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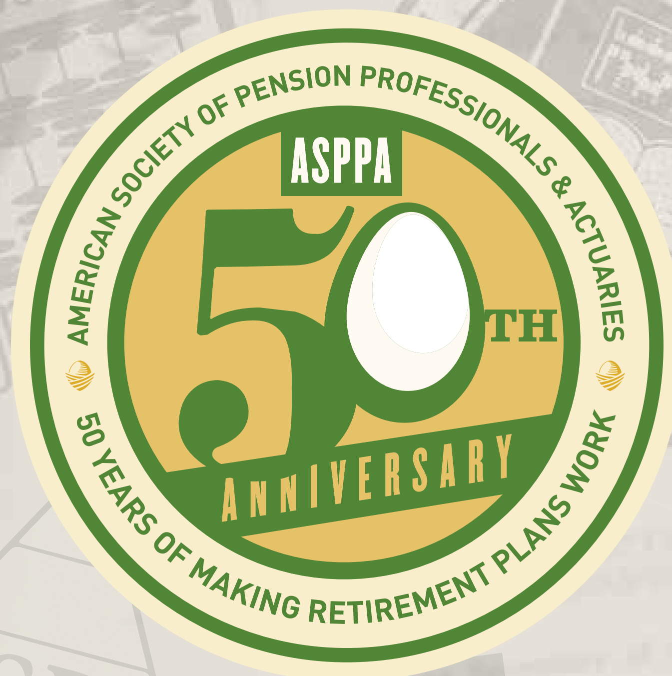
PLAN CONSULTANT

WINTER 2016



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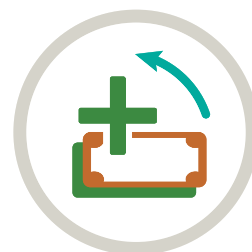

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From Adversity to Excellence

The celebration of ASPPA's 50 years at the forefront of the retirement industry starts here.

BY JOHN ORTMAN

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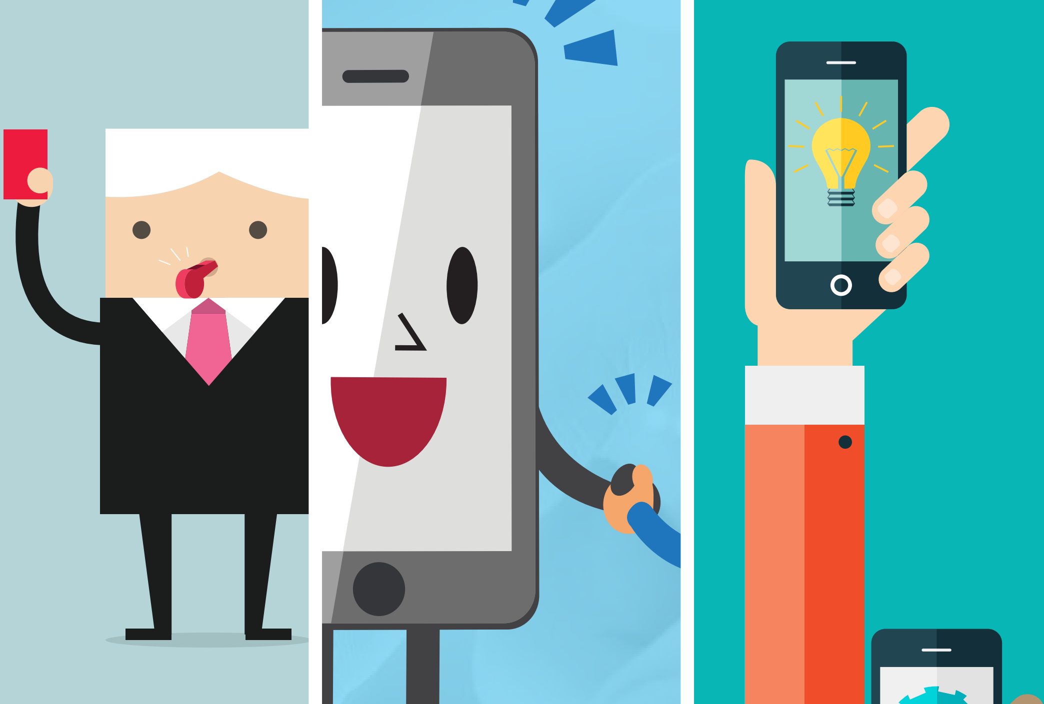

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We're also creating an opportunity for individual ASPPA members to support the history book effort via a dedication/remembrance program — for more information, go to **asppa-net.org/About/ASPPA-History-Book**

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Chief *What* Officer?

As too many employers have found out the hard way, the costs and expenses associated with workers who are not prepared financially to retire include lower productivity, higher levels of stress, higher health care costs and fewer opportunities for advancement by younger employees. Hence the emphasis on participant education and outcomes.

The good news is that plan sponsors seeking to tackle these issues through effective oversight of their plan now have a new way of doing so: by adding a Chief Retirement Officer, or CRO.

As retirement industry veteran Steff Chalk, executive director of The Plan Sponsor University, notes, the CRO position is still unknown to most organizations. (Chalk, a columnist for NAPA's quarterly magazine, introduced me to the CRO concept in a recent column he wrote for the magazine.) In fact, it currently exists in only a handful of forward-thinking companies that recognize the benefits associated with preparing participants for an orderly separation of service at normal retirement age.

Chalk sees two key roles of the CRO: negotiator and communicator.

- **Negotiator.** As negotiator, the CRO is responsible for the prudent oversight of fees, services and all plan related expenses. For example, the presence of a "professional purchaser" — and even a formal, written expense policy — may have saved a lot of time and trouble in the case of *Tibble vs. Edison*. This negotiator role should be thought of as a strategic one in addition to a functional one, Chalk says.
- **Communicator.** The CRO should deliver very specific messages to plan participants, Chalk recommends, starting with the touchstone messages of behavioral finance pioneers Profs. Richard H. Thayler of the University of Chicago and Shlomo Bernartzi of UCLA: "Save More Today" and "Save More Tomorrow." This communications role may also include being (or overseeing) an onsite Certified Financial Planner (CFP) or other financial designation holder. This designation holder would not sell securities, of course. Rather, he or she would be a readily accessible internal resource to which a plan participant could turn for a meaningful answer — at last — to the question, "What should I do?"

> "It's time to recognize the CRO as a strategic contributor to the well being of the 401(k) plan sponsor and each plan participant."

Chalk offers some ideas for setting the CRO's pay, including tying it to performance. Would it make sense to compensate the CRO based upon successfully preparing a workforce for retirement? How about basing the CRO's compensation on the percentage of a workforce that is on track to retire at or near normal retirement age, or perhaps upon the number of employees who are ready to retire in any given year, or upon income replacement ratios pre-retirement?

