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Summary: This session presents expert views on emerging issues that have technical and practical ramifications for plan sponsors, participants and/or advisers. Attendees gain a better understanding of the current retirement system's regulatory environment and how it has changed. This knowledge allows attendees to provide up-to-date advice for clients.

MR. DONALD SEGAL: I'm with the Segal Company in New York. With us on the panel today are Ethan Kra, chief actuary (retirement) at Mercer Human Resource Consulting, and Wayne Jacobsen, a partner at O'Melveny & Myers in Newport Beach, Calif. Today we're going to go over a number of the recent rulings, regulations and court cases that have been bedeviling us. We'll probably be jumping around quite a bit to keep it interesting. Ethan, do you want to start off?

MR. KRA: I'll start off with Erie County and the Equal Employment Opportunity Commission (EEOC). Erie County was a court case. The retirees sued on age discrimination because pre-Medicare, it was a continuation of the active plan. Post-Medicare, it was a Medicare supplement that produced, in the aggregate, combined with Medicare, less benefits than the pre-Medicare plan. The retirees sued that it was age discriminatory. You were discriminating against the older retirees in favor of the younger retirees. No discrimination took place during the working years; it

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was discrimination during the retirement years. The Third Circuit agreed with the plaintiffs.

Under the Age Discrimination in Employment Act of 1967 (ADEA), the EEOC does have the right to provide exceptions to ADEA where it would be to the benefit of the elderly. What the plaintiffs thought would occur in general was that if you're providing certain benefits below 65, you'll provide the same benefits above 65 because the courts say you have to. No, that's not what employers did, because most of them had reservation of rights. Instead of topping up the benefits post-Medicare, they lowered the benefits pre-Medicare or eliminated retiree medical all together. The EEOC said, "Wait a second. This is counterproductive. By insisting that we shouldn't discriminate against the elderly, we're not helping the elderly, we're hurting the elderly because now they'll get less benefits in total in retirement." So they've carved out an exception in this proposed regulation that would allow plan sponsors to provide lesser benefits once Medicare kicked in, and that would not be age discriminatory between the two retiree groups. It still has to go to the Office of Management and Budget (OMB), and the American Association of Retired Persons (AARP) has announced that it will take this to court and litigate, so the last shoe has not yet dropped. We can expect some litigation.

MR. WAYNE JACOBSEN: I say EEOC wins that one. I think it was questionable whether there was any discrimination in the first place under that type of plan, so I think EEOC is going to win that one.

MR. KRA: However, it will tie up the regulation in court for some time.

MR. SEGAL: But will it? Because as we sit here today, the regulation is effective, correct?

MR. KRA: No. It has to still go through some other processes within the fed. I think it's a final regulation that hasn't gone through all of the approvals, like OMB and things like that. I'm not sure at what point AARP comes in and litigates, whether they can hold up the finalization.

MR. SEGAL: My understanding right now is that in effect you could follow what the EEOC is proposing in every place but Erie County, N.Y.

MR. KRA: In every place but in the Third Circuit, which includes Pennsylvania and...

MR. SEGAL: It's all of the Third Circuit.

MR. KRA: Yes.

MR. JACOBSEN: Yes. I think that case would still be good law in the Third Circuit, and I don't think it's widely followed elsewhere in the country. I think people have

thought that the Third Circuit is being weird.

MR. SEGAL: I hope you're aware that on May 6, the PBGC issued a couple of notices. They are doing two things. They are expanding their enforcement program with regard to participant notices. They're basically increasing the penalties, but then changing the penalties to a number of participants as opposed to a number of days. The more important notice they issued is that they are introducing a voluntary compliance program (VCP). It's a participant notice voluntary compliance program that covers failures for the 2002 and 2003 plan years for which participant notices were due before May 7, 2004. They picked May 7 because that's the day it was published in the *Federal Register*. Some plans may have gotten special disaster extensions, and they even talk about that, that that's OK. The important thing is that to take advantage of this program, the plan administrator must issue a VCP corrective notice to participants by the due date for the 2004 Participant Notice. All the administrator needs to do is to issue the notice. The PBGC gives you models. What it does is give you protection in case you had failures in 2002 and 2003. There is an expectation on the part of the PBGC, and it's something that you might consider for your clients, that many plan sponsors might file under this program just in case they had a problem. It doesn't really cost them anything. The information you're giving to your participants on the required notice was the funded ratio on the PBGC basis.

MR. KRA: The real reason they're doing this is that many plan sponsors did not realize they had to give notices for those two years because of the funding relief that was for 2002 and 2003, where you were using 120 percent of 30-year Treasuries for current liability. The PBGC notice was triggered based on 105 percent. The relief to go from 105 percent of the four-year moving average of 30-year Treasuries to 120 percent in calculating current liability was for determining your contributions, your full funding limit and all that sort of stuff, but it did not extend to the notice to participants. That one still had to be recalculated using a current liability determined at the 105-percent level, and many plan sponsors were unaware that they were not exempt. Many people thought they were exempt from the notice. They really weren't exempt, they didn't realize it and they didn't give the notices.

MR. SEGAL: That's right. It says right in the notice, "The PBGC will not assess penalties for failure to provide a 2002 or 2003 Participant Notice as required if the failure is corrected in accordance with the guidelines in this notice." In case you don't even know if you had a failure, you file and you're protected.

MR. KRA: You probably want to check for each of your clients whether they should have filed the notice. You may have thought they were exempt based on full funding limit, no variable premium, based on the funded ratios, etc., but you did it based on the 120 percent rules. You have to recalculate all that based on the 105 percent rules, and then determine if they were exempt. If they weren't, get the notices out.

MR. SEGAL: There's another reason why a plan sponsor might want to file anyway. It says that the PBGC will not pursue failures to provide a pre-2002 Participant Notice unless there is a 2002 or 2003 Participant Notice failure that's covered by the VCP but does not meet the requirements for penalty relief under the VCP. Essentially, if you file this, you're going to get a waiver going all the way back. The PBGC discussed this with certain practitioners before they released it. They said their expectation was that a lot of people who don't need it are going to file anyway just as a fail-safe measure. We're just bringing this to your attention in case you didn't read it.

MR. KRA: However, that's one shoe dropping. That was the good shoe. The bad shoe is that the penalties going forward are going up dramatically. It will be based on numbers of participants. If you have a large plan, the penalty can become very substantial. The price for not providing appropriate notices prospectively has just gone up.

MR. SEGAL: That's right. Pre-audit, the penalty is $5 per participant or $20 per participant for a repeat violation. Post-audit, meaning this is after the PBGC issues a written notice of the audit, the penalty is $40 per participant and $100 if it's a repeat violation. That's a lot.

