RECORD OF SOCIETY OF ACTUARIES
1975 VOL. 1 NO. 3

# THE ENROLLED ACTUARY AND ERISA RESPONSIBILITIES

*Chairman: EDWIN F. BOYNTON. Panelists: MARY H. ADAMS, LYND T. BLATCHFORD, DONALD S. GRUBBS, JR.*

1. Enrollment of actuaries.
2. Actuary on behalf of participants?
3. The actuary as fiduciary?
4. Personal liability and liability insurance.
5. Conflicts of interest.
6. Professional conduct.

MR. DONALD S. GRUBBS, JR.: ERISA states that the Joint Board is appointed by the Secretaries of Labor and the Treasury. The By-laws of the Joint Board require that three members, including two actuaries, be appointed by the Secretary of the Treasury and that two members, including one actuary, be appointed by the Secretary of Labor. The Board presently consists of Rowland Cross, Edward Daly, Forest Montgomery, Ellis Scott and myself. In addition the Pension Benefit Guaranty Corporation has a non-voting representative, William Moore. The Board has appointed Leslie Shapiro as its Executive Director.

Part of the Board's activity has necessarily been with its internal administration. It adopted By-laws, published the required statement of organization and the required statement under the Freedom of Information Act in the Federal Register, and took care of other administrative measures.

From the outset, those of us concerned with enrollment have sought the viewpoints of actuaries outside government. In the past year, representatives of IRS and the Department of Labor have met with a number of actuaries interested in this problem, including some meetings with representatives of the American Academy of Actuaries. After the Joint Board was established, we held open public meetings, at which my three fellow panelists all testified. The Academy presented a position paper to the Board. In addition, the Board has received written comments from a number of individual actuaries, as well as from several actuarial clubs.

The Joint Board prepared proposed regulations, which include the requirements for enrollment for persons applying in 1975 and Rules of Conduct for enrolled actuaries. After approval by the Secretary of Labor and the Secretary of the Treasury, these were published in the Federal Register on May 9. The public is invited to submit comments to the Executive Director up to May 29, and public hearings will be held in Washington on June 2, and continuing on June 3 if necessary. After considering all the comments, the Joint Board will prepare final regulations for approval by the Secretaries of Labor and the Treasury, after which they will be published.

Shortly after publication of the regulations, application forms will be made available. These will be mailed to every member of the American Academy of Actuaries, the American Society of Pension Actuaries, the Conference of Actuaries in Public Practice and the Society of Actuaries. With the application for enrollment, the Joint Board will also provide information about the examination to be given to those who do not otherwise qualify for enrollment. We expect to give the examination in 52 locations around the country, in late summer and again in February. Work on the application forms, the examination, and administrative procedures is well under way.

The proposed regulations do not consider the requirements for enrollment in 1976 and later, nor do they deal with suspension and termination of enrollment.

The Rules of Conduct contained in the proposed regulations contain a number of similarities to the Guides to Professional Conduct of the Academy, the Conference, and the Society.

Regarding requirements for enrollment for those applying in 1975, the proposed regulations require either at least 36 months of responsible pension actuarial experience, or at least 60 months of total responsible actuarial experience which includes at least 24 months of responsible pension actuarial experience. Only experience within 15 years prior to application is considered. "Actuarial experience" means the performance or direct supervision of services involving the application of principles of probability and compound interest to determine the present value of payments to be made upon the fulfillment of certain specified conditions and/or the occurrence of certain specified events. "Responsible actuarial experience" means actuarial experience involving significant participation in the determination that the methods and assumptions adopted and the procedures followed are appropriate in the light of all pertinent circumstances, and demonstration of a thorough understanding of the principles and alternatives involved. "Responsible pension actuarial experience" means responsible actuarial experience involving valuations of the liabilities of pension plans, wherein the performance of such valuations requires the application of principles of life contingencies and compound interest in the determination, under one or more standard actuarial cost methods, of such of the following as may be appropriate in the particular case: normal cost, accrued liability, payment required to amortize a liability or other amount over a period of time, and actuarial gain or loss.

In addition to satisfying the experience requirement, applicants must (a) have qualifying formal education, or (b) have organizational qualification, or (c) pass an examination given by the Board. The qualifying formal education requirement is satisfied by applicants with a bachelors or higher degree in actuarial science, or a bachelors or higher degree in mathematics, statistics, or computer science provided at least 6 semester hours or 9 quarter hours of life contingencies or courses requiring the use of life contingencies were included. Organization qualification is met by being a Member of the American Academy of Actuaries, a Fellow or Member of the American Society of Pension Actuaries, a Fellow or Member of the Conference of Actuaries in Public Practice, a Fellow or Associate of the Society of Actuaries, or, under certain conditions, a member of other actuarial organizations. Qualification through admission to any of the organizations after March 1, 1975 is subject to the Joint Board determining that the admission standards were not lower than they were immediately prior to March 1. The examination required of applicants who do not satisfy the educational qualification or the organizational qualification will cover actuarial mathematics and methodology related to pension plans.

The Joint Board gave considerable thought and study to the development of the proposed regulations. In publishing them, it presented what it believed to be the best set of solutions. But the Board keeps an open mind and will give due consideration to all comments received in writing or at the hearing.

Why did we arrive at these conclusions?