Sounds like an idea whose time may have come.

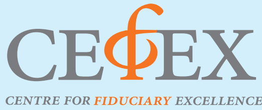
Questions, comments, bright ideas? Email me at jortman@usaretirement.org. PC

JOHN ORTMAN
EDITOR-IN-CHIEF

Visit the PC Online Archive!

One of last year's enhancements to the ASPPA Net website was a new page that houses past and present articles published in *Plan Consultant*. More than 100 articles are now online, in 18 topic categories. And we'll be adding new content from the magazine on a regular basis in the future.

The new online PC archive is part of our effort to amp up ASPPA Net's "Resources" tab. The goal: to provide the industry's most robust library of business intel, compliance and legal content. Check out the PC Online archive — just go to asppa-net.org and click on the "Resources" tab in the top nav bar, then on "PC Online."



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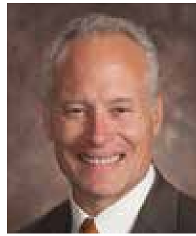

History in Numbers

Learning about our history reinforces the importance of what ASPPA stands for.

Numbers have always been a large part of my life. So much so, that my father guided me toward the actuarial profession at a young age. Whether it was using mile markers to calculate how long until we get "there," or remembering where I was when the odometer turned over to 100,000, or celebrating Pi Day, I was (and am) constantly using numbers to amuse myself and pass the time. For example, I always know the Super Bowl number because I was 1 when my Kansas City Chiefs lost the first one.

So it brings me great joy to be age 50 as I start my term as ASPPA President in the year ASPPA celebrates its 50th anniversary. And what a year it will be! Our celebration begins with the cover story in this issue and culminates with a most excellent party in October (more on the party later).

Observing a milestone always provides an opportunity to learn about an organization's history. Thanks to the diligent work of our 50th Anniversary volunteers, the proud history of ASPPA will be front and center all year. Memorabilia, pictures, videos and stories have been collected for the history book that will be unveiled in October. And pieces of history will be scattered throughout ASPPA activities all year, including conferences, webcasts and this wonderful magazine.

Learning about our history is important for many reasons. Not only is it a way to recognize the retirement professionals who blazed the trail before us, but it also reinforces the importance of what ASPPA stands for — supporting our members who provide competent, ethical and professional retirement plan services to plan sponsors.

Many changes have occurred in ASPPA over its lifetime — ERISA, acceptance of non-actuaries, the devastating blow of the Tax Reform Act of 1986, acceptance of financial advisors, and now reorganization within American Retirement Association. The lessons learned during each of these pivotal changes are vital in helping us move forward.

One of my goals for the coming year is to plan an incredible party for October — wait, more on that later. Our most important goal for this year is to set the framework for a new strategic plan. The recent reorganization has narrowed our mission and goals; in addition, our industry is in the middle of some very significant changes. Consolidation, technology and fee structures are just a few of the variables that will continue to alter the TPA landscape over the next 5, 10 and 25 years.

In tackling this goal, ASPPA's Leadership Council determined that it would be premature of us to map out a new strategic plan without a better understanding of how our membership will evolve in the future.

Much of this understanding will be achieved by listening to our members. I will be taking all the opportunities I can to discuss how you feel your businesses will be changed (for better and worse) in the short and long term. If you see me at a conference, please introduce yourself and let me know your thoughts. Also, feel free to email me at joeactuary@gmail.com. The information we receive from you, along with what we learn celebrating our history, will help prepare both our current Leadership Council and future LCs to propel us into the next 50 years.

Okay, now on to the party! ASPPA's 50th Anniversary Gala will be held October 25, on the Tuesday night of this year's ASPPA Annual Conference. Don't miss it — the night will be a 1960s retro party that will start with a seated dinner, then move on to recognitions (some serious and some not), and end with a show by The Beatles tribute band Rain. It will be a night that will be talked about for years.

Thank you to everyone who made ASPPA what it is today, and thank you to those who continue to make it the premier retirement professional organization. I look forward to a successful, enlightening and fun year!

One more geeky numbers quip: My wife will turn 50 exactly 50 weeks after I did, on the night of ASPPA's 50th Anniversary Gala! PC

Joseph A. Nichols, MSPA, ASA, EA, MAAA, is ASPPA's 2016 President. A senior director with FTI Consulting's Pension Consulting Services group, he has provided pension actuarial services to a wide range of plan sponsors for more than 25 years.

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REGULATORY/ LEGISLATIVE UPDATE

The Government Does Not Do It Better

New DOL guidance gives state-run retirement plan products an unfair advantage without any reasonably apparent policy justification.

BY BRIAN H. GRAFF

November was a good month for those who believe that the government should take over the private retirement system.

Since far too many Americans continue to lack access to a retirement plan at work, state governments have been legislating retirement policy in recent years to address this significant coverage gap. A few states — California, Illinois and Oregon — have enacted legislation requiring businesses over a certain size to offer a retirement savings program to their employees, coupled with the creation of a state-run auto-IRA program that employers can use to meet the requirement. And more than two dozen other states are considering various bills focused on retirement policy.

These efforts are spearheaded in states controlled by Democrats, where the narrative that the private retirement system has failed the American public and so the government needs to step in to curtail the crisis is pervasive. Sound familiar? We heard the same thing in the health care debate in the last decade, which led to Obamacare. Now retirement is the new health care.

In May, more than two dozen Senate Democrats put pressure on the Obama administration to clarify the legal issues surrounding these state initiatives because of the frenetic activity in these Democrat-leaning states. In particular, questions needed to be answered about the interaction of ERISA with these new state-run retirement programs and whether ERISA prevents the ability of the state to require businesses to offer retirement savings options for their employees.

In July, President Obama responded, directing his Department of Labor to facilitate the implementation of these state laws. Now, with the DOL's Nov. 16 release of their comprehensive guidance on state retirement programs, the Obama administration has officially greenlighted these efforts and provided a roadmap for more states to follow going forward.

Tragically, however, the DOL's guidance helps state-run retirement plan solutions at the expense of the private sector, giving state products an unfair advantage over those offered in the private without any reasonably apparent policy justification. The guidance is a misplaced attempt by the Obama administration to promote coverage by suggesting that the state is somehow going to do a better job providing retirement plan products than the private sector.

Specifically, the proposal creates a new state plan payroll deduction IRA safe harbor to allow for automatic enrollment provisions for the state program without making it an ERISA arrangement, if there is a requirement to offer the program and it is the default option. The proposal capriciously does not extend this new ERISA exemption to private sector automatic enrollment payroll deduction IRAs.