MR. KRA: If you have 10,000 or 20,000 participants in your plan who are going to become actives, retirees or vested terms, they all count. Multiply it by those dollars and that's the check you can write. You better be very careful as you go forward, making sure you get these notices out appropriately.

MR. SEGAL: Can that check be written from the plan?

MR. KRA: No. They go after the plan administrator. If it's a single-employer Taft-Hartley plan, it's the plan administrator, not the plan assets.

Have you heard of the relative value regulations? Before we go into the details on those regulations, let's give you a little update. As many of you are aware, there are very substantial problems in addressing and dealing with these relative value regulations. Accordingly, many of the Washington-based organizations, as well as consulting firms and plan sponsors and others, have gone to IRS and Treasury demanding, begging, pleading, requesting for a delay in the effective date. We'll go through some of the reasons. Treasury seems to be somewhat sympathetic. However, these regulations were issued as part of a deal with various legislators on Capitol Hill not to legislate certain things a few years ago, and they had to put this on a fast-track basis. So Treasury's response to certain individuals was, "What does Sen. Harkin think?" In other words, if Sen. Harkin (D-Iowa) tells them he thinks the regulations should be postponed, maybe they'd be willing to, but he might say, "No, we don't feel like getting the darts thrown at us in an election year."

MR. SEGAL: Sen. Harkin wrote a letter in 2000 to Treasury expressing concern

about people passing up subsidized annuities in favor of a lump sum payment.

MR. KRA: The lump sum was the lump sum of the deferred to 65. The annuity was unreduced at 55. The lump sum clearly was sub-value compared to the annuity, and the participant didn't realize it. These regulations were supposed to address that question. Unfortunately, something got lost in translation and they are a little bit more than that singular question. A number of us went to visit Sen. Harkin's staff. There was some sympathy. In setting up the meeting, we included two representatives of Principal Mutual. Considering that they're one of the largest, if not the largest employer in the state of Iowa, we were trying to make sure that the staff understood that this was an issue that dealt with Sen. Harkin's voters also. The proposed compromise for which we were hoping to get their support would be that the regulations be delayed. Our feeling was that they should road-test the regulations with focus groups to see if what comes out of them is understandable by the average employee. We don't know if they'll go that far. If the early retirement subsidy were not in the lump sum, and if the lump sum were less in value, and only if the lump sum were less in value than the immediate annuity, you would have to include a statement saying that this lump sum does not include the value of the early retirement subsidy included in the annuity and the lump sum is only worth X percent of the annuity. That would be all. There would be none of this comparing all the different options and the obfuscation if the lump sum is substantially more valuable. Just leave that all off the table and come back to that at a later date. People are taking this view because we will eliminate a lot of those optional forms in the 411(d)(6) regulations when they get finalized. Also, because of the relative value regulations, many people realize now that they have to update their optional form factors because they're highlighting the fact that some of them are outliers and that the tables haven't been updated. Remember, most people used to have very dynamic option factors and updated them frequently. That stopped in the early 1980s. In the early 1980s, the IRS came out with a requirement that all factors be put in the plan document and that they provide 411(d)(6) protected benefits. Then we had Norris, and so we had to be unisex. So during the early 1980s, everybody put into the plan document either tables or hardwired descriptions of all the mortality tables, interest rates, etc., for determining all the optional form factors. How many of you have spent much time with your clients updating those tables in the last 20 years?

MR. SEGAL: That totally overlooks what has been happening with plan mergers, acquisitions, etc.

MR. KRA: Not a hand here. We've got good news for you and bad news. The good news is that people are living longer. The bad news is that that may change the factors. Unfortunately, many plans have not been updated to reflect that. If the factors are based on an out-of-date mortality table and interest rate calculation, and the comparison is going to be done on a modern mortality table and a current interest rate, you may have some anomalies and outliers again. Remember that the joint-and-survivor (J&S) has to be the most valuable. These are creating problems.

MR. SEGAL: It's not going to be easy to explain to your participants that what is deemed to be actuarially equivalent is showing up as nonactuarially equivalent because of the difference in the actuarial basis.

MR. KRA: Then we're faced with the last problem, which is the Precept 8 of the code of conduct. I will assume that virtually everyone in this room is either an associate or a fellow of the Society, a member of the Academy, a member, fellow or associate of the Conference, or a member of the American Society of Pension Actuaries (ASPA). If you belong to any of those organizations, you're subject to the Code of Professional Conduct, and the Actuarial Board for Counseling and Discipline can either counsel or discipline you. Precept 8 of the code of conduct says that you do not produce anything that is intended to mislead anyone, or you don't produce something that you understand will be used by somebody else to mislead someone. Because of the 417(e) factors, the lump sum may be worth 140 percent or 150 percent of the immediate annuity payable at age 35, because your early retirement factors are based on, say, 6 percent interest. And Group Anuity Mortality (GAM) 83 unisex, and of course, 417(e) is based on 4.5 interest or whatever the interest rate is at that time. We can come up with examples where the lump sum can be worth 120 percent, 130 percent, 140 percent, or 150 percent or more of the qualified joint-and-survivor annuity if you're using any reasonable mortality table and interest rate to compare. That's the interplay of 417(e) with the traditional factors. Now, under the regulations, if that lump sum is so much more valuable, you're permitted to say that they're equal value. Under Precept 8 of the Code of Professional Conduct, that may be a violation of the actuarial code of conduct.

MR. SEGAL: I think you can tell that a lot of time has been spent with these regulations and with trying to deal with the problems on a professional level. Wayne, would you like to talk about a case?

MR. JACOBSEN: ERISA cases sometimes get replayed under state law. I'm going to talk about a couple of cases. One is the *Metropolitan Water District vs. Superior Court* case. I'm going into this because it's not one that gets quite as much attention as the big ERISA cases that are nationwide. I call this one the state law Microsoft case. To retirement plan lawyers and consultants, the Microsoft case is not the antitrust case. The Microsoft case is the independent contractor case, the one where the supposed independent contractors and supposed leased employees said, "Gee, I really wish I had been in the Microsoft 401(k) plan. I really wish I had been buying Microsoft stock with my matching contributions in that plan. I want to be a Microsoft millionaire, too." They won their case, but it was no big deal for the rest of the plans around the country because the lawyers just said, "We're going to draft that problem into oblivion. We'll write our plan so that it says it doesn't matter if you're actually an employee. If we call you an independent contractor, you're not going to be in the plan. You'll be an employee, but an ineligible employee." That's how private sector plans dealt with Microsoft. It's not a significant issue anymore in a well-drafted private sector plan. Let's replay the Microsoft plan on the state law context. Why state law? Because governmental plans are not subject to ERISA.