The Joint Board did not operate in a vacuum. The function of an administrative body is to administer the law as passed by Congress. On matters where the law itself is not entirely clear, the body must seek to determine the intent of Congress in enacting the law. In addition, the Joint Board needed to develop regulations that would be approved by the Secretaries of Labor and the Treasury.

First let's look at the Act itself. It provides that the Joint Board "shall, by regulations, establish reasonable standards and qualifications for persons performing actuarial services" for pension plans. It indicates that the standards should be different for persons applying before January 1, 1976 and those applying on or after that date. For persons applying in 1976 and later,

the Act states that the requirements shall include both a period of responsible actuarial experience and also education and training in actuarial mathematics and methodology, as evidenced by a degree in actuarial mathematics, or by passing an examination in actuarial mathematics given by the Joint Board, or by passing other examinations deemed adequate by the Joint Board. But for persons applying before 1976, the Act states only that the requirements shall include a period of responsible actuarial experience with pension plans; there is no mention of education and training, or of examinations. Some have indicated that they think this means that, for persons applying prior to 1976, the Joint Board should consider only experience and should not give any consideration whatsoever to actuarial society membership, examinations, or actuarial education. While that interpretation may be legally possible, the Joint Board felt that the problems of verifying and evaluating experience made it necessary to have supplementary bases to determine the qualification of actuaries. But the Act leaves no doubt that lower standards were intended for those applying before 1976.

Now look at a bit of the legislative history. Some early versions of the bill, including the version approved by the House Labor Committee, defined a qualified actuary as an actuary who is a member of the American Academy of Actuaries or any other organization which the Secretary of Labor determines has equivalent standards, or who meets qualifications established by the Secretary. Following a strong lobbying effort by the American Society of Pension Actuaries, Congress decided to reject that approach and to adopt the language now in ERISA. For those of you familiar with the Academy position on enrollment, it appears to be essentially the same as the position rejected earlier by Congress.

Now let us look at the House-Senate Conference Committee Statement, the final Congressional report on ERISA. It states, "With respect to persons who perform actuarial services for smaller and simpler plans, the conferees anticipate that, to the extent feasible, the standards for enrollment will make it possible to use standard actuarial tables and standard earnings assumptions whether or not the actuary's training includes the highest level of actuarial skills. The limited number of persons with a high level of actuarial skills makes it desirable that the standards acceptable for persons examining smaller and simpler plans need not be as restrictive as in the case of those examining larger plans."

The Board recognized that smaller plans are not necessarily simpler plans. For a variety of reasons, we determined it was not feasible to have two classes of actuaries, one of which was limited to working on smaller and simpler plans. The Academy has expressed agreement in rejecting the two-tier approach. But we are left with a clear intent of Congress to allow persons without the highest level of actuarial skills to continue to practice their trade, an intent directly related to an effective lobbying effort of persons who were concerned that they would lose their livelihood.

While the approach taken in the proposed regulations is not the only possible approach, the Board is limited to solutions which carry out the intent of Congress. An approach which does not follow the intent of Congress is not likely to be approved by the Secretaries of Labor and the Treasury, and is not likely to be upheld in court against those contesting it.

Many Academy Members have expressed concern over the enrollment of Fellows and Members of the American Society of Pension Actuaries, commonly called ASPA. ASPA includes approximately 1400 persons in four classes of membership: Fellows, Members, Associate Members and Associates. Only the two top categories, less than 25% of the total, would come in under the grandfather provision.

Many of us used to ridicule the admission standards of ASPA in the 1960's, when it admitted persons who passed a one-question examination administered by mail. Many are not aware of the very significant progress they have made

since 1970. In 1974, they gave a series of 5 examinations. The first 3 were required to become a Member and all 5 were required to become a Fellow. The syllabus is impressive, including many of the texts on the Society of Actuaries' syllabus. And the pass ratio for the third examination on pension mathematics, which is required to become a Member, indicates high standards. In 1975, their education and examination program has been further expanded to 8 examinations. While it might be unrealistic to expect that, in less than 10 years of existence, ASPA would have an education and examination program matching that of the Society of Actuaries, I think that no one can objectively examine their program today and fail to be impressed with their progress. After all, in 1889 the Actuarial Society of America did not have any examinations.

But would not the proposed regulations admit persons who became Members of ASPA by the old mail-order examination? Yes. I understand that the 293 Fellows and Members include 108 persons who were originally admitted by that examination. A few of these 108 have since passed the new examinations in order to become Fellows of ASPA.

Also grandfathered in were some Members of the American Academy of Actuaries and some members of the Conference who were admitted solely on the basis of experience rather than by examination, and this number includes some of our finest actuaries. Remember that ERISA also requires responsible actuarial experience, and no one, regardless of membership or lack thereof, is to be enrolled without it.

The Rules of Conduct in the proposed regulations are intended to promote a high level of professionalism by all enrolled actuaries, and the Board can suspend or terminate the enrollment of anyone who fails to discharge his duties under ERISA or whom it finds does not satisfy the requirements for enrollment as in effect at the time of enrollment.

I want to sincerely invite each of you to provide your suggestions to the Joint Board on how we can better carry out the provisions of the Act and the intent of Congress.

What is the overall effect of enrollment? It is to substantially narrow the number of people providing actuarial services. Today, my eleven-year-old son could sign a pension plan valuation report. When actuarial reports are required under ERISA, a number of those today purporting to be actuaries will not be able to sign.

