



# AMERICAN ACADEMY of ACTUARIES

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## MEMORANDUM

TO: Barbara B. Weyher, Esq., Chair  
Douglas J. Brocker, Esq., UPL Counsel  
The Members of the Authorized Practice Committee

FROM: John P. Parks, Vice President for Pensions  
American Academy of Actuaries

RE: Allegations of Unauthorized Practice of Law by  
Retirement Plan Professionals in North Carolina

DATE: April 9, 2003

The American Academy of Actuaries (“the Academy”)<sup>1</sup> understands that the Authorized Practice Committee of the North Carolina Bar Association has issued letters to several retirement plan professionals alleging that they are engaged in the unauthorized practice of law with respect to certain retirement plan services provided by those professionals to North Carolina businesses. As a nonprofit professional association whose members include thousands of actuaries who are federally licensed to provide professional services to employee benefit plans under ERISA (“Enrolled Actuaries”), the Academy has a compelling interest in the North Carolina Bar Association’s resolution of this matter. The Academy believes that the Authorized Practice Committee’s definition of “unauthorized practice of law” is overbroad and infringes improperly on the activities of Enrolled Actuaries, who are expressly permitted by federal law to provide advice on retirement plans to sponsors and plan trustees. We urge you to reconsider the position taken in the committee’s letters.

Enrolled Actuaries are skilled professionals who are required to pass a series of extremely challenging examinations and to meet regulatory requirements for relevant experience before being licensed. *See generally* 20 C.F.R. §§901.10 - 901.13. An Enrolled Actuary is required to renew his or her enrollment every three years. 20 C.F.R. §901.11. As a prerequisite to renewal, an Enrolled Actuary must meet rigorous continuing education requirements. At least half of the Enrolled Actuary’s continuing

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<sup>1</sup> The American Academy of Actuaries is the public policy organization for actuaries practicing in all specialties within the United States. A major purpose of the Academy is to act as the public information organization for the profession. The Academy is non-partisan and assists the public policy process through the presentation of clear and objective actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal elected officials, comments on proposed federal regulations, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualification and practice, and the Code of Professional Conduct for all actuaries practicing in the United States

education must consist of “core subject matter,” with the remainder consisting of “non-core subject matter.”<sup>2</sup> The federal government maintains strict guidelines that continuing education opportunities must meet to qualify under the regulations, 20 C.F.R. §§901.11(f)-(i), and reserves the right to audit Enrolled Actuaries’ continuing education records. 20 C.F.R. §901.11(j).

The Academy is familiar with the December 13, 2002 memorandum submitted to you by the American Society of Pension Actuaries (“ASPA”). We concur in general with ASPA’s comments, and see no reason to repeat them here. However, we wish to emphasize that, pursuant to authority granted by Congress, Enrolled Actuaries are expressly permitted to practice before the federal agencies that administer ERISA. To the extent that Enrolled Actuaries provide professional advice to sponsors and administrators of ERISA-qualified plans they are, therefore, acting under federal law that preempts state definitions of “authorized practice of law” for purposes of ERISA practice. As the United States Supreme Court has recognized, “ERISA pre-empts any state law that refers to or has a connection with covered benefit plans ... ‘even if the law is not specifically designed to affect such plans, or the effect is only indirect,’ and even if the law is ‘consistent with ERISA’s substantive requirements.’” *Fort Halifax Packing Co., Inc. v. Coyne*, 481 U.S. 1, 10 (1987), quoting *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 1390 and *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 739 (1985).

In 1990, in a case in which the Academy participated as an *amicus curiae*, the Supreme Court of Florida considered and rejected a proposed advisory opinion of the Florida State Bar that purported to define as “unauthorized practice of law” professional activities involving pension plans that were virtually identical to those at issue here. The Florida Supreme Court recognized that, because federal laws and regulations expressly authorize Enrolled Actuaries and other licensed nonlawyers to practice before the federal agencies that regulate ERISA plans, “we cannot prohibit authorized professionals from preparing and presenting the necessary documents to federal agencies before which they are admitted to practice.” *The Florida Bar re Advisory Opinion —Nonlawyer Preparation of Pension Plans*, 571 So.2d 430, 433 (S.Ct. FL 1990). We anticipate that other courts, if faced with this question, would come to a comparable conclusion.

North Carolina’s unauthorized practice of law statute is intended to protect the state’s citizens from incompetence and dishonesty in an area of activity affecting the general welfare. *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962). The effect of the

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<sup>2</sup> 20 C.F.R. §901.11(e). “Core subject matter” is defined as “program content designed to enhance the knowledge of an enrolled actuary with respect to matters directly related to the performance of pension actuarial services under ERISA or the Internal Revenue Code. Such core subject matter includes the characteristics of actuarial cost methods under ERISA, actuarial assumptions, minimum funding standards, title IV of ERISA, requirements with respect to the valuation of plan assets, requirements for qualification of pension plans, maximum deductible contributions, tax treatments of distributions from qualified pension plans, excise taxes related to the funding of qualified pension plans and standards of performance for actuarial services.” 20 C.F.R. §901.11(f)(1). “Non-core subject matter” is defined as “program content designed to enhance the knowledge of an enrolled actuary in matters related to the performance of pension actuarial services. Examples include economics, computer programs, pension accounting, investment and finance, risk theory, communication skills and business and general tax law.” 20 C.F.R. §901.11(f)(2).

Authorized Practice Committee's letters would be to place responsibility for all aspects of professional practice in the hands of attorneys regardless of their technical competence. Just as an Enrolled Actuary would not usually be competent to represent pension plan sponsors in a court of law, an attorney who was not also licensed as an Enrolled Actuary would not be competent to advise plan sponsors on valuation of plan assets, calculation of reserves, selection of actuarial assumptions, minimum funding standards and other highly technical actuarial matters. Thus, enforcement of the committee's definition of "unauthorized practice of law" would have the undesirable effect of depriving the citizens of North Carolina of the benefits of competent advice that only an Enrolled Actuary can provide. Such a result would be clearly contrary to the intent of North Carolina's unauthorized practice of law statute. *State v. Pledger, supra.*

We strongly urge the North Carolina Bar to withdraw the Authorized Practice Committee's current position on retirement plan services as contrary to established federal law and the public interest of the citizens of North Carolina. Please contact the Academy's Executive Director, Richard C. Lawson, or its General Counsel, Lauren M. Bloom, at (202) 223-8196 if you require any additional information from the Academy with respect to this matter.