There's no ERISA preemption. ERISA doesn't apply to governmental plans at all, but governmental plans are huge. There are lots of governmental plans that cover lots and lots of employees. Some of the biggest plans around are governmental plans, and governments are huge employers. This case was in the California Supreme Court. They reached the same conclusion that the Ninth Circuit did and that a bunch of other courts have done under ERISA. They ask who an employee is. It's a common-law test. The result of this is that it has gone back to the trial court to say that now we have to apply this common-law test. But there is a group of agency employees who were nominally employed by a service agency to the Metropolitan Water District (MWD) and these employees said, "We are actually common-law employees of MWD. We come to work every day at MWD, the supervisors at MWD tell us what to do and we do it, so we're common-law employees. Whoever writes our paycheck doesn't matter." The California Supreme Court agreed with them, and so now they're going to go back and determine whether they get retroactive benefits under the California Public Employees' Retirement System and whether the Metropolitan Water District gets to pay for those. The real problem in these cases is that it's not the easy fix that we had in the private sector where you call your lawyer and say that you need to fix the plan document. In a governmental plan, the plan document is a statute that's passed by the legislature and it requires a political fix to change the plan document. Quite frankly, there's no political will to do that. For example, some of the public employee unions aren't particularly crazy about hiring leased employees, and this is a disincentive to do that. That case is huge in California, and I think it could spread to other states.

Another rerun of an ERISA case is *Boggs vs. Boggs*. I don't know if you remember that case. There wasn't a qualified domestic relations order (QDRO) involved, but it runs into some of the same issues. The Boggs case happened in Louisiana, which is a community property state just like California. The non-participant spouse, the wife of the plan participant, died. They were still married when she died. Under Louisiana law, her heirs claimed to have an interest in the husband's retirement benefits that were subject to ERISA. It got all the way up to the U.S. Supreme Court. The U.S. Supreme Court said, "No. ERISA has an anti-alienation clause that says you don't hand the plan benefits away from the plan participant to the kids in that instance. There's no QDRO and there's no basis to go against the anti-alienation clause. We don't care what Louisiana law says because it's pre-empted on this point." So Louisiana law didn't play into it. Again, if you're in a governmental plan, you have no ERISA pre-emption and you're essentially on your own to make those arguments. We just got a decision yesterday on what I call the state law Boggs case. It's the *Benford vs. The University of California* case. The court in this instance — it's just out of the trial courts — said that they're going to adopt the Boggs rule for one of the major governmental plans in the state. But that's sure to play out also in the community property states.

MR. SEGAL: Would you care to identify the attorney who worked on that case?

MR. JACOBSEN: Oh yes, that was me. We argued it yesterday and got the decision today about two hours ago. That's truly late-breaking.

MR. SEGAL: It's nice to have the judge make the right decision. As we've seen in some of the other cases we'll discuss, the court doesn't always come down with what we may consider the "right" decision.

MR. JACOBSEN: Let me hit another case that didn't have a happy outcome. This is *Burstein vs. Retirement Account Plan for Employees*. It happened to be a cash-balance plan. They managed to get themselves in a little bit of trouble, partly because it's the nature of cash-balance plans to sometimes sound like something they're not. You're a defined benefit plan, but you kind of want to sound like an account balance plan. You kind of want to sound like defined contribution because it's easier for employees to understand. There's nothing inherently evil about that, but you can run into some problems. In this cash balance plan, they had a summary plan description (SPD) that said, "The employer contributes to your account each year based on your pay. Your account earns interest at a guaranteed rate. You have your own interest-bearing account that's completely funded by the organization." They're trying to explain a cash-balance plan. That's a normal description of a cash balance plan. Then they have a section about vesting that says the employee owns the account after five years. I guess that's right for vesting purposes. They also said that if the plan is terminated, the employee automatically becomes vested in the account regardless of how many years of service the employee has. So what happens in this case? The company runs into financial problems. It doesn't have enough money in the plan to pay all the benefits, and so the plan was taken over by PBGC in this bankruptcy. The plan was terminated. Prior to that, there was probably a partial termination of the plan because a bunch of employees lost their jobs before they had the five years of service. There was enough money in the plan to fund the benefits that had been vested prior to the termination or partial termination. The way that the allocation rules work on a terminating plan under ERISA is that you fund those benefits before you fund the benefits that vest because of the partial termination or termination. These employees said, "The SPD didn't tell us that. The SPD said that we'd be fully vested if there were a termination of the plan. We want to be fully vested. The SPD promised that there would be full funding of all this, and we want the SPD to be binding." The court agreed. The court said that the language I read to you was enough to override the plan document and promise those employees that they'd be fully vested in their accounts despite the fact that the accounts weren't funded. You read that section and you think that the PBGC is in trouble and that they're going to have to come up with money to pay for this. The court in the next part of the case says, however, that in the PBGC's capacity as guarantor, those are not going to be guaranteed benefits. In reading through the case, I don't know whether the employees will actually get anything, but I do know that in the Third Circuit, it's created a rather nasty precedent.

MR. KRA: How do they not get those benefits into category 4, to the extent that they're below the PBGC-guaranteed levels?

MR. JACOBSEN: These are the benefits that only vested because of the termination.

MR. SEGAL: So they'll go into category 5 then?

MR. JACOBSEN: If you can number the categories, then you're ahead of me on that one. They go into the category that's not going to get paid. In any event, we're there in the Third Circuit. As the capper to this, the Third Circuit said that it doesn't matter if the employees relied on the summary plan description or not. They don't even have to show that they read it, understood it or actually made that inference. The court is going to decide what it meant and whether they read it doesn't matter. That has big implications for lawyers and plan administrators in that we need to spend time, effort and a lot of care in drafting summary plan descriptions. Presumably it has some implications for the folks who tell employers how much they have to fund their plans, and so on.

MR. SEGAL: There are Schedule B implications. Don't we typically put in our valuation that our valuation was based upon the plan provisions? We may even state, "The plan as amended through 'such-and-such' date," but it's on the plan provisions. Here in the Third Circuit, we now have a court decision that says the SPD takes precedence over the plan and we don't always have an SPD. Even the employer doesn't always have an up-to-date SPD.

MR. KRA: Don, when you say you base it on the plan provisions, I think sometimes you may have to go beyond that. What happens if you look at the plan document and, notwithstanding its IRS determination letter, it clearly violates Title I of ERISA and that there is an employee entitlement that can be enforced under Title I? The minimum funding is not only Title II, but it's Title II, and do you have to include that benefit in your valuation?

MR. SEGAL: I think that's beyond the scope of Wayne's case right here, but I would say that we probably do have an issue there. The last thing is, don't SPDs usually say, "No matter what we say here, the terms of the plan rule?"

MR. KRA: Yes.

MR. SEGAL: We don't know if this particular SPD said that.

