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November 20, 2009

Subject: Proposed Amendments to 20 C.F.R. Part 901

The purpose of this letter is to provide Mercer's comments on the Joint Board of Enrolled Actuaries' (JBEA) proposed amendments to 20 C.F.R. 901 relating to the enrollment of actuaries under the Employee Retirement Income Security Act of 1974 (the "Proposed Regulation"). Mercer is one of the largest employers of pension actuaries in the United States with more than 400 Enrolled Actuaries on staff. We appreciate the opportunity to comment on the Proposed Regulation.

We commend the Board for its work in promulgating the Proposed Regulation. While for the most part we believe the proposals are reasonable, we have concerns about the proposed performance standards under 901.20, the proposed requirement under 901.11 to attend sessions in person and certain other elements of the proposed regulations, as set forth below.

### Section 901.20(b) – Professional duty

The Proposed Regulation would require every Enrolled Actuary to report every material violation of Section 920 of which he or she learns to the JBEA Executive Director. We believe that this requirement places an inappropriate burden on the actuary and is problematic for a number of reasons, including:

1. An actuary is unlikely to have access to all of the information necessary to make a determination as to whether a suspected violation is material or not, or even whether another actuary's conduct was in fact a violation. In addition, there is no commonly understood meaning of "material" for these purposes.
2. Even if an actuary has all the information necessary to make such a determination (which we think would be unlikely in most cases), we believe it inappropriate to require actuaries to become in effect an investigative arm of the JBEA. To our knowledge, only in rare cases are members of other professions required by law to report suspected regulatory violations by their peers. We believe the JBEA should identify other measures to confirm compliance with the regulations.

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3. The proposed violation disclosure requirement, if adopted, will have the effect of reducing cooperation among actuaries. For example, terminating actuaries might be less likely to provide all necessary information to ensure a smooth transition to a new actuary if they believe that their every act will be viewed in light of whether it is reportable. Ultimately, those who employ actuaries will suffer to the extent that cooperation is impeded.
4. The proposed violation reporting requirement conflicts with Precept 13 of the Code of Professional Conduct of the American Academy of Actuaries (CoPC) by requiring a report even where the perceived violation is cured. Precept 13 specifically does not require a report in such instance and we believe if the Proposed Regulation is adopted then there should be no requirement to report if the actuary believes that the violation has been cured.
5. The proposed violation reporting requirement could be interpreted to conflict with Precept 13 of the CoPC in that it does not clearly allow for an exception in the situation where the actuary would be divulging confidential information when reporting the suspected violation. Much of the information obtained by actuaries during the course of their work is proprietary or confidential to their clients, and actuaries are expected, both by professional ethics and often by contract, to maintain those confidences. Forcing actuaries to disclose confidential information would result in violations of professional standards and breaches of contractual commitments.

## Section 901.20(d) - Conflicts of interest

We have a number of comments on the Proposed Regulation as it pertains to disclosure of conflicts of interest:

1. The Proposed Regulation would require *written disclosure and consent* for all actual *and potential* conflicts of interest. While we support the proposed requirement that disclosure of *actual* conflicts of interest be made in writing, a requirement to disclose any *potential* conflicts would not be meaningful or necessary in the complex world in which pension plans and actuaries operate. For any large pension plan, there is never perfect alignment of the interests of the plan administrator, the plan trustees, plan fiduciaries, collective bargaining representatives and participants. For a variety of reasons, each of those stakeholders may desire that the actuary's work produce a different outcome. This

potential divergence of interests is known to all stakeholders. Requiring written disclosure by the actuary and consent of all such stakeholders of the potential for such conflicts would serve no practical purpose.