CHAIRMAN EDWIN F. BOYNTON: Several members of ASPA became members by completing the one-question, open-book examination and remitting $15 or $20. While we are not necessarily saying they are unqualified, there is considerable doubt that answering one particular question would prove they had sufficient actuarial qualifications. Admittedly, some Academy Members entered without satisfying a specific education or examination criteria; but these persons were subject to a thorough review by the Admissions Committee to assure that the Academy would maintain high standards for anyone who would become a Member.

MR. GRUBBS: One needs to place this in the context that we do require responsible actuarial experience regarding pension plans and, therefore, are going to be looking at people's experience. We also look at it in the context of the overall intent of Congress. There is no absolutely perfect solution and this is a level of imperfection that we can live with in regards to the number of people admitted under that standard.

CHAIRMAN BOYNTON: Mr. Grubbs mentioned that the Academy expressed agreement in rejecting the two-tier approach. The proposed regulations, perhaps, give rise to the question of whether or not the Academy should change its position.

MR. LYND T. BLATCHFORD: I sincerely question the premise that the interests of the plan participants would be adequately served by resorting to standard tables and methods, where this is handled by individuals with, perhaps, lesser skills. Small clients have their own set of problems which, if the thrust of ERISA is to be adequately met, must receive adequate professional attention. The new calculations, definitions, reports, etc. required under ERISA are in many instances beyond the ken of some of those seeking entry into the lower tier.

There are also the practical problems involved in the development of a two-tier system: Where do you split it? How do you administer a two-tier enrollment? What plans could have "a lesser qualified actuary"? If you do arbitrarily set a size limit, what do you do when these plans grow?

These considerations lead me to believe that the two-tier approach is inappropriate.

MR. GRUBBS: If we had gone the two-tier route, we would have been faced with determining what the eligibility standards should have been for the lower tier. It would have been possible to reach conclusions that would have resulted in a far lower eligibility standard than proposed for one tier. Further, we concluded that small plans are not necessarily simple plans, and, if we had gone this route, we would have had to decide what were simple plans. Developing regulations would have been time consuming. Also, there would be the problem of using standard tables -- What standard tables? Would the Board decide there is only one standard table or there are several standard tables? What if one of the standard tables wasn't reasonable, or wasn't the actuary's best estimate?

CHAIRMAN BOYNTON: Another possibility, as an alternative to what the Joint Board is proposing, is to have everyone take an examination.

MRS. MARY H. ADAMS: I detest taking exams, just about as much as anybody else. That is a pretty far-out solution, but, if it were the only way to control the quality of actuarial work, I would be a victim at this altar of sacrifice. However, for everybody to take an exam, the evaluation of results would be very difficult. Some people are recent students and some of us are sort of part of the furniture. The way we would approach any part of the examination would be quite different.

With regard to responsible actuarial experience, there is one phrase that troubles me. It indicates that the person has been participating in the determination that the methods and assumptions adopted and the procedures followed are appropriate in the light of all pertinent circumstances. It is marvelous that this phrase is there, but it is going to be one of the most difficult things for the Joint Board to evaluate. Presumably a person will swear that he has done all these things. The difficulty would arise where a person is not sufficiently knowledgeable to understand whether he could properly evaluate everything in the light of all pertinent circumstances.

MR. GRUBBS: We are trying to sort out the people who may do routine calculations from the people who do what we call responsible actuarial work.

We have two sources of information. We have the application form itself, in which we will ask certain questions. The person must attest to those under rather severe Federal penalties and fines. We have the opportunity to go back to the applicant and ask for more information if the form seems incomplete or not clear. We also have the opportunity to inquire of employers and former employers in an effort to verify this information. Admittedly, it is an extremely difficult job to verify or evaluate this information.

CHAIRMAN BOYNTON: The proposed regulations give credit to someone who majored in computer science with life contingencies courses included. Why computer science? Is there a uniform standard as to what kind of mathematical courses are involved in such a degree?

MR. GRUBBS: A person must have had some basic mathematical courses if he is going to be able to tackle the life contingencies courses. Computer science is a very important tool for actuaries today.

MRS. ADAMS: Many of us don't realize or don't know how rigorous is a degree in computer science. I am sure that there are very fine universities that give rigorous courses. However, in the New York area, you see many advertisements for colleges giving these degrees, and you wonder about some of them. Of course, you are in a bad position if you say a degree from one place is acceptable but from another place it is not, if they are both accredited colleges.

CHAIRMAN BOYNTON: There is a section in the proposed regulations under Rules of Conduct that talks about disclosure of compensation. It may make people receiving insurance commissions a little bit nervous, since they must report those commissions to the plan administrator. But it goes on to be much more sweeping and requires that, if an actuary works for a plan and also does work for employers contributing to that plan, he must report any payments received from any such employer to the plan administrator. Now the obvious implication here is Taft-Hartley plans, which run the gamut from two- or three-employer plans to some which have 15,000 or 20,000 employers. If you are the actuary for a Teamsters' plan and also for Ford Motor Company, which has six employees in that plan, do you have to report the fees you are receiving from Ford to the plan administrator?

MR. GRUBBS: Our objective was to make sure that major conflicts of interest are apparent. For example, consider a multi-employer plan in which there are four major contributing employers and one firm is actuary to the plan and also actuary for one of those employers. It is entirely proper to disclose this fact to both parties involved. The situation that you point out, where there might be thousands of employers, none of which has a really significant interest, is a different situation.