FROM THE FLOOR: If an actuary is going to do a valuation of plan and advise the client on funding, PBGC premiums or otherwise, is the actuary negligent if he has not investigated every possible administrative practice, SPD and other thing of the employer so that the actuary is valuing the ultimate plan that the courts will eventually decide applies?

MR. JACOBSEN: I would not think that's necessary. If you have a plan document that you in good faith believe is the plan document, identify in the attachment to the Schedule B that you relied on the plan document provided by the plan sponsor. Include a summary of what was in there and have no reason to doubt that it is in the entire document, I think you can rely on that. If you have reason to doubt it or if you think that the plan document is deficient in certain fashions, then you may have a positive obligation to go further.

MR. SEGAL: When we do a valuation, we rely on the data provided to us by the plan sponsor. We don't go to check that the sponsor gave us the correct data. Sometimes a year or two years later we find out the sponsor may not have, but that's also in our valuation report.

MR. JACOBSEN: Quite frankly, if any of us had read this summary plan description beforehand, I'm not sure we would have been as sure as the court was that this plan document was in conflict with the summary plan description. It seems like the court was using some convenient hindsight to reach that result.

MR. KRA: How about the Schedule B cash-balance attachment?

MR. SEGAL: We will presume that you are all aware that in the instructions for the 2003 Schedule B, they added something. If you have a cash-balance plan, you have to provide additional information in your age-and-service display.

MR. KRA: There are some questions as to what should be in that. What happens if some of the people are in the cash balance and some are not? Can you have two attachments, one with the cash balance information and one with the pay information?

MR. SEGAL: It said if there were how many people in the cell?

MR. KRA: If there are fewer than 1,000 people, you don't usually provide the detail. If there are fewer than 20 in a cell, you don't provide the detail.

MR. SEGAL: That's right, but if you had 1,000 people in a cash-balance plan, you have to provide this additional detail.

MR. KRA: But what happens if you have 1,200 people in the plan, of whom only 400 have cash-balance accounts?

MR. SEGAL: According to what we heard at the EA meeting, the additional attachment is required.

MR. KRA: But you would only include it for cells that had at least 20 people.

MR. SEGAL: That's right. Then the question came up, but of the 20 people in the

cell, what if one had a cash balance and 19 didn't? What do you show? Do you show anything?

MR. JACOBSEN: How do they define a cash-balance plan for that purpose? To me the cash-balance plan is a sort of reporting device that tells people their account is worth this much, and maybe it's an accrual formula that says they're going to accrue benefits at this certain rate. How do they say what a cash-balance plan is?

MR. KRA: They usually define it as a plan in which the benefit is defined in terms of an account that gets pay credits, usually, or certain dollar credits each year and is then credited with deemed investment return. The lump sum would be equal to the account balance. Alternatively, that gets converted to an annuity, but it's done in terms of this deemed investment return.

MR. SEGAL: I would like to talk about IRS Announcements 2004-32 and 2004-33. The IRS will implement staggered remedial amendment periods for retirement plans. The IRS has had a project going for several years on the determination letter process. This is Paul Schultz's legacy, so to speak. Paul has been working on this and he deserves a lot of credit. The IRS has been looking at the determination letter process because, as you are all probably aware, in the past they have had these huge peaks when submission deadlines came up. They wanted to try to smooth them out. The private sector organized a liaison group on determination letters that worked with the IRS on this. It was not an IRS advisory committee; it was a private sector liaison group with representation from all interested parties. The actuarial organizations, the Profit Sharing Council of America, volume submitters, drafters of plans, Fidelity, lawyers — everyone was there — and the IRS, of course, was involved. There were a couple of white papers that came out, but the result, which was announced recently, is that for single-employer plans, they are going to go on a five-year cycle. Every plan will have to come in every five years. It will be triggered off the last digit of your Employer Identification Number (EIN). If this starts in 2006 and the last digit of your EIN is a "6" or a "1," this means you come in in 2006 or 2011. If it's a "7" or a "2," you'll come in 2007, 2012, etc. It's nice and simple.

MR. JACOBSEN: If I'm a "6" and I merge with a "7," can I then push it off another year or something?

MR. SEGAL: Technically, yes. There are also probably some very large employers that have multiple EINs.

MR. KRA: I've asked someone from the Service. They expect that with mergers you're going to end up with situations where some people will get accelerated and some will get deferred, but they don't expect that people will be merging organizations and controlling their entire tax filing process solely for the purpose of manipulating the determination letters.

MR. SEGAL: This does not prevent you from coming in in the interim. A new plan still comes in when it's set up. If for some reason you want a determination letter in the interim, you can come in, but this is when you *must* come in. In cases of legislative changes and regulatory changes, good faith amendments may be required to be adopted in the interim. The IRS plans to issue model amendments that you can adopt or to help you determine the adoption. I will take credit for being the author, or the suggester, of the five-year cycle. Everybody was talking about four. I suggested five, came up with that scheme and that's what they went with because you have to make it simple for plan administrators.

Now, for volume submitter plans and master and prototype plans, first, they are merging the two programs (after a great deal of discussion). The five-year cycle did not work for those types of sponsors because it was felt that this would give an advantage to one sponsor over another in terms of having a newer plan or having a delayed date. They got together with all the interested parties and came up with a solution where they will be on a six-year cycle. All the defined contribution (DC) plans will have to submit in year one and they will receive their determination letters in years two and three. The defined benefit (DB) plans will submit in year three and they'll receive their letters in year four and year five. They didn't mention what happens in year six. I originally heard it was going to be a two-four type of approach but apparently they have that little bit of overlap.

This was a wonderful example of cooperation between the private sector and the IRS. One of the advantages from the IRS's point of view of having reached out to all interested parties is that they got the buy-in by everybody before they came up with this program. They really expect that this is going to level the load. As a result, the IRS did reorganize in the Rulings and Agreements area so that people will now be devoted solely to audits and solely to examination instead of having to borrow people. When the peaks came in, they would borrow people from audits to do the examinations. You had people giving you determination letters who didn't always have the best knowledge about what was going on because they had to go through very quick training programs. It's a win/win situation for all concerned.

Let's talk about another court case.

MR. JACOBSEN: Let's talk about the employment cases. One of them is legitimately on the current events. That's *the Bodine vs. Employers Casualty Co.* case. What happened in this case is that there was a subsidized early retirement benefit, but you had to be terminated by the employer within a certain period of time. The employer terminated a bunch of executives, making them eligible for the early retirement window, not necessarily relevant to what the court did, but interesting. The company hired them back as supposed independent contractors. This infuriated some of the other employees, who were terminated but ended up not getting this early retirement window. They took a shot under the ERISA provisions that say it's illegal to discriminate against somebody and it's illegal to interfere with a protected right under ERISA. They said that the employer's failure

to fire the employee on a timely basis was an interference with the employee's rights under ERISA to get this benefit. The court said it was not.