In addition, the DOL issued an official opinion that allows states to create a state-run "open" multiple employer plan (MEP). This is the same DOL that shut down private open MEPs in 2010 with a stringent economic nexus requirement. What nexus do states have that the private sector doesn't, you may ask? From the opinion: "a state can indirectly act in the interest of the employers and sponsor a MEP under ERISA because the state is tied to the contributing employers and their employees by a special representational interest in the health and welfare of its citizens." Translation: the states care about their citizens, but private sector enterprises do not care about their customers.

I could point out the numerous occasions in the last decade in which state officials in control of state pension assets failed to represent the interests of citizens by succumbing to corruption, but enough with the sour grapes. What our industry needs to do instead is lobby at the federal level to enact bipartisan policies to increase the types of private retirement plan product options available in the marketplace, and let American business owners decide who can do it best. For instance, let's change federal law to open up private MEPs to any employer as long as there is a designated plan service provider the employer can count on to keep that plan running properly. And let's create a new deferral-only 401(k) plan safe harbor for start-up businesses. These new options will move the needle on coverage and allow private industry to compete and succeed against the state. **PC**

Brian H. Graff, Esq., APM, is the Executive Director of ASPPA.

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The Administration of Orphan and Abandoned Plans

When a plan is left without a trustee, it presents unusual challenges for the TPA.

BY DAVID M. LIPKIN

While those of us in the plan administration area are very familiar with the day-to-day challenges of "normal" plan administration, there are some plans that involve special situations. When a plan, for whatever reason, is left without a trustee, for example, it presents unusual challenges. This article will discuss these issues for the TPA.

WHAT IS AN ABANDONED PLAN?

There are several reasons why a plan may be left without a trustee, including resignation, death or bankruptcy of the firm. Some of these situations develop because the trustee has stolen funds from the plan, and has either disappeared or is in jail. As you know, the handling of employee funds requires special care. A trustee or employer who is desperate for money may be tempted to "temporarily" dip into these liquid assets, oftentimes with the intention of repaying them.

One can gain control of such a plan by several means: the DOL's QTA regulations, voluntary assignment, or court order.

QTA Regulations

The DOL issued Qualified Termination Administrator (QTA) regulations in 2006 to address the problem of abandoned plans. Some financial institutions had millions of dollars in these plans, with no way of disposing of them because no one was authorized to sign the distribution paperwork, plan restatements, etc. In addition to resolving this problem, the QTA regulations offered a pathway for plan participants in these abandoned plans to finally receive their money.

Take a moment to review these regulations. They sketch out efficient ways that the QTA can streamline the termination and payout process. There are special provisions for avoiding the normal plan document restatement process, on the theory that plan funds should be distributed to plan members, rather than being spent on administrative expenses (leading one to question the efficiency of the current system of plan document updates for other plans). Along the same lines, there are provisions that avoid the need to file an annual 5500 Form until the final year of plan operation.

The biggest drawback to the regulations is that they only allow the financial institution that holds the plan assets to become the QTA, effectively carving out the TPA side of the industry, which has the necessary skills. The DOL's thinking, apparently, was that these institutions already have control over plan assets, so transferring them into a rollover IRA would be more efficient.

> "One enjoyable aspect of serving in this role is the novelty of special, unique challenges that we'd rarely see within our normal practice."

Voluntary Assignment

A company which will be entering bankruptcy, but which still needs time to wrap up a plan, may want to hire someone to perform the duties of trustee. This allows for an orderly liquidation of the plan. It becomes necessary because the people who would normally perform these functions are no longer employed by the company.

Another avenue for a voluntary assignment is by pressure from the DOL. If a DOL investigation is ongoing, and if the plan sponsor is cooperative, the DOL may allow that plan sponsor to voluntarily turn over control of the plan to another trustee.

Court Order

Sometimes, the DOL goes to court and seeks a court order to kick out the "bad trustee" and replace them with a new one. Oftentimes, if money is missing from the plan, the prior trustee also agrees to repay the plan over time, although many of these "repayment commitments" fall apart after the first few repayments. It is important that the trustee follow the terms of the court order exactly.

WHAT ARE THE GOALS OF THE TRUSTEE?

The majority of the time, the goal is to terminate the plan and pay out members efficiently and quickly. This includes communicating with plan participants, coordinating the payout phase and wrapping up whatever compliance work is needed. Sometimes, the goal can be accomplished with the stroke of a pen — for example, signing a payout form and filing a final 5500. Other situations are considerably more involved.

SPECIAL CHALLENGES FOR ABANDONED PLANS

One enjoyable aspect of serving in this role is the novelty of special, unique challenges that we'd rarely see within our normal practice. There is no employer to turn to in order to make a difficult decision. When you have no data, no history, no one to talk to, etc., then you have special problems. The other enjoyable aspect is that you are truly helping people in need.

Let's take a close look at some of these special administrative challenges.

Lack of Data

This is the #1 problem. Imagine a profit sharing plan with $20,000 in a pooled account. There is absolutely no compensation history, W-2 availability, contribution history, plan document or anything else. There are no plan officials to speak with. When faced with exactly this set of facts, we felt that our only option was to distribute assets on a per capita basis.

In other instances, we have received fragments of plan data, some of which conflicted with other fragments. The independent fiduciary's role is to make the best possible judgment. These tricky judgments can make large financial differences.

One enjoyable aspect of serving in this role is the novelty of special, unique challenges that we'd rarely see within our normal practice.

> "When you have no data, no history, no one to talk to, etc., then you have special problems."

Communication with Participants

Many of these situations drag on for years. As you can imagine, this creates untold frustration and anger for plan members, who are powerless to access their own money. We like to start the process by sending out a letter to the plan members, letting them know who we are and what we intend to do. Many are pleased to get this information (although this joy is not uniform).

Once, we dealt with a plan for a union of security guards, many of whom did not speak English well. We learned that it is not always easy for plan participants to differentiate the good guys (us) from the bad guys. Some participant calls from this union of armed guards were unsettling and intimidating to our administrators.

One useful technique we have learned is to find the "queen bees" of the plan, *i.e.*, those plan members with the most energy to get their funds and to potentially help us find others. We have sometimes attached lists of missing people, and found that participant networking can be helpful in getting replies.

When one is dealing with non-locatable and/or non-responsive participants, it is important to be aware of the DOL regulations on these topics. (Those regulations are beyond the scope of this article, and are voluminous enough to warrant their own article.)

Illiquid Plan Assets

One can imagine that certain types of trustees may take liberties in investing plan assets, whether for self-dealing purposes or whatever other reasons. We have gotten some practice in selling real estate (in the middle of nowhere), and currently we have a plan where $250,000 of plan assets ended up being donated to purchase a church organ. While the book is still open on the organ, it is important to note that the new trustee has a responsibility to get a fair price for these illiquid assets.