I have a question for my fellow panelists. What do you think of the length of required service: 36 months pension experience, or 24 months pension experience if you have a total of 60 months actuarial experience?

MRS. ADAMS: I still have trouble with the responsible experience question. If the experience is responsible, then within the prescribed period of time someone could be prepared to adequately service a pension fund. But it is the question of a person's understanding all of the pertinent information and being able to evaluate the implications both of what he is doing and of the alternatives. If somebody has really been doing this for five years, he is well equipped to continue doing so, and to do an honest evaluation of his adequacy to fulfill an assignment.

CHAIRMAN BOYNTON: The pension experience requirement can be a problem when you consider the insurance company rotation programs for actuarial students. Assignments in a particular department often last one year, rarely as long as two years. Thus, you could have an FSA who has spent a year, even the preceding year, working with pensions and yet he would not qualify. Perhaps the two-in-five rule might be cut back to a one-in-five rule: Five years total experience, one year pension experience. Once in a while we do hire an actuary from an insurance company; and, if he is a well-qualified FSA, within a

year he is certainly doing responsible actuarial work on his own. On the other hand, ASA's or even FSA's coming out of the actuarial schools require a little seasoning or maturity before they are able to be fully responsible; so I don't really disagree with the three year rule.

Let's consider the point about the actuary operating on behalf of participants or, putting it another way, the topic of conflict of interest. The concept of the actuary working on behalf of plan participants has a lot of us concerned because of existing relationships with plan sponsors. How do we proceed in the future to avoid a conflict of interest? The basic problem is where the actuary is working for the plan sponsor and has information which could possibly be detrimental to the plan participants. For example, you may be a consulting actuary for a company and learn that the company is making plans to shut down a plant. As the enrolled actuary for the plan, what are your responsibilities under this provision?

MR. BLATCHFORD: This is a real problem and we seem to have several conflicting directions here. First, Guide 2(b) of the Guides to Professional Conduct states that a member will act for each client or employer with scrupulous attention to the trust and confidence that the relationship implies and will have due regard for the confidential nature of his work. On the other hand, Act Section 103(d)(11) states that the actuary must disclose, in the actuarial statement portion of the annual report, such other information as may be necessary to fully and fairly disclose the actuarial position of the plan. Thus, whenever an actuary is working for the plan sponsor on an activity that is not related to the actuarial valuation, that is, when he is not serving as enrolled actuary for that activity, he should disclose to the plan sponsor that a potential conflict of interest may evolve. Other than that, we need to see more in the way of regulations.

MRS. ADAMS: If you think in terms of disclosure and in terms of the actuary's influence, you resolve the conflict by having an open, thorough discussion with your client. In a sense, for actuarial valuation purposes, what is best for the client is also best for the participants. If you know that there is going to be a termination or merger, there are specific rules with regard to having to report this. As an advisor to the client, you certainly must tell him that he must report it. I can't see a situation where an actuarial valuation would be detrimental to a participant as long as there is full disclosure on the client side, because he has certain responsibilities. Now the only other place would be if you were going into a labor negotiation. Again, being an honorable person would prevail. However, where any client would go into a labor agreement knowing that something else is going to happen and develop the terms of a labor agreement to purposely cut benefits of employees or to word a contract improperly, the actuary has no choice but to sever the relationship.

CHAIRMAN BOYNTON: More generally, do you think the actuary can serve as the enrolled actuary for the plan and, at the same time, be an actuarial consultant or advisor to the employer?

MR. BLATCHFORD: It is not immediately apparent that there would automatically be a conflict of interest, but the potential for such a conflict exists. It is interesting to note that Section 901.20(d) of the proposed regulations requires that, in any situation in which there is or may be a conflict of interest involving actuarial services as defined by the regulation, i.e., those services required by ERISA, the actuary cannot perform those services except after full disclosure to all directly interested parties. What is the definition of interested parties? For example, does this mean that we have to dis-

close to the plan participants that there may be a potential conflict of interest?

MRS. ADAMS: I have another question on the term "directly interested parties." The beginning of that phrase says that, whether or not there is a prohibited transaction involved, you must do this. If there is a prohibited transaction involved, there are certain reporting requirements to both the Department of Labor and the Department of the Treasury. Are they intended to be part of the directly interested parties in this particular provision?

MR. GRUBBS: The fact that we need to have information disclosed to us does not make us an interested party. There has been no formal determination, however. We do expect regulations dealing with interested parties to come out fairly shortly.

CHAIRMAN BOYNTON: In the past the employer has often exercised a certain amount of influence over the funding approach to be used, either by general instructions with respect to conservatism or realism, or as specific suggestions with respect to interest rates or salary scales. To what extent under ERISA can the enrolled actuary allow the employer to influence the selection of assumptions and the selection of funding method? Is there a difference between the funding method and assumptions in this respect?