The next one is a 2002 case, but you need to know about this case if you set foot in California and if you work on a corporate transaction somewhere in the Ninth Circuit. It's *Lessard vs. Applied Risk Management*. It involved an asset purchase agreement. When one company buys the assets of another company, the employees don't just come over. They have to be terminated by one company and hired by another company because their employment relationship is not with the assets, it's with the corporation that used to own the assets. You end that employment relationship and you start another one. The Ninth Circuit said that under this asset purchase agreement there was an automatic transfer. I don't know how the Ninth Circuit got that idea because I don't think you can have an automatic transfer of an employment relationship. But the Ninth Circuit said that there was an automatic transfer of active employees to the new employer, but if you were on leave, if you were medically disabled and not able to work at that time, your employment is not automatically transferred to the purchaser of assets until you're ready to come back to work. The buyer said, "We'll hire everybody, but we don't want to hire the people who aren't ready to work right now." If you think of an employer's normal hiring practices, from the buyer's perspective, that's OK. You don't have to hire people who aren't able to come to work. The Ninth Circuit said that it would have been illegal for the seller to have fired these people in order to terminate their medical benefits until they were able to work and come back. I don't know that I agree with that premise. I had thought it was OK to fire people who weren't able to work. Justice Kozinski is quite a colorful guy and came up with a bunch of quotes. He said that this is a no-brainer. He said that not only is this an easy case, but "the lawyers should have advised them otherwise and we can only hope they do in future cases." I'll tell you that this is a very standard provision in asset purchase agreements that you just can't use here anymore because of that.

MR. KRA: I'm presuming you've all heard that President Bush signed funding relief into law. We don't have 30-year Treasuries now. We have the four-year weighted moving average of corporate rates. It's a blended corporate rate. It's very easy to apply, isn't it, or is it? There are a few questions. First of all, they also did some monkeying around in very convoluted language with the 415 limits for the first year. Some people read it to say that people who got paid benefits at the 415 limit in a lump sum before the president signed it into law have to give back some of the money.

MR. SEGAL: Ethan and I are going to mention a few issues that have been identified and have been brought to the attention of the IRS. That's the first one.

MR. KRA: The IRS was sent a letter written by the senior technical actuaries of the major large firms. I think it's on our corporate Web site, http**:**//mercerhr.com, among other places.

Another issue is that they de-linked min and max, so that the minimum contribution for current liability is based on corporate rates. For the maximum contribution, you may elect to go under the old regime of 30-year Treasuries. If you do that election and you're at 100 percent of the top end on the corporate side, are you permitted to go to the bottom end on the Treasury side for 404? This would be different than the rule we've had up until now for min and max with current liability, where you had to use the same current liability number for min and max.

MR. SEGAL: Put very succinctly, can you do your valuation using 100 percent of the corporate bond rate for purposes of the minimum and the deficit reduction threshold (DRC) threshold, and 90 percent of the 30-year Treasury average for purposes of the maximum deductible? I don't see why anyone would do anything else but that way.

MR. KRA: Right. Furthermore, you have certain options in going back to 2003 and 2002 and 2001 in determining whether or not you were at 80 percent, 90 percent or 100 percent for DRC relief, for the anti-volatility, as well as for purposes of whether you owe quarterlies in 2004. You're able to recalculate it based on the corporate rates. Let's assume you were at 90 percent of 30-year Treasuries in 2003 because you wanted to have an unfunded current liability for deductibility. In going back and doing the anti-volatility, may you use the 100 percent of the corporate rate for that year for purposes of now redoing the minimum, solely for purposes of determining what your contribution requirement is in 2004?

MR. SEGAL: Your quarterly contribution.

MR. KRA: It doesn't change the amount of the quarterly if you're subject to quarterlies, it's only whether you are required to make quarterlies, as well as whether you met the 90 percent threshold for 2003, 2002 or 2001.

MR. SEGAL: And the 80/90 rule.

MR. KRA: These questions are all in a group of questions that have been submitted to Marty Pippen.

MR. SEGAL: We did them in the style of the gray book. We gave them the question and we gave them the answer. All we're waiting for them to say is, "Yes, you're right," but we haven't heard from them yet.

FROM THE FLOOR: Is there any timetable?

MR. SEGAL: You can't rush. The latest word was that it will be a while before we get any formal guidance on our questions.

MR. KRA: The reason is that Marty was out of town. He did not have e-mail access while he was traveling on business. He only got the questions last week.

MR. SEGAL: They're working on other things that are less important to us than these questions. People had their quarterly contributions due April 15. It would have been nice to have an answer. Then again, I'm being unfair. The law was only signed April 10, and they did get their guidance to us on the rates out on April 12, so they were very good.

FROM THE FLOOR: Can I ask a question on the min/max? We went through this logic, trying to figure out what to do. My understanding was that the act came out and that it said basically, "Here's what you do for minimum purposes. You may ignore this for max purposes." Then you go back and look at the rules for the maximum. They refer you back to 412 for the definition of current liability. So they kind of tell you that you should still be doing the same thing, although we're using a different index.

MR. KRA: Do you still use 100 percent for both, or do you use 100 percent for one and 90 percent for the other?

FROM THE FLOOR: The argument I got was that since it was structured saying you may ignore this, and if you go back to the maximum regulations where it says that you're supposed to look to 412 for your definition of current liability, then that leads you to think that you should be doing the same thing. That's the argument against using the bottom of the scale when you're using the top of the scale on the other end. But yet, they're two different things. But that's the argument.

MR. SEGAL: The argument on the side that Ethan presented, which I totally agree with, is that the law clearly de-linked them. First of all, consistently having to use 90 percent, for the Omnibus Budget Reconciliation Act (OBRA) and Retirement Protection Act (RPA) current liability, and you can only go above one when you're at the top of the range, was a notice or an announcement. It wasn't even a regulation, so that was not in the Code. You're referring to Code here and the Code has clearly de-linked the two. I would make an argument that they're de-linked, and my selection of my current liability rates based upon corporate bond rates is totally separate from my determination of the maximum deductible as current liability affects that. I'll even go so far as to say that if you consider the full funding limitation, I now have separate calculations for the full funding limitation, one based upon corporate bond rates for the full funding limitation as it affects the minimum and a separate one for the full funding limitation based upon 30-year Treasuries as it affects the maximum.

MR. KRA: I think it depends on who's going to make up the answer at the Service.

MR. SEGAL: This is a fine little mess we have here, and we do need the guidance now. Unfortunately, nobody from the IRS is here.