Seriously Non-locatable People

As noted above, we have encountered plans where we could not get SSN's for some or all plan members. How does one ever terminate such a plan if those members do not respond? It is difficult or impossible to set up a default IRA for people with no SSN. However, we are just now experimenting with new search software that is allowing us to determine SSNs for some lost plan members.

Other Issues

Here are some other considerations for TPA firms, especially owners:

- Does your E&O policy cover this function? Some policies exclude all coverage where a TPA serves as a fiduciary, while others set out boundaries. For example, at one time our policy provided coverage for the fiduciary role, but not with respect to the investment of plan assets. This is, obviously, a high-risk area, so insurance coverage is essential.
- It is important to avoid either real or perceived conflicts of interest. For example, your fee schedule must be set forth clearly and not subject to change. Another question is the advisability or allowability of using your own (TPA) firm to do the work.
- Investment of plan assets: Since our role is typically short term, I prefer to invest in a money market fund. If it were expected to last longer, I would consider hiring an advisor.
- Know what you don't know. Not being an ERISA attorney, and not having one on staff, we often consult with one when sticky issues arise. This is good advice, of course, for all plans.

SUMMARY

The handling of orphan and abandoned plans provides special opportunities for the TPA. However, they also provide special challenges, which should be carefully considered before accepting the assignment. PC

David M. Lipkin, MSPA, is the founder of Metro Benefits, Inc. He has been selected by the DOL to serve as an independent fiduciary for many orphan/abandoned plans. David served as ASPPA's president in 2014.

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ASPPA Regional
Conference: Philadelphia
Philadelphia, PA

JUNE 2016

June 6–9
Women Business
Leaders Forum
New Orleans, LA

June 16–17
ASPPA Regional
Conference: Chicago
Chicago, IL

JULY 2016

July 14–15
ASPPA Regional
Conference: Boston
Boston, MA

July 19–22
Western Benefits
Conference
Seattle, WA

AUGUST 2016

August 12–13
ACOPA Actuarial
Symposium
Chicago, IL

OCTOBER 2016

Oct. 23–26
ASPPA Annual
Conference
National Harbor, MD

NOVEMBER 2016

Nov. 14–15
ASPPA Regional
Conference: Cincinnati
Covington, KY

COMPLIANCE

Plan Disqualification: Our Version of the NCAA's 'Death Penalty'

Tips on avoiding plan qualification errors.

BY LANA Y. WALTZ

When a college football program is guilty of an egregious violation of rules or standards, the harshest penalty is to be banned from NCAA competition — the so-called "death penalty." In 1987, for example, Southern Methodist University's entire season was canceled due to maintaining a slush fund for recruiting purposes.

In 1919, baseball fans watched nervously as the Black Sox scandal banished eight players who conspired to lose the World Series. And in 2013, speculation surfaced around baseball player Alex Rodriguez and the possibility of a lifetime ban from the sport — baseball's version of the death penalty.

For qualified plans, plan disqualification acts as the death penalty. A tax-qualified retirement plan allows various tax benefits for the employee and employer. The employer is allowed to take an annual deduction for the employer contribution and participant accounts are allowed to grow taxed-deferred or otherwise advantaged (*e.g.*, via a Roth conversion) until withdrawn. And plans maintain that favorable tax treatment as long as they meet the requirements of

the Internal Revenue Code, Treasury regulations, ERISA and the plan document.

Many practitioners have had conversations with our plan sponsor clients about at least one of the top 10 plan errors identified by the IRS (see sidebar.) Generally, these failures fall into three separate plan disqualification categories:

- failure to adopt required amendments
- failure to administer the plan in accordance with plan terms
- failure to satisfy yearly testing

Unfortunately, some plan sponsors believe the rules or regulations do not apply to them or their plan. For whatever reason, they decide not to take your advice or to ignore the situation. What happens then?

Regrettably, the plan administrator in this case makes an unfortunate decision to put the plan trust at risk. When the plan administrator or any individual working on the plan decides not to follow the document or regulations, the result could be disastrous for the plan trust, participants and the employer. These three individuals are all affected differently.

THE TRUST

Code Section 501 grants the tax exemption of the plan trust, so the trust loses the tax exemption when the plan becomes disqualified and must pay income tax on the trust earnings. The employer files Form 1041, U.S. Income Tax Return for Estates and Trusts.

THE PARTICIPANT

Participants must include all vested employer contributions deposited into the plan during the year of plan disqualification as gross income. Therefore, they must pay income tax on the employer contributions. Depending on the length of time and amounts of contributions, the tax liability could be substantial. In addition to income tax, FICA and FUTA must be paid as well. In disqualification situations that result from minimum participation or coverage requirements, highly compensated employees (HCEs) may have to claim their entire plan balance as income.

For example:

- Rose is an employee who participates in the ABC Bottle 401(k) Profit Sharing Plan. All contributions to the plan are 100% vested. All participants direct their own investments and each has their own separate account. The participant and trust are both calendar year taxpayers. The plan excludes only collectively bargained employees.
- In 2013, ABC makes a $5,000 contribution to the plan's trust on behalf of Rose; in 2014, ABC makes a $2,500 contribution to the plan's trust on her behalf.
- If the plan is disqualified for these years, Rose would include $5,000 as income in 2013 and $2,500 as income in 2014.
- If the fact pattern changed and the plan excluded otherwise non-excludable employees with a result that violates Code Section 410(b), TRA '86 made a significant change to the rule set forth above under which only HCEs would be affected. An HCE would include their entire plan balance as income.

Furthermore, participant distributions are no longer eligible rollover distributions. This means the year in which the distribution occurred becomes a taxable event for the participant.

THE EMPLOYER

Employer deductions are limited as employer contributions to a nonexempt employee trust that are not deductible until the employee claims the amount as gross income. The employer may not deduct the employer contributions that were not maintained in separate accounts for each employee. Therefore, a defined benefit plan could not deduct any contributions.

Top 10 Plan Errors

1. Failure to amend the plan for tax law changes by the required date
2. Failure to follow the plan's definition of compensation for purposes of determining contributions
3. Failure to include eligible employees in the plan or to exclude ineligible employees from the plan
4. Failure to satisfy plan loan provisions
5. Impermissible in-service withdrawals
6. Failure to satisfy required minimum distribution rules
7. Employer eligibility failure
8. Failure to pass annual nondiscrimination testing
9. Failure to properly provide the minimum top-heavy benefit or contribution to non-key employees
10. Failure to observe the limits on maximum annual contributions a participant can receive (in a defined contribution plan) or the amount of benefits a participant can accrue (in a defined benefit plan)

Source: Internal Revenue Service, 2011.