MRS. ADAMS: Up to a certain point, I consider funding methods a long-term part of assumptions. But I will address the probability aspects. I think in terms of some assumptions as being "ours," meaning mine and the client's, and some that are "mine," meaning the actuary's. In the economic area, the interest assumption is "ours." The client may have information from his money managers, or information with regard to the long-term flow of the money, that would indicate reasonable expectations of the long-term interest yield of the fund. Once we get beyond the decision as to an interest assumption that the client feels is appropriate and that I feel is within the general area of reasonableness, the rest of the assumptions are "mine." There is no way that a client could particularly influence me. I might get information from a client, especially with regard to some of the newer benefits such as 30-year retirement, and specifically, as to what they think the election rate might be. Also, I might get turnover information from a new client, or from a present client if, for example, there had been a five-year service requirement for membership which has been liberalized and we don't know what kind of turnover they have had during the early service years.

MR. BLATCHFORD: When it comes to the selection of actuarial cost method, the actuary must remember that he was engaged to act on behalf of the plan participants. What does that really mean? The interest of the plan participants may not necessarily be served by rapid or level funding of benefits. The level of benefits may well be impacted by the procedure for funding benefits. Accordingly, the enrolled actuary must weigh carefully the desires of the plan sponsor with respect to the incidence of funding. In summary, the actuary has the ultimate responsibility for the selection of the funding method, but he should give due allowance for the considerations of the plan sponsor.

CHAIRMAN BOYNTON: Does the certification required by the actuary with respect to the best estimate include both the assumptions and the funding method, or just the assumptions.

MR. GRUBBS: It only specifically deals with the assumptions; but, of course,

there is an interrelationship. The requirement for a salary scale certainly differs from the entry age to the unit credit method. But it is only the assumptions that he has to certify.

CHAIRMAN BOYNTON: Suppose you are retained to do an actuarial study of a municipal retirement plan. You are retained, not by the joint board of administration, but by the association of employees, or union, which is represented on the joint board. You carry out a study and find that the 15% of payroll being contributed should be at least 75%. You transmit these results to the union, realizing that part of the assignment is to present this report to the full joint board. The union says they want all copies of the report turned over to them, and you are not to say anything to anybody. It is obvious they intend to bury it. Now, admittedly, ERISA does not cover municipal plans; but from a pre-ERISA standpoint what are the professional conduct implications here and how might the law affect them if these plans were covered?

MRS. ADAMS: First, you have your duty to those who hired you, which in this case is a group of union people who happen to also be on the board of administration. You fulfill your responsibility to the people who directly hired you, by submitting your report to them. With respect to turning in all the copies, you would certainly keep a file copy in your own personal work papers. You now have the question of your responsibility to the group to whom it was to be presented. Giving the report to 50% of the board of administration puts the burden of disclosure on them. This was without reference to ERISA. The second part of your question comes back to one of our other questions, which is whether or not the actuary is a fiduciary. If the actuary is a fiduciary, you have to see that full disclosure is made. In my own mind, I can't decide whether it should be full disclosure to the participants or full disclosure to the board of administration, or full disclosure to both. But I think that under the fiduciary provisions, where you have to watch the other fiduciaries, you would have to disclose.

CHAIRMAN BOYNTON: What kind of conflict of interest situations, if any, are faced by the insurance company actuary under ERISA?

MR. BLATCHFORD: Traditionally, many insurance company actuaries have viewed their company and its field force as the primary client for their services. Under ERISA this is no longer a permissible view; therefore, the actuary in this position should order matters so that his employer and the field force are aware of his new responsibilities and relationships. To get down to specifics, the insurance company actuary should be prepared to deal with situations where the interests of the plan participants are not compatible with those of his company or its agents. An example might be the choice of funding vehicle. A similar situation might revolve around whether a particular case should be conserved for the company. It might be in the company's best interest to maintain the case, but it might not be for the plan participants. In summary, an actuary in this position should reexamine his relationship with his employer and should develop a clear understanding with him as to what conduct is and is not permissible under ERISA.

CHAIRMAN BOYNTON: Are actuaries fiduciaries under the Act, and if so, in what respect?

MRS. ADAMS: On September 3rd of last year I felt that you may be a fiduciary, but it was a gray area then. It still seems kind of gray. The Rules of Conduct as published say that actuaries must be prudent. The wording is similar to the prudent man rule that is in ERISA. At the very least, whether or not

we are fiduciaries, we should act like them.

There are certain specific situations where we must be fiduciaries; for example, if you give investment advice for a fee or are directly responsible for the administration of a plan. You may be a fiduciary if your office performs peripheral services, such as calculating benefits and preparing benefit statements. I am not sure whether the definition is going to come out other than through the courts.

CHAIRMAN BOYNTON: Isn't the decision as to whether the actuary is a fiduciary in the Labor Department's jurisdiction?

MR. GRUBBS: This is an area where both the Departments have an interest, but the Department of Labor has the responsibility for issuing regulations. This is one which is being actively addressed, and hopefully it won't be too long before we have regulations.

CHAIRMAN BOYNTON: One of the interesting things introduced in the draft regulation was the section on Rules of Conduct, which perhaps are extracted from the Guides to Professional Conduct of the actuarial organizations. Is it appropriate for the Federal Government to be issuing the rules of conduct for a professional group? For example, there are attorneys and accountants who practice before the SEC and the IRS. Are there rules of conduct for those professionals?

MRS. ADAMS: I understand that there are rules of conduct for people who practice before the Treasury Department and that people have lost this right to practice because of infractions of these rules.

CHAIRMAN BOYNTON: In the case of people who are professionally recognized, such as members of the bar or CPA's, are there rules of conduct applicable to them promulgated by the Government?