MR. KRA: Under Code section 411(d)(6), the IRS has issued proposed regulations on DB plans that you could eliminate certain optional forms. For example, I have a

plan that allows the J&S at any percentage, from 50 percent to 100 percent, in whole integral percentages. You can elect a 58 percent J&S, a 72 percent J&S or whatever you want. As you get into relative value regulations, the question is, how many of them do you have to illustrate? The IRS proposal is that you would be able to eliminate quite a large number of optional forms, as long as you preserve certain bookends. They provide certain categories of optional forms, where pop-up option may be separate from a non-pop-up option, but you would have to provide for certain forms that have to stay, and others that are "in between" so to speak, could be eliminated. You have to provide the one that provides the greatest death benefit protection. Let's say somebody is 30-and-out and 50 years old, but the lump sum has been deferred to 65. The most valuable form is probably the 100 percent J&S with the beneficiary who's 40 years old or the spouse who's 35. That's more valuable than the lump sum, as far as a death benefit protection, should the individual die tomorrow, because that will provide substantially more than this lump sum, which may only be capturing 30 percent of the value of the benefit. It's not always the lump sum that's the most valuable death benefit.

MR. SEGAL: The regulations are complex; they require a few readings to understand. You can eliminate forms if the effect is de minimus. There's a definition in there of "de minimus." In the example Ethan gave, the family is "greater than 50 percent J&S." There's another family of "less than 50 percent J&S," so you could eliminate some in there, if they're truly actuarially equivalent. If they're truly actuarially equivalent, you can demonstrate that there would be only de minimus changes in terms of what they're doing. It's fairly complex. There were delayed effective dates in certain cases.

MR. KRA: If you had 5-, 10- and 15-year certain options with life, you could probably eliminate the 5 and 10 and just keep the 15. You definitely can eliminate the 10 because it's in between others.

MR. SEGAL: The comment period is open probably for another two months.

MR. KRA: They will take comments after that.

MR. SEGAL: They may have a deadline, usually 90 days for comments, but that's only to get people going.

MR. KRA: They get 75 percent of the comments on the 89th or 88th or 90th day, but if you do send a comment in a week or two later, they'll look at it right up until they make up their minds, because they want those comments.

MR. JACOBSEN: Let me mention another case. There's an interesting case on corporate-owned life insurance (COLI). It's *Mayo vs. Hartford Life*, but it really involved Wal-Mart. In any event, this was so-called janitor insurance, which is a pretty disdainful term. The corporation Wal-Mart would go out and buy life insurance on the lives of a whole lot of employees. Since they were itty bitty, little

policies, under the rules that allow you some de minimus borrowing from those policies, they could borrow a lot of that money back and make some dough off of it. Where they ran into problems was in Texas, where this was decided. They had no insurable interest in those employees, and it violated law to buy life insurance on these employees. That's troublesome for those types of plans, and an employer that wants to do that has to look at each and every jurisdiction and figure out what the insurable interest is.

I also want to quickly mention the reimbursement and subrogation cases. I want to make sure we've mentioned at least some health plan cases while we're here. Here's the deal on these cases. This came out of fiduciary breach cases where individuals wanted to sue fiduciaries and get damages if there was a fiduciary breach. The Supreme Court said that you can sue the fiduciary and you can get "equitable remedies," but you can't get what's called "legal relief." To figure out what's equitable versus legal, you have to go back and dust off volumes somewhere in London where they figured this stuff out when the bench was split between law and equity. It's kind of crazy, but a legal remedy is money. If you damage somebody and you want to get paid money because you were damaged, that's a legal remedy. An equitable remedy is something like restitution, specific performance of a contract or something like that. But often if there's a problem, you just want the money. You want a legal remedy. Plans are running into those precedents from the U.S. Supreme Court saying there's no legal remedy when they're trying to get reimbursed on these subrogation cases. Somebody goes out and gets into a car wreck, he runs up a lot of hospital bills, but later on the person who hit them, that person's insurance pays off and the plan is written to say they're supposed to pay the plan back out of the insurance proceeds from the person who hit them. It's becoming difficult, and there are a lot of different outcomes on these cases as to whether the plans can get repaid.

MR. KRA: The IRS is planning to attack the abuse of life insurance in retirement plans. How many of you are familiar with 412(i) plans? There are some very good legitimate ones and then there are some that are less appropriate. These life insurance contracts are designed so that you put in the money, it becomes deductible as a contribution to the plan, and then the policy gets all these monies flowing in, but doesn't have a cash surrender value of any significant amount. As one example, let's say premiums paid were $1 million and the cash surrender value was $250,000. The policy then is distributed out of the plan to the individual. In effect, there's a distribution of the policy to the individual. The individual would claim taxable income of $250,000, but not cash the policy in and perhaps even gift the policy to a child or grandchild and claim on the gift tax return as only having a value of $250,000 for gift tax and generation-skipping tax. The policy would be maintained with no additional premium of any significant amount for another two or three years. Then suddenly, lo and behold, all these surrender charges disappear and the cash surrender value jumps up to over $1 million. The IRS said, "Wait a second. The economic value that has been transferred was not $250,000. It was substantially more, closer to $1 million. Maybe discounted by a couple years, the

economic value is $900,000, but it's not $250,000." Because of the abuse, they wrote a very tight revenue ruling and proposed regulations that would effectively tax it — based on the premiums paid minus the value of the life insurance provided, etc. — at a very high level, probably too high. In private meetings, they've admitted that they think they may have pushed the pendulum a little too far. The American Academy of Actuaries has been asked to provide them with comment and come up with a better methodology to determine the taxable amount, because it affects not only 412(i) plans but would affect other insurance transactions where there's a transfer of an insurance contract. It would be used for evaluation for gift tax, income tax and other types of taxes in a number of other situations. This is still fluid, but it's an attack at what would be viewed as extremely egregious definitions of taxable income.

MR. SEGAL: We can give credit to where it's due. ASPA was very active in bringing these types of abusive transactions to the attention of the IRS. They rightly felt that if this was permitted to go on, it was going to be bad for everyone.

Ethan was concentrating on what has been known for years as "springing cash values." But the IRS also discovered life insurance policies within plans that had death benefits well in excess of incidental death benefits. The IRS said no. They would be taxed as non-incidental or as an excessive incidental.

The last one we're going to discuss is funding waivers. Some of you may have heard of something called the "perfect storm," and you may be aware that some of your clients may have had some difficulty in meeting their minimum funding requirements. The IRS issued a revenue procedure updating the procedures for requesting a funding waiver. This is for single-employer plans under Code section 412(d). They restated all the prior requirements but asked for additional information on compensation information for the highest-paid employees, including information on non-qualified plans. We are still waiting for the updated rules for extensions of amortization periods under 412(e), which probably will be of the greatest use to multi-employer plans. They're available to single-employer plans, except that the interest rate on the extension of the amortization period is the greater of the valuation rate or 150 percent (maybe it's 175 percent).