For example, since Rose included $5,000 in 2013 and $2,500 in 2014 as income, the employer could deduct these amounts in those respective years. However, if Rose was less than 100% vested, Rose would receive the vested portion of the contribution and the employer would only deduct the actual amount Rose received.

HOW TO REGAIN YOUR TAX-EXEMPT STATUS

The plan must correct the error that caused disqualification before the IRS will requalify it. The disqualification carries forward year to year until the defect is completely corrected. The routes to correction include the IRS Voluntary Correction Program or the Audit Closing Agreement Program. Disqualification is not a self-correctible event. In the best interests of the plan trust, participants and plan sponsor, it is

always best to correct the plan before disqualification.

Historically, the IRS has had multiple compliance systems in place. Through the years, they have developed alternatives to plan disqualification for tax-qualified retirement plans. The current compliance system, the Employee Plans Compliance Resolution System (EPCRS), is set forth in Rev. Proc. 2013-12 and Rev. Proc. 2015-27.

Even though the number of tax-qualified retirement plans that have been disqualified has decreased drastically in recent years, it is important for employee benefit professionals to be aware of consequences of plan disqualifications.

The Internal Revenue Code, Treasury regulations and ERISA act as our own NCAA or baseball commissioner. The key is to avoid qualification failures and avoid plan disqualification — the dreaded "death penalty." To do so, practitioners should advise plan sponsors to:

1. Review required document regulations regularly
2. Complete audits checks of their annual compliance testing
3. Request that the plan's brokers evaluate the plan yearly
4. Identify errors quickly to avoid the unintended consequence of plan disqualification
5. Work with their service providers to identify problems they might otherwise miss

For more information, see Rev. Rul. 74-299 and Rev. Rul. 2007-48. PC

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WORKING WITH PLAN SPONSORS

Diagnosis Uncertain — The Importance of Accurate Census Data

Complete and accurate census data is the key to minimizing time-consuming and expensive corrective procedures if a plan defect is uncovered.

BY CATHY GIANOTTO

The job of a pension administrator can be a bit like being a physician trying to diagnose a patient. Just as a physician relies on the patient to disclose physical symptoms that may require diagnostic tests, to diagnose the health of the plan we rely upon the plan sponsor to provide complete employee demographic information so we can perform administrative services and annual compliance testing.

Withholding information such as minor back pain during a checkup can result in a patient leaving the appointment believing all is well. But months later the pain has become severe and the patient is diagnosed with a ruptured disc. Had the physician known about the back pain at the time of the visit, the patient's course of treatment likely would be less aggressive than the treatment that is now needed.

Retirement plan administrators rely on employee census information for one purpose or another nearly every day, so the data is critical to ensuring compliance with the regulations and plan provisions. Annual compliance testing, vesting, retirement age, eligibility to participate — this is the short list of pension plan items affected by census data.

Like a patient who withholds important information, if a plan sponsor withholds complete and accurate census data, the more time-consuming and expensive the corrective procedure will be in the event a plan defect is uncovered.

There are various administration service models offered by practitioners. Some take the data the client provides and ask no questions. Others receive the data and "scrub" it to determine whether the data accurately reflects the employment activity for the year. From either approach, the resulting tests are the same, and the results rely upon the accuracy of the data received from the plan sponsor.

Following are three examples of how incorrect or incomplete census elements can dramatically affect participants and the health of the plan.

1. THE TAX BILL IS DUE

John Doe was born Feb. 3, 1943, and worked for ABC Corporation for 20 years. He quit on Dec. 31, 2014, and still has an account in ABC's profit sharing plan. ABC's pension administration company is gearing up to distribute the 2015 Required Minimum Distribution (RMD) packages to participants, and according to their records, John's date of birth is Feb. 3, 1948. John is not included when the packages are mailed because he is not yet 70½ according to the information they have on file from the sponsor.

John is extremely upset when he later learns that he was required to take a minimum distribution, and because he did not, he has to pay the IRS a 50% excise tax on the RMD amount. The plan sponsor is dealing with a very unhappy participant and the pension administrator is dealing with a very unhappy client, all because the year of birth in the census was wrong.

2. WHO WANTS A REFUND?

A plan provides for catch-up contributions and Bob Smith, an HCE, turned 50 in 2015. After the end of the 2015 plan year, the ADP test is completed. The result is a failed test, requiring the sponsor to make a QNEC contribution or distribute excess contributions and earnings to one or more HCEs.

When Bob receives a notice that he is getting a refund of deferrals, he marches into the benefits office and demands to know why. The sponsor finds that his year of birth in the HRIS system is 1966 instead of 1965, and the pension practitioner's records reflect the same. Rather than characterizing Bob's deferral amounts above $18,000 as catch-up contributions in the ADP test, they are characterized as excess deferrals and the ADP test is incorrect. The expense and time spent correcting the data to rerun the test creates frustration for the participant, sponsor and practitioner.

3. PAY NOW *AND* PAY LATER

Molly Patrick is deferring 10% of her salary each pay period. The plan definition of compensation is W-2 box 1, increased by salary deferrals (401(k), 125, 132(f), 403(b), 414(h) pickup and 457), with no other adjustments or exclusions. Participants may not make a separate deferral election for bonus pay.

The plan sponsor pays a $10,000 bonus to Molly but fails to deduct 10% for her 401(k) contribution, and because there is no deferral, Molly does not receive a matching contribution.

After the end of the plan year, the sponsor tells the pension administrator that salary deferrals were not deducted from bonuses paid during the year. Now what? For plan purposes, a bonus is eligible compensation and is treated the same as vacation pay, holiday pay and pay for time worked, so this is an operational error.

The sponsor will correct under the EPCRS Voluntary Compliance Program guidelines and make a QNEC contribution along with the missed match, adjusted for earnings, to the affected employees. In addition to the costs to calculate the QNEC amount, the sponsor also has the out-of-pocket expense of funding the contribution. The correction may also cause employee relations problems since not everyone is going to receive this "extra" contribution.

LESSONS LEARNED

Compensation for plan purposes is often misunderstood. Plan sponsors look to their pension consultant for clarification of what items of compensation make up the total compensation they will report at year-end. What is the definition of compensation for purposes of calculating contributions? What about the definition for determining HCEs? If the compensation reported at year-end is incorrect, or if contributions are not calculated using the correct compensation elements, the "routine" diagnostic tests of ADP and ACP, Section 415 annual additions, top heavy allocations and HCE determination are in vain.

Accurate dates of hire and dates of birth ensure vesting, retirement age benefits, eligibility to participate and other provisions are applied appropriately to participants as required by the plan and by the regulations.