MRS. ADAMS: I believe the same rules apply whether you are entitled to practice by virtue of being a lawyer or CPA or by virtue of examination.

MR. GRUBBS: With regard to representing persons before the IRS, it is significant that the Director of Practice of the Department of the Treasury, who is the person who administers this procedure, has been selected by the Joint Board to administer the enrollment process. There are rules of conduct and legal counsel advises us that this is legitimate. Also, there have been prosecutions, with respect to people enrolled to practice before the IRS, which have been upheld in court.

CHAIRMAN BOYNTON: Are the proposed Rules of Conduct in the draft regulation consistent with the Guides to Professional Conduct of the actuarial organizations?

MRS. ADAMS: They are a very simplified version of the Guides to Professional Conduct that are common to all of our groups. I believe that every Guide is present, except No. 7, which isn't pertinent, and No. 5, relating to advertising. There are some questions, however, What does an enrolled actuary call himself? When should he use this designation -- for example, only when signing an actuarial report? If he can only use it in signing an actuarial report, that precludes putting it up on a billboard. An offhand suggestion would be that the designation only be used when signing a report which is intended for the purposes of the law. Other than that, I think the rules are good. I assume that, since these cover what we have in our Guides and our Guides were

initially drafted in anticipation of opinions at a later date, these proposed rules also will have further regulations and interpretations that would correspond to the opinions that the other actuarial groups have.

MR. GRUBBS: We haven't addressed ourselves to that problem yet. It is a good question.

CHAIRMAN BOYNTON: Many actuaries have concern over the provisions of the law regarding personal liability. If the actuary is a fiduciary, do you think the liability falls on the individual actuary or on the corporation, if he is so employed?

MR. BLATCHFORD: Assuming the actuary is a fiduciary, that is a good question. It seems clear that, if the actuary is a fiduciary in a particular circumstance, the act envisions that he is personally liable, and there may be some problem if his company tries to cover that liability for him.

CHAIRMAN BOYNTON: There is an interesting paragraph in the Act that I haven't been able to figure out. It imposes a personal liability on the fiduciary and prohibits an exculpatory provision, that is, any provision which purports to relieve a fiduciary from responsibility. The next paragraph then goes on to specify certain circumstances under which insurance may be purchased. Can the employer back up the deductible in the insurance policy? Could the employer self-insure, if he was crazy enough to do that?

MRS. ADAMS: If you have responsibility, you have it. How you pay for it, in the dollar sense, is not material. Your brother-in-law could pay for it or your employer could. That is a personal relationship between you and, say, your employer. It raises the issue of whether the individual or his company can be sued. The personal responsibility is, under the law, certainly with the enrolled actuary. If you are a fiduciary, you have invited the world to sue you. When you ask who gets sued, I would assume that most suits would be directed against a company. With regard to the employee/company relationship, you must assume that an employee would not be working for the company and the company wouldn't hire him if they didn't have some kind of mutual respect for each other. It could be that the person made a mistake because the company's computer program blew up, or it could be that he just made a foolish mistake. Presumably he couldn't be dishonest. It is all interwoven, but I think that, insurance or no insurance, the word responsibility can also mean professional pride.

MR. GORDON W. CLARKE: The implication in the Rules of Conduct is that, if you are an enrolled actuary and the plan is an ERISA covered plan, all of your actions relative to that plan must meet these rules, not just the ones that are designed to meet the requirements of the law. If that is true, then I wonder if the need to specify that you are an enrolled actuary and that these are the guides that you are required to follow are not part of what you must disclose to every client?

MR. GRUBBS: You make a good point. The rules are not limited to the actuarial report signed by the enrolled actuary. We haven't related that yet to the other question raised, as to the disclosure of your enrolled status.

MR. PAUL C. COWAN: When ERISA was passed, I thought the actuary's work was going to be a lot easier and that some of the problems in the pension field were going to be under control. But, as rumblings came out of Washington, I began to have misgivings that the administrators of this Act, particularly

with respect to the Enrollment of Actuaries, might fumble the ball as they crossed the goal line. This morning I begin to get the first glimmerings of what is really taking place, and that is: Mr. Grubbs' problem is to get the Joint Board's recommendations approved. So, the administrators are really not the administrators; they have to be aware of political forces to a certain degree.

It seems to me that the problem the Joint Board is facing in this area, that is, expanding the definition of enrolled actuary, is a rather serious one in this respect:

> A lot of the problems in the pension field stemmed from incompetence in the actuarial area, and largely these problems involved insurance plans sold by agents who were not qualified nor properly trained to give competent actuarial advice. If the definition of an enrolled actuary is so broadened that a large sector of this group continues to be able to practice as enrolled actuaries, then it will be "business as usual" and one of the fine purposes of ERISA will be circumvented.

The Joint Board is attempting to compromise by viewing the problem in terms of protecting the jobs of certain individuals already practicing in the actuarial field and still carrying out the spirit of ERISA. On the other hand, I wonder if the Joint Board has explored fully the fact that these people, who are not members of the Society, nor the Conference, nor the Academy, have their product lines largely derived from the insurance industry. The insurance industry offers its product for sale and, therefore, should provide the services of an enrolled actuary to certify these plans, thus making it highly unnecessary for the Joint Board to broaden the definition to include a large group of people who are not qualified professionally to render these services.

MR. JAMES A. ATTWOOD: The rules proposed by the Federal Joint Board for the Enrollment of Actuaries appear to have serious implications as to the manner in which actuarial practice is organized in the future.