2. The Proposed Regulation does not incorporate a materiality standard. As the list of stakeholders receiving disclosures and the scope of the disclosure increases (if, for example, potential conflicts must be disclosed), the need for a materiality standard becomes more evident. We believe that actuaries should be required to disclose only conflicts of interest that they believe could materially impact their ability to be objective in the performance of services. In fact, the CoPC contemplates a materiality standard across all of its precepts, including those related to conflicts of interest.
3. The Proposed Regulation requires disclosure of conflicts of interest be made to present and known prospective principals whose interest may be affected by such conflicts. We support the requirement for disclosure in writing of material conflicts to the persons listed in the current regulation whose interests would be affected by the conflict. In the Proposed Regulation, however, the definition of “principal” is unclear. We believe that the term must be defined in a limited way to make the conflict provision workable, and suggest using the definition in the CoPC: “A client or employer of the Actuary.”
4. We oppose the proposed requirement that consent be obtained in writing from those persons receiving disclosure. We believe the requirement to obtain written consents from all of these persons will significantly delay the ability for an actuary to begin its work, and will put additional pressure on the actuary to complete the work in a shorter time frame, potentially resulting in a lower quality result. We believe a more effective approach would be to permit the actuary to proceed with the services after providing the disclosures in writing unless a disclosure recipient whose interests are affected by the conflict objects, within a reasonable period of time following receipt of such disclosure, to the performance of the services by the actuary.
5. Under the Proposed Regulation, before the actuary may perform the services the actuary must reasonably believe that he or she can act “fairly” in the event of a conflict of interest. We believe a better word to use would be “objectively.” Actuaries have no obligation to treat affected parties in a fair or similar manner. Actuaries should, however, not allow conflicts of interest to impair their objectivity in the performance of their duties.



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In sum, we believe that the regulation should require written disclosure only of *actual* conflicts of interest that the actuary reasonably believes are *material* to the actuary's ability to perform the services in an objective manner. Consent of the recipients of that disclosure should not be required, and only those persons currently enumerated in the rule should be required to receive the disclosure.

## Section 901.20 (e) – Assumptions, calculations and recommendations

We believe that the plan sponsor should retain some responsibility for the reasonableness of individual assumptions provided that the actuary believes that the assumptions in the aggregate continue to create a reasonable result. Furthermore, we believe that the proposed requirement that the actuary ensure that all assumptions be individually reasonable, as this requirement is currently written, would create great difficulties for many actuaries. For example, an actuary may not believe that an assumption that is prescribed by law is reasonable. At a minimum the regulations should address this issue. A better approach, we feel, would be to replace the language in the Proposed Regulation with the language from Actuarial Standard Of Practice 4 that includes exceptions for prescribed assumptions.

## Section 901.11 – Enrollment procedures

The Proposed Regulation at 901.11 would require "...no less than one-third of the total hours of continuing education credit required for an enrollment cycle must be obtained by attending *in person* a formal program or programs within the meaning of paragraph (f)(2)(ii)(A) of this section." (Emphasis added.) To qualify as a formal program, the qualifying session must be attended "by at least three individuals engaged in substantive pension service in addition to the instructor, discussion leader or speaker".

A great many continuing education programs are available today through webcasts and other electronic means, and the availability of such programs becomes ever more important as employers of actuaries seek to contain costs while continuing to provide high quality services to clients. Requiring "in-person" attendance seems unnecessary given such technology, and could impair individuals' ability to satisfy continuing education requirements. Furthermore, our actuaries are located in multiple towns and cities and relevant in-person continuing education is not necessarily available in every town and city. Permitting credit for webcasts and other electronic continuing education programs would allow our actuaries to attend those programs that are most relevant for their specific client base regardless of the actuary's location. At the

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very least, in-person attendance at a webcast requiring sign-in with at least three individuals engaged in substantive pension service should be deemed attendance at a formal program.

We would be happy to meet with you or provide further information with respect to our comments.

Sincerely,

A handwritten signature in black ink that reads "Ethan E. Kra".

Ethan E. Kra, FSA, MAAA, FCA  
Enrolled Actuary 08-02865  
Worldwide Partner and Chief Actuary - Retirement

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