MR. KRA: For multi-employer plans, it's the lesser of the valuation interest rate or the federal short-term rate, which is about 2 percent. So for multi-employer plans, effectively it becomes a 2 percent amortization, which dramatically lowers the amount that needs to be paid. They've had more applications done to 412(e) in the past six to nine months than they've had since ERISA was enacted. I believe they have approved one or two.

MR. SEGAL: Maybe, but I know they've turned a few down. They're going to be asking for the same type of information from the multi-employer plans that they have from the single-employer plans, but they still haven't come out with a revenue procedure. Although apparently that's one of the things they're trying to get out

that is holding them back from responding to our questions on the new law.

MR. KRA: I believe they're going to be asking, for example, are you doing anything that will improve the situation, like getting additional contributions or cutting future benefit accruals? Is anybody sharing in the pain, or is it just you're asking for funding relief? They want to see that a legitimate effort is being made toward resolving the problem and that there's a game plan for getting out of the problem.

MR. SEGAL: One thing we don't know if they'll address is, what will happen if you blow up the waiver? What happens? You've gotten an extension. You have an amortization period that had maybe 10 years left and now you've tacked 10 years on to it, so it's now a 20-year amortization. Typically when you get the extension of the amortization period, which is a form of a funding waiver, you cannot improve benefits in a meaningful manner as long as you have the funding waiver. If you do and you blow up the waiver, then what happens?

MR. KRA: How quickly do you have to pay it off? Do you have to pay the remainder off over the remainder of the original period, or do you have to bring it up to snuff as if you had never had the waiver? Nobody knows the answers yet.

MR. SEGAL: Nobody knows the answers here and we're hoping that the IRS will address it. I don't have any of those plans, fortunately.

FROM THE FLOOR: How active is the PBGC in working with the IRS on funding waivers?

MR. SEGAL: Very active. The PBGC gets involved. For example, going back to something we were talking about earlier, this whole question of the additional information on the Schedule B with respect to cash balance plans was requested by the PBGC. Back in January, a group of actuaries went to the IRS and said, "You sprung this additional information on us. We finished our valuations. We finished all the tables, etc. We have to go back now and work up the tables. Can you give us a waiver for 2003?" The answer from the IRS was, "Go talk to the PBGC." We're going to get some guidance on what we're going to do. At the EA meeting, Marty Pippen exposed several things that the IRS was thinking about. But since the 5500 is a multi-agency form, the IRS may have made that decision, but they still need approval from the PBGC and the Department of Labor (DOL). That's why we haven't seen anything there. Again, we're used to talking about the IRS very often, but very often, as you just pointed out, like on funding waivers, the PBGC is involved. You don't get a funding waiver until the PBGC approves, even for a single-employer plan, because, for example, if collateral has to be put up, it's the PBGC that wants the collateral, not the IRS.

MR. KRA: Wayne, do have any more cases to talk about?

MR. JACOBSEN: I'll do another interesting case, *Musmeci vs. Schwegmann Giant*

Supermarkets Inc. The deal in this case is whether or not a grocery store chain had created a pension plan. Their deal was that if you worked long enough for the grocery store chain, reached a certain age and left, they would give you vouchers every month. You could come to the grocery store, turn in your voucher and buy groceries. It was about $200 a month, and you had to use the vouchers there. It wasn't cash, although the case says that sometimes the clerk would give you change when you bought something. But that wasn't the turning point in the case. The question was whether that's a pension plan under ERISA. The courts said yes, that's a pension plan under ERISA. I think what underlies the decision is that everybody has to buy groceries, and giving somebody a voucher for groceries is pretty darn close to giving them cash. I think that's how it came out. What about the discount seats that people fly on in airlines? There may be some other sort of interesting ones that pop up there. The real problem with a case like this is the utter failure to follow reporting and funding requirements. Once you become a pension plan under ERISA, you're sort of de facto a defined benefit pension plan because if you want to be a defined contribution plan, you have to have account balances and investments, and your accrued benefit has to equal your account balances. This thing is a defined benefit plan.

MR. SEGAL: That's right. The definition of defined benefit plan in ERISA, I believe, is one that is not a defined contribution plan.

MR. JACOBSEN: That's right. You haven't made a defined contribution plan; you've made a defined benefit plan with this. Of course, they don't have a trust fund, they haven't consulted an actuary to figure out the minimum funding requirements and there are no investments and so on.

MR. SEGAL: Even if it's not qualified, it's still subject to the funding rules.

MR. JACOBSEN: It's a horrible mess. There are not a lot of grocery stores that do that, but there are these sorts of worries about creating a defined benefit plan and not following any of those rules. There are a lot of these little guys ticking out there in terms of a bad top hat plan. Again, under ERISA, if you have a plan that's primarily or exclusively to provide benefits for a select group of management and highly compensated employees, you don't have to satisfy the funding and reporting rules and all that, you can just have a nice, unfunded plan to pay that. That's great, except that there's no definition of who's highly compensated, other than a very vague definition that would suggest it's a very small group. There are a couple of cases out there — the names aren't popping into my mind of these top hat plans that have blown up — and it's the same disaster of problems with them.

MR. SEGAL: But this doesn't even qualify as a top hat plan.

MR. JACOBSEN: Right. This had no chance. This was the rank and file. What I'm saying is that I think the same problem is out there for employers who have said that anybody who makes over $100,000 can be in their top-hat plan. They're taking

a risk there.

MR. KRA: Let me share a case with you. This is one that never got into court because it was settled out of court. I was going to be an expert, and I advised my client to settle as quickly as possible. It was probably back in the old leveraged-COLI days. You had an insurance agent sell a program to a small company, and the money that you would make on it would be used to pay a pension benefit to a certain group of employees, down to the executive secretary who was making $25,000 a year in the late 1980s. That's a little far from what I would call a top hat plan. As interest rates came down, these policies — I don't remember if it was leveraged COLI or if it was regular COLI — were substantially underperforming the original projections because interest rates were lower. The company decided to sue the insurance company and the broker. The insurance company asked me to look at the situation. I said, "We can justify the fact that the policies are underperforming because interest rates have come down. I think we can formulate a very good defense." In that particular state, and I think it was in Michigan, any case going to court has to first go to a mediator who puts a dollar value on the case. It's mandatory mediation. If one side accepts the mediator's number and the other side rejects it, the rejecting side has to beat the mediator's number by 10 percent or pay opposing counsel's fees, as an incentive to settle. The mediator put a figure of, let's say for argument's sake, $125,000 on the case. This would mean that the definition of my client winning, not paying the fees, would mean that ultimately the damages would have to be under $112,500 or they would pay opposing counsel's fees. It was based on the underperformance of the policies. My advice to the client was, "I think you have a good shot of beating them on that particular item, but if they ever get a good expert to look at the situation, you're going to have issues on Title I of ERISA, the trust, the minimum funding, penalties, and excise taxes that will easily run into seven figures and beyond. If you can get a total, general release for $125,000, take it and run, but it has to cover anything and everything, including things that they don't know about." They did it, the case never went to court, somehow this plan disappeared, and DOL and IRS never got involved. That's the type of thing where an insurance agent can end up getting a company into what is called a top hat plan, but very likely may not be a top hat plan.