The rules appear to recognize only individual, natural persons as being eligible to apply to become enrolled actuaries. There seems to be no recognition that actuaries may be employed by corporations, or be partners in organizations, and that the corporation or partnership may be engaged in actuarial practice. The rules seem to imply that a plan sponsor must contract with an individual person for actuarial services. That individual person must perform actuarial valuations and prepare and certify actuarial reports. This approach raises several questions:

1. Is the actuary functioning on behalf of his firm or as an independent contractor? If the firm wishes to realign its workload, can it? Or could this only be done by obtaining the client's agreement to contract with a different individual, which would then require that the client make a disclosure filing that it has changed actuaries? What happens when an individual actuary leaves a firm? Can his work be reassigned, or does he take his clients with him?

2. Who is paid by the client? The firm or the individual? If the individual, does he legally become an independent contractor, with consequent implications for his own employee benefits, Social Security status, etc.?

3. Is the firm or the individual liable for the actuarial work? Can the firm indemnify the individual?

Many other questions could be raised, but these are sufficient to make the point. The rules seem to imply that individuals, rather than their firms, are the structure of actuarial practice for the future.

I have serious difficulties with this structuring of the actuary into an individual practitioner organization. I have trouble seeing the value of this from any point of view, including the governmental and public interest points of view. The personnel and financial resources of actuarial consulting firms and insurance companies provide a better source of strength to pension funds and their covered employees to assure that the funds are not adversely affected by inadequate actuarial work.

One suggestion is that this be handled in the same way that accounting firms operate. In their case, the firm is retained by the client and the audits, reports, and certifications are generally signed by the firm, not by any individual. Of course, the firm must have a qualified professional staff in order to qualify to practice.

Another solution would permit a corporation or a partnership to be engaged as actuary, but would require that all reports and certifications be signed by an individual who is an enrolled actuary. The personal involvement of an enrolled actuary is probably unnecessary in many routine calculations that are performed with procedures, assumptions, and factors that have been established by an enrolled actuary. However, if a signature requirement requires undue attention to detail, there could be a capacity issue: Are there sufficient qualified actuaries in the country to function on a personal basis for all of the plans, including the smallest ones, that now exist?

MR. GRUBBS: Let me comment as an actuary and not as a member of the Joint Board. This is not a new problem. It is directly related to our present Guides to Professional Conduct, which do require the individual actuary to make known his availability. There are insurance companies who turn out deposit administration proposals right now that are not signed by anyone. In my personal opinion, that is a serious violation of our present Guides to Professional Conduct.

MR. RICHARD S. HESTER: Mr. Grubbs indicated that membership achieved after March 1, 1975 must be based on the same standards that prevailed "immediately" before that date. Unfortunately, the regulation does not use the word "immediately" and this should be corrected in the final version.

The question of conflict of interest as it involves home office actuaries seems to me more important than the question of ASPA members. After all, unless 406(b) and/or 414(c)(4) are repealed or amended, the typical ASPA member will have only two more years in which he can both advise a plan as the actuary and also collect insurance commissions. I believe most will opt for the latter.

The home office actuary, on the other hand, if he is allowed to act as the enrolled actuary on his company's cases, will go merrily on his way without advising a single client that a plan could save money by doing business with some other funding medium or some other insurance company. Surely, this is not what we mean by professionalism.

On this point, the attempt of the Joint Board proposed regulation 901.20(g) to allow such situations by "excluding any gain to an insurance company as the result of issuing contracts" is clearly beyond their jurisdiction. Section 408(a) reserves to the Secretary of Labor, after consultation with the Secretary of the Treasury, the power to grant exemptions to prohibited transactions.

The problem of firms versus individuals caused me some anxious moments until I discovered that the drafters of the law had not been asleep after all. A close reading of Section 3042(a) shows that it is "persons" who perform actuarial services even though it is "individuals" who become enrolled actuaries.

The definition of person in Section 3(9) is quite broad.

(The question of "engaging" an enrolled actuary is solved by a definition of "engage"which reads "to arrange for the services of" and does not, therefore, imply the need for a one-to-one contact.)

It is incumbent upon the Joint Board, however, to follow their mandate to "establish reasonable standards and qualifications for persons" as soon as possible.

Finally, I am curious as to why the Joint Board did not take advantage of its authority to enroll actuaries on a temporary basis until January 1, 1976, instead of enrolling everyone for five years.

MR. GRUBBS: It was the intent of the Joint Board to have that be "immediately prior." We are talking about the standards that have been in effect during the last year. On the temporary enrollment issue, we thought there were problems with temporary enrollment. If you have a temporary enrollment, you are either going to enroll people who will not be permanently enrolled or you are going to be so strict that you will not enroll people who really ought to be enrolled. We felt that we could push ahead and get the permanent enrollment going in a reasonable time, and, therefore, did not go the temporary enrollment route.

MR. CHARLES L. WALLS: On Mrs. Adams' point about labor negotiations, I have adopted the viewpoint that I am probably going to be wrong in all my assumptions anyway and I so advise my client. The client, as far as I am concerned, is free to adopt a position of his own. This comes up particularly on questions of new benefits where retirement age is quite significant. In negotiation situations, I tell my client that, if I am asked, I must reveal what my opinion is. However, he doesn't necessarily have to follow this opinion in trying to obtain cost credit from the union.