As we jump head first into compliance testing season, now is a good time to consider our clients' depth of understanding of the reasons behind the census information we request. It may be worth having a discussion of how the data affects the overall health of the plan. PC

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ETHICS

Reporting Professional Misconduct (Part 1)

What does the American Retirement Association Code say about the duty to report another pension professional's misconduct?

BY LAUREN BLOOM

In his play No Exit, French philosopher Jean-Paul Sartre famously wrote, "Hell is — other people!" Sartre's quote can be interpreted in a variety of ways. For the pension professional who learns of another professional's misconduct, however, the philosopher's observation becomes uncomfortably true.

For example, imagine this scenario. While working on a sponsor's defined benefit plan, a pension professional named Jean, who is a member of ASPPA, gains access to information about the sponsor's 401(k) plan. Jean discovers that, to manage cash flow, the sponsor had not been investing participants' funds as directed. Rather, when a participant retired or left employment, the sponsor would calculate what the participant would have earned if the funds had been properly invested, then contributed the necessary funds. Jean believes (correctly) that the sponsor's practices violated federal law.

Unfortunately, the 401(k) documents that Jean reviewed include a memorandum from Paul, another pension professional and member of ASPPA. In that memorandum, Paul advised the sponsor that its practice of withholding 401(k) funds, while unorthodox, "was consistent with the spirit of federal pension law and caused no actual harm to participants." Consequently, Paul wrote, the sponsor's practice "was unlikely to result in any serious penalty." Jean concludes that Paul, either intentionally or negligently, acted unprofessionally in giving the sponsor that advice. Jean also believes that the sponsor may have paid Paul extra for an opinion that would legitimize its practices if they were ever challenged.

What should Jean do now?

Jean knows that Paul, as a member of ASPPA, is bound by the American Retirement Association Code of Professional Conduct. Section 10 of the Code requires ASPPA members to "perform professional services with honesty, integrity, skill and care." Jean sincerely believes that Paul violated Section 10. Jean is reluctant, though, to report Paul to ASPPA (or any other professional organization) for investigation and possible discipline. Jean likes Paul and doesn't want to ruin his professional reputation. She's also worried that if she reports Paul, she could get dragged into a battle that could cost her time, legal fees and her good professional relationships with Paul and their shared client.

Jean's professional obligations may depend on her specialty within the employee benefits field. The American Retirement Association Code of Professional Conduct does not specifically require ASPPA members to report other members' apparent professional misconduct. However, Section 13(A) of the Code does require members "whose professional conduct is regulated by another membership organization shall abide by the professional Code of Conduct (or similar rules) of such organization." Many professions, including the legal and actuarial professions, require their members to report the misconduct of their peers. If Jean and Paul are both members of one of those professions, Jean may well be obliged to report Paul under the rules of that profession as well as Section 13(A) of the American Retirement Association Code.

> "The collective reputation of pension professionals suffers when individual practitioners cut ethical corners."

Still, there's a complicating factor. The American Retirement Association Code requires Jean to safeguard the confidentiality of client information. Specifically, Section 5 of the Code provides, "A Member shall not disclose to another party any Confidential Information obtained in rendering Professional Services for a Principal unless authorized to do so by the Principal or required to do so by Law." Jean had been hired to work on the sponsor's defined benefit plan, not its 401(k) plan, so it may not be clear to her whether the sponsor intended that she keep the 401(k) information, including Paul's memorandum, confidential. In all likelihood, though, the sponsor wouldn't thank her for reporting Paul, especially if, as Jean believes, the sponsor paid extra to get Paul's blessing on its practices.

Complicating things still more is the possibility that Jean has a legal obligation to report the sponsor and, perhaps, Paul for violating federal pension law. Unless Jean is an employee benefits attorney herself, she would be well advised to consult one before making a decision about whether, and to whom, to report apparent misconduct by the sponsor and Paul.

Given all the potential pitfalls, wouldn't it be easiest for Jean just to look the other way? Perhaps, but there are also good reasons for Jean not to turn a blind eye to Paul's unprofessional behavior. If Paul is merely careless, an inquiry into the circumstances and reasoning that led him to reassure the sponsor that withholding 401(k) funds was not unacceptable will teach him to be more judicious about the advice he gives his clients. If, as Jean suspects, Paul intentionally gave his clients questionable advice in exchange for an inflated fee, an inquiry from his peers may make him think twice before he compromises his ethics again. Either way, Paul is likely to benefit from the experience, though he might not thank Jean right away.

The employee benefits profession also benefits when its members' shoddy practices are investigated and corrected. Every profession owes a duty of skill and care to the public. Participants suffer when plan advisors fail to meet that duty, and the collective reputation of pension professionals suffers when individual practitioners cut ethical corners.

If Jean decides to report Paul, she'd be smart to let her lawyer help craft a submission that's truthful and free of unsubstantiated accusations. She's also smart to consider confidentiality, and to document the basis for her decision to disclose the contents of her report. In my next column, we'll look at what might happen if the American Retirement Association came to Jean seeking information about Paul's professional conduct. **PC**

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ACTUARIAL

New Mortality Tables on the Horizon

An effective date of 2017 or later provides opportunities to plan and make key decisions.

BY JOHN R. MARKLEY

In October 2014, the Society of Actuaries released updated mortality tables, RP-2014 and MP-2014. RP-2014 is a mortality table applicable for 2014, and MP-2014 represents expected improvements for future years. Then in October 2015, the Society released an update to MP-2014, titled MP-2015, to incorporate more recent historical improvement data. This table is expected to be updated annually.

These tables are the result of extensive study by the Society and update previously applicable mortality tables. For defined benefit plans, the RP-2000 table is updated annually by Scale AA, and has been prescribed to date for both funding and lump sum calculations.

The report by the Society provided mortality tables for many different populations. The RP-2014 mortality options include annuitant/non-annuitant, blue/white collar, top/bottom quartile, disabled retirees and on a head count basis.

Where the selection of a mortality table is not prescribed, such as determining a liability for financial statement purposes or for public sector plans, the actuary can select the mortality table that best fits the situation. In selecting the mortality assumption, an actuary must follow Actuarial Standards of Practice (ASOP).

For funding and lump sum purposes in single employer plans, the mortality assumption is prescribed by the IRS. In 2017 or 2018, new mortality assumptions will be prescribed by the IRS that will increase funding requirements for plans and increase lump sum benefits paid to participants.

Here is the good news: You are going to live longer, according to the new mortality tables! Of course, that means that when the new mortality tables are implemented for funding and lump sum purposes, funding requirements and lump sums will increase.

The Society's study included a table to provide estimates of the increase in the liability for a plan. The table is provided in Table 1, below.