MR. JACOBSEN: Like I said, I think there are a lot of little time bombs out there. They'd be great cases for the DOL, great cases for the IRS, great cases for the employee and just a terrible disaster for the officers of the company.

FROM THE FLOOR**:** How did the supermarket case get to court?

MR. JACOBSEN: I believe it was a lawsuit by an employee. I think the supermarket chain went bankrupt and stopped giving them their vouchers. Somebody came in and suggested going after the officers under ERISA. I believe it was a lawsuit by employees.

MR. DENIS PLOUFFE: On the top hat plan, when a plan is implemented, do you

give the DOL an application to get the plan exempt from reporting?

MR. JACOBSEN: No.

MR. PLOUFFE: I thought you had to report something to either the DOL or the IRS so that you get your plan qualified as a top hat.

MR. JACOBSEN: You report it, but there's no qualification.

MR. KRA: It's a report you send them; they never send back anything.

MR. PLOUFFE: And it's a one-time reporting. The plan could be top hat but over time as you add more plan participants it could become not a top hat anymore.

MR. JACOBSEN: I want to be clear about what we're talking about. There is a one-page notice that you send off to the DOL. You tell the DOL that you have a top hat plan and it has this many participants in it as of today. If you don't file that form, it means you're supposed to file 5500s on your top hat plan because you fall out of the reporting exemption. That's just simply something you've told the DOL. They don't come back with an IRS-like determination letter that says they agree that your plan constitutes a top hat plan. You would get no protection from having filed that. In fact, if you weren't top hat, all the reporting requirements would apply. If you think you're top hat, you better file that form because that's consistent with treatment as a top hat plan. You'd hurt yourself if you don't file the form, but it's not like a determination letter where you're getting some protection of a government review process.

MR. SEGAL: Let's assume you've established the plan, it was top hat and you filed the form. But over time, you're no longer top hat because you've just put too many people in the plan who don't fit the qualification of top hat employees.

MR. KRA: You get no protection.

MR. JACOBSEN: You're a goner. There's absolutely no protection on that. It has to be this select group of management or highly compensated employees. The only thing I know of that gives a little guidance from a Department of Labor perspective is that they've said to look at people who are high up enough in the organization that they could influence the corporate policy about benefits. That's a pretty small group.

MR. KRA: I saw one situation where a chief counsel of a company was opined to be not a top hat employee because the nature of the job could not influence the decision and negotiate his contract.

MR. JACOBSEN: You're familiar with that DOL release. It's about 10 years old, but there's not much out there in the way of guidance.

MR. SEGAL: In Revenue Ruling 2004-10, the IRS said that DC plans can charge expenses to terminated vested participants. They were fairly specific in what they said. For example, it says "a pro rata share of administrative expenses." They're saying you can't charge a disproportional part of the expenses to your terminated vested participants. It has to be done on a reasonable basis, which is the general definition of pro rata. Even if the employer picks up the administrative expenses for the active employees, it's not necessarily prohibited to charge the terminated vested employees. Once this came out, the question came up, could you do it for DB plans? The problem with DB plans is something that we mentioned earlier today, a little section of the Code called 411. If you were to charge terminated vested participants in the DB plan for the expenses of the plan, how would you do it other than by reducing their benefits, which might result in an impermissible forfeiture?

MR. KRA: The place where it would be tempting is if you had a cash balance plan. You would try to take it out of the interest credits on the cash balance plan. I think that would be a prohibited forfeiture under 411.

MR. JACOBSEN: Maybe it's another way of saying the same thing, but could you devise some mechanism where you wouldn't reduce their current balance, but you would eliminate future accruals? Typically, though, terminated employees aren't getting much in the way of accruals, or shouldn't be, so it's hard to do it. I think you could envision a way to charge the account balances or the accruals of active employees, but nobody wants to do it. It would be an odd thing to do.

MR. SEGAL: I'm sort of speculating on the spot. Could you define the rate of benefit accrual as whatever your formula is, less the expenses?

MR. JACOBSEN: I don't think you could.

MR. KRA: I think you would define it as minus a specific dollar amount, but then you'd have to worry about backloading, accrual rules … it could get messy and ugly.

MR. SEGAL: It's not worth it.

MR. PLOUFFE: With respect to the relative value regulations, what is the likelihood that the effective date would be postponed?

MR. KRA: It will be decided at very high political levels in the administration. It could be at presidential advisory level.

MR. SEGAL: Or high up in Treasury. It will be at a level higher than the IRS.

MR. KRA: It will be higher than Sweetnam, that's for sure.

MR. PLOUFFE: In terms of a course of action with clients, we still have a little

time?

MR. SEGAL: You proceed as if it's going to be in effect. I'm presuming you've all been working with it, and the more you work with it, the more problems you see with it.

MR. KRA: The uglier it gets.

MR. SEGAL: They knew there were problems when they issued the regulation. It says to please show the relative value. Of course you can do it on two bases at the same time. Then they go on to say, "Yes, we know we have a regulation that says the qualified joint and survivor must be the most valuable, but if your demonstration shows that it is not, that's not considered a violation of the regulation."

Ron Gebhardtsbauer, who is, as you know, pension fellow of the American Academy of Actuaries, *gebhardtsbauer@actuary.org*, is looking for strange examples of problems, because the Academy is working on behalf of participants, plan sponsors and actuaries to ask the IRS to postpone the effective date of the regulations.

MR. KRA: Also, if you have some sample client work that's already been completed that you can sanitize, get that to Ron. Let's say the disclosure runs four pages of immense gobbledy gook. That would be an excellent one to send to Ron because then they can share it with people on the Hill, at the Treasury, and at the Service, saying, "This is what you want us to give out. Does this make sense?" The people to send it to would be Ron Gebhardtsbauer at the Academy, Janice Gregory at the ERISA Industry Committee (ERIC), and Lynn Dudley or Diane Holland at abcstaff.org, the American Benefits Council. They're all working together. Give it to all of them because if you get it to all of them, it will have that much more impact.

MR. SEGAL: Get your plan sponsors to contact their Congressmen. That's better because they want to hear from the taxpayers, not from the professionals, that this is burdensome.

MR. KRA: To the extent that you have clients who are willing to go to Treasury, IRS and the Hill to lobby for an extension, that's more powerful than all of us combined, because they are viewed as the real people.