MR. J. REUBEN RIGEL: I would like to address the ASPA question. Many nonlawyers and some lawyers misuse legislative history. The inclusion of the ASPA group, with its large number of persons who took the one-question test, is totally out of context with the overall intent of ERISA. The effect of it is to weaken the actuarial profession.

MR. RALPH J. BRASKETT: On the enrollment question, we lost that battle. On the insurance company question, if there is not a personal signature of an actuary required, you are setting yourself up for your salespeople to dictate the assumptions in competitive situations. Salespeople want the lowest cost. The lowest cost is achieved by using a unit credit funding method, if it is a defined benefit plan, with salary scale and interest assumptions that are not consistent. The only way you are going to strengthen the insurance company actuary's hand, or make his job more tenable, is by requiring an enrolled actuary to sign those proposals.

There is a problem in work load assignments, especially in insurance companies where they like to rotate people, so that there will be good and sufficient reason why the enrolled actuary who signs valuations in 1976 will be different than the one in 1979. That is also true of consulting firms. The real answer is that the plan sponsor engages an insurance company or a consulting firm to do a job and the firm assigns an enrolled actuary to do it. Now, maybe to strengthen the hand of the enrolled actuary, there still ought to be an explanation at any time the person changes.

MR. GRUBBS: The individual must certify; that is clear from the Act. It is also clear that there must be a statement of a reason for a change in the enrolled actuary, who is an individual. I don't see a problem in having one

sentence to the effect that we changed actuaries because we reassigned the actuary working on this case within the firm.

MR. WILLIAM F. LUMSDEN: I assume that this follows a pattern that has been established in SEC rules. When the accountant of a company is changed, there is a filing by the corporation as to why they changed their accountant. But there is also an opportunity or requirement for the accountant to write a letter saying why he thought he was being changed. The law will require the administrator to state why he changed the actuary. In your regulations are you going to give us a chance to write a letter as to why we are being changed? Also, on the subject of disclosure of compensation and conflict of interest, you have raised the question of a multiemployer plan where you were the actuary to both the plan and to one of the employers. I have a multiemployer plan where I am actuary to both the plan and two out of the three employers. There are no secrets. There has been full disclosure for 20 years. But according to this regulation, I now have to go to this joint committee on a comparatively small plan and disclose to them the fees I am getting from these two companies which are national corporations paying quite substantial fees; and this can cause quite a bit of embarrassment. How serious is the Joint Board on requiring disclosure of the fees under such situations?

MR. GRUBBS: That is a good point.

MR. EUGENE SCHLOSS: Has the Society, the Academy, or the Conference done anything about personal liability insurance for either the companies involved in doing actuarial work or sole practitioners?

CHAIRMAN BOYNTON: There was a proposal by one of the national brokerage firms to the Academy to try to establish some kind of blanket coverage for all enrolled actuaries. The Academy felt it wasn't the type of activity that it should be doing. I am not sure about the Society or the Conference.

MR. WILLIAM H. CROSSON, III: Responsibility means putting your name on the report and taking any criticism. Assume you are not an enrolled actuary and don't qualify this year but want to become an enrolled actuary sometime later. How can you possibly demonstrate that you have had responsible experience, unless you have been taking the responsibility for your actuarial reports?

MR. GRUBBS: The Board has not addressed itself to what the requirements will be for enrollment after January 1, 1976. They may be different. I would point out that the Act itself, with respect to people applying in 1975, speaks of actuarial experience with pension plans, and, with respect to people applying in 1976, it does not mention pension plans; so this is one of the questions we need to deal with.

MR. ROBERT I. BOSTIAN: The application of standard tables has been mentioned. If somebody has in the past developed costs using these standard tables, is that going to be considered as responsible actuarial experience?

MR. GRUBBS: We have defined responsible actuarial experience and, if the individual has been involved in determining that the tables were an appropriate basis, it would constitute responsible actuarial experience.

MR. BOSTIAN: The American Academy of Actuaries, the Conference of Actuaries in Public Practice, and the Society of Actuaries are organizations of professional actuaries with distinguished histories and admission requirements designed to assure that only truly qualified professional actuaries are members.

On the other hand, the American Society of Pension Actuaries has many members who are insurance agents, administrators, or actuarial clerks whose only experience in pension plan mathematics has been the development of costs through the application of standard factors without any knowledge of the underlying actuarial concepts. These individuals may be very competent as salesmen, consultants, administrators, or clerks; but they are not qualified to be considered professional actuaries. The Joint Board has apparently decided that the application of standard factors and simplified procedures would not meet the needs of ERISA, by rejecting the two-tier approach. The Joint Board should now take steps to assure that individuals whose pension plan experience and training do not include truly responsible actuarial experience and actuarial training are not enrolled. If the experience requirement is enforced and the definition of responsible pension actuarial experience in the proposed regulations is adhered to, these individuals would be excluded. However, it may be administratively very difficult to exclude all of these individuals in this manner. The admission of even one such unqualified person would be degrading to the entire legitimate actuarial profession. It would be wiser to omit from the list of organizations whose members satisfy the organizational qualification an organization whose record indicates that many of its members are not truly qualified professional actuaries. Any member of this organization who is qualified would not be arbitrarily excluded from enrollment since he could demonstrate his qualifications by passing the Joint Board examination.