When this article was envisioned in July 2015, the mortality tables to be used for 2016 were still undetermined (should actuaries stay the course with RP-2000 or implement the RP-2014 tables?) and the defined benefit plan community was anxiously awaiting guidance. Whether the new mortality was applicable for 2016 or later, it was expected that the article would review the implementation of the new mortality tables.

So, this article brings good news! The new mortality tables, which will increase plan liability, will not be effective until 2017 or later. This means there is an opportunity to plan and make decisions before the implementation of the new mortality tables. When the IRS issues proposed regulations to implement the new mortality tables, another article will be in order.

TABLE 1: PERCENTAGE CHANGE OF MOVING TO RP-2014 (WITH MP-2014) FROM:

	Age	Base Rates: RP-2000 Proj. Scale: AA
MALES	25	2.5%
	35	2.7%
	45	2.8%
	55	3.0%
	65	4.4%
	75	10.5%
	85	17.4%
FEMALES	25	8.1%
	35	7.7%
	45	7.1%
	55	6.3%
	65	5.5%
	75	8.1%
	85	10.5%

**Monthly Deferred to 62 Annuity Due Value*

2016 MORTALITY TABLES ANNOUNCED

In IRS Notice 2015-53, published July 31, 2015, the IRS announced that the 2016 mortality tables for single employer pension plans will continue to be a modification of the RP-2000 mortality tables.

For lump sum distributions paid in 2016, the new mortality tables announced by the Society of Actuaries in October 2014 will not yet be used.

When the new mortality tables are announced for 2017 or later, the liabilities of a pension plan for lump sum purposes will increase by 4% to 10%. When plan liabilities increase by 10%, for example, the unfunded liability can increase by a much larger amount as shown below for a hypothetical plan, as depicted in Table 2. As that table shows, the new mortality increases the liability of the plan by 10% but increases the unfunded liability by more than 100%. One way to avoid some of this increase is to pay lump sum benefits to participants in 2016.

TABLE 2: INCREASE IN UNFUNDED LIABILITY WITH NEW MORTALITY

	Pension Plan with Current Mortality	Pension Plan with New Mortality – 10% Increase
Plan Liability	$11,000,000	$12,100,000
Plan Assets	$10,000,000	$10,000,000
Plan Unfunded Liability = (1.–2.)	$1,000,000	$2,100,000
Increase in Unfunded Liablity		$1,100,000 or over 100%

What Can Be Done to Pay Lump Sums in 2016?

There are generally two situations when lump sum distributions are paid from a plan:

1. A lump sum option in an ongoing plan for terminated vested participants. This option can be structured as either a one-time offering or a permanent amendment.
2. Plan termination, including lump sum options for all active and terminated vested participants.

WILL THE NEW MORTALITY TABLES APPLY IN 2017?

The Pension Protection Act (PPA) requires the implementation of a new mortality approach 10 years after the 2008 implementation of the RP-2000 mortality. If mortality tables are delayed beyond 2017, a new mortality approach will be required for funding and lump sums for 2018 because of PPA. The IRS intends to issue proposed regulations on the topic. After comments from the retirement plan community, the IRS will determine the final mortality tables.

The IRS has many issues to consider in proposing new mortality tables. Although the RP-2014 mortality table has been met with acceptance, the improvements of the MP table are the topic of considerable debate. The Society study did not provide a "combined" (male and female) mortality table, so the IRS will have to develop this table through the regulations. Furthermore, the IRS must determine whether to apply the mortality in a true multidimensional approach (that is, the mortality for a 60-year-old varies by year of birth), or whether to continue the current approach of utilizing a base mortality table (RP-2014) with annual improvements from another table (MP) to go beyond 2014.

OTHER USES FOR MORTALITY TABLES

The accounting profession is aware of the new mortality studies. In releasing financial statements of companies and pension plans, CPA firms are required to recognize the most current information available on the release date.

With financial information at the end of 2014, accounting firms required consideration, and in many cases, implementation of the new mortality tables. In our experience, accounting firms needed a compelling reason to not change the mortality assumption at year-end 2014. A compelling reason could be mortality experience consistent with the prior assumption, or that plan termination is likely to occur before the implementation of the new mortality tables.

IMPACT OF NEW MORTALITY TABLES ON CASH BALANCE PLANS

The actual benefit payable from a recently established cash balance plan is the hypothetical account balance of a participant. So, the payment of single sum benefits will not change as a result of the implementation of the new mortality tables.

MAXIMUM BENEFITS FROM A DEFINED BENEFIT PLAN

For defined benefit plans designed to provide maximum benefits under Code Section 415, new mortality tables will increase maximum benefits and maximum tax deductible contributions.

For maximum lump sums, with current interest rates below the 5.5% rate used to determine the maximum benefit, change in mortality is the only assumption available that increases lump sum benefits.

CONCLUSION

As always, communication is critical! Since the new mortality tables have not yet been implemented, there is an opportunity for actuaries to help defined benefit plan sponsors measure the potential impact and make decisions regarding their plans. PC

John R. Markley, FSPA, CPC, ASA, FCA, MAAA, founded Markley Actuarial Services in 1985. He has more than 30 years of experience providing services to qualified retirement plans. John received a B.S. degree in math from the University of North Carolina and an M.B.A. from Penn State University, and currently serves on the Leadership Council of ACOPA.

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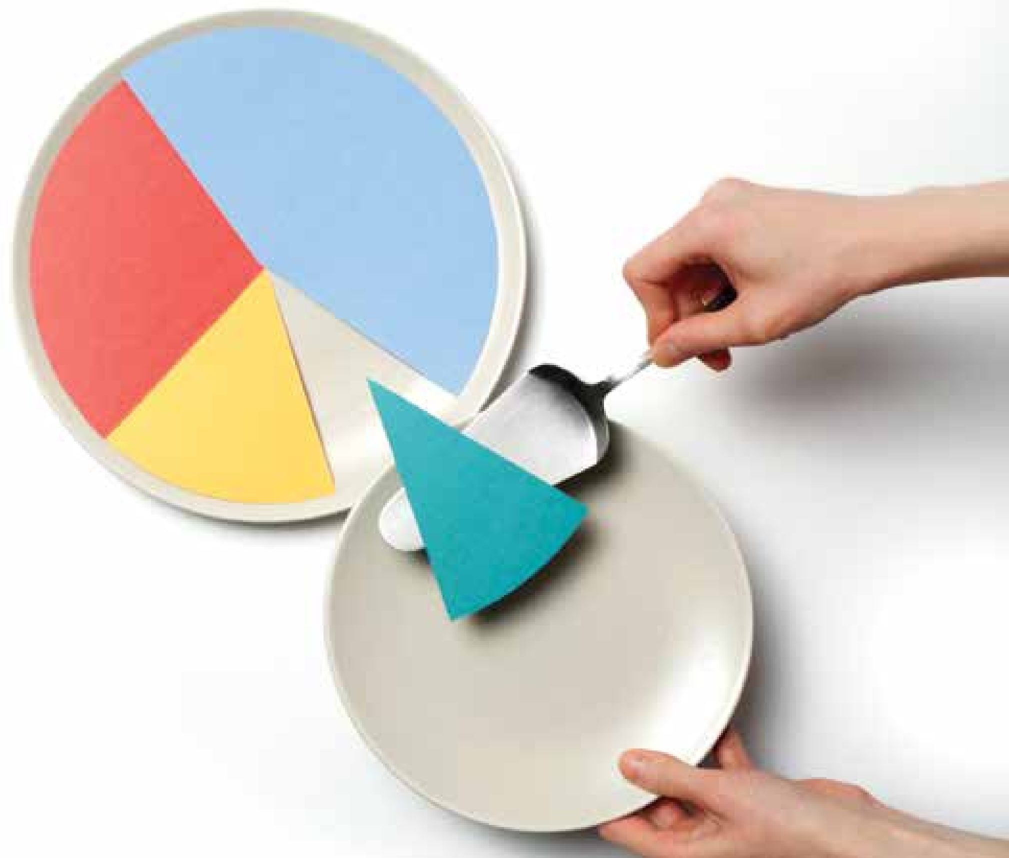

