a federal law, not a state law. Nothing within the purview of the Joint Board covers performance of any services under any state law. The Joint Board has no control over the enactment of any state law. For a period of time, the laws of one state prohibited enrolled actuaries from using the designation EA. I strongly urge deletion from 901.20(g) of all references to any State Law.

I call for a public hearing on the proposed regulation.

I would be happy to expand on the above comments. I can be reached by phone at (212) 330 1390, and by email at jan.harrington@buckconsultants.com

Sincerely

(Signed) JAN R HARRINGTON

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