The Brave New World of Distributions

Understanding distribution education will be an important part of our future.

BY FRED REISH AND BRUCE ASHTON

It seems like everybody is interested in retirement plan distributions these days… and with good reason. One major research firm has estimated that roughly $400 billion dollars *per year* will be distributed from plans in the future.[1] And that's just the money expected to be rolled over to IRAs.

Government policymakers and regulators are paying attention to the money coming out of plans, money that is moving from institutionally priced retirement plans to retail-priced IRAs. Part of this attention arises because IRAs have outstripped defined contribution plans as the largest repository of tax-favored retirement savings.[2] Of particular concern are potential conflicts of interest and higher costs, which can erode retirement savings and leave retirees without enough savings to live on.

1 "Retirement Markets 2013: Data & Dynamics of Employer-Sponsored Plans," Cerulli Associates.

2 "2015 Investment Company Fact Book," Chapter Seven: Retirement and Education Savings, Figure 7.5.

"Properly done, providing education will avoid fiduciary status."

Anyone working in the retirement plan and IRA markets needs to understand recent (and proposed) actions by regulators on distributions, rollovers and IRA investing — and potentially change their business practices. These issues are the focus of this article.

REGULATORY GUIDANCE

By now, most retirement plan practitioners should be familiar with DOL Advisory Opinion 2005-23A. Ten years ago, the Department of Labor said that recommending that a participant take a distribution and roll his benefit to an IRA was not fiduciary investment advice. But they also said that if someone who was already a fiduciary to a plan makes the same recommendation, that is a fiduciary act. This means the advice must be prudent and in the interest of the participant and may entail a prohibited transaction if the recommendation financially benefits the fiduciary. For those advisors who were paying attention, this led many to get out of the rollover business… or if they stayed in it, to limit their services to distribution "education."

Fast forward to 2013. In March, the Government Accountability Office (GAO) issued a report[3] in which it pointed out that "participants separating from their employers may find it difficult to understand and compare all their distribution options." It found that "Plan participants are often subject to biased information and aggressive marketing of IRAs when seeking assistance and information" when they separate from service.

Perhaps in response to the GAO report, in October 2013, the Financial Industry Regulatory Authority (FINRA) joined the fray.[4] Its first piece was a report on conflicts of interest, specifically where major investing decisions at "key liquidity events" — like take a distribution from a retirement plan and deciding what to do with it — are made. FINRA's concern was that conflicts of interest by brokerage firms and their representatives could adversely affect retirees. Shortly after this report, FINRA issued Regulatory Notice 13-45.[5] It deals with recommendations to participants to take distributions and roll over to IRAs with the broker-dealer and the application of the "suitability" standard.

Since FINRA regulates broker-dealers and their registered representatives, some readers may wonder why we are spending time discussing its pronouncements. The answer is simple: the 2013 report and the regulatory notice provide useful guidance on the distribution and rollover process, even for those not subject to FINRA regulation.

So FINRA's focus is on securities transactions. In Regulatory Notice 13-45, it says that recommending a distribution and rollover is a securities recommendation (*i.e.*, a recommendation to liquidate the investments inside a participant's account and transfer the money to an IRA). An advisor who makes such a recommendation must make sure it is "suitable" for the participant, which means the advisor must understand the needs and investment preferences of the participant, as well as the alternatives available to the participant. But echoing some of the DOL guidance (*i.e.*, Interpretive Bulletin 96-1), FINRA noted that distribution education would not be considered a recommendation subject to the suitability requirement.

The Regulatory Notice then talked about a participant's choices when he had a distributable event: take a taxable distribution; take a distribution and roll it to a new employer's plan; take a distribution and roll it to an IRA; or leave the money where it is. If the advisor provides information on these choices and the factors to consider in selecting among them, he or she has provided education and not a securities recommendation. Absent other guidance, this Regulatory Notice — which includes seven non-exclusive factors that can be material considerations for participants in making a distribution decision — has been a guide for many practitioners in the retirement plan market for addressing the distribution issue.

This brings us to today and the DOL's proposed conflict of interest regulation. If adopted in its current form, the rule will say that fiduciary advice includes a recommendation to take a distribution from a plan or IRA, as well as a recommendation about how to invest the money once it is distributed. This is clearly a change from the 2005 Advisory Opinion, and the DOL specifically acknowledges that. The regulatory package containing the revised definition

3 Government Accountability Office, "401(k) Plans; Labor and IRS Could Improve the Rollover Process for Participants," GAO 13-30, published March 7, 2013, released April 3, 2013 (http://www.gao.gov/products/GAO -13-30).
4 FINRA Report on Conflicts of Interest, October 2013
5 FINRA Regulatory Notice 13-45, December 2013.

of fiduciary also includes proposed prohibited transaction exemptions that would permit certain financial conflicts in connection with fiduciary distribution advice. As the rule was drafted, many in the retirement and investment communities believe the exemptions to be so difficult to satisfy that they do not offer a practical alternative. (However, a number of thoughtful comment letters were filed with the DOL and, if the concepts discussed in those letters are adopted by the DOL, the final exemptions may be workable.)

That said, there is a practical alternative in the proposed regulation. The proposal retains the concept that education, including distribution education, does not constitute advice, so long as the information provided is complete, is not biased in favor of one distribution option over the others and does not reference specific investment alternatives.

> "If education is handled properly, participants should be equipped to make their own decisions about whether to take a distribution and, if so, whether to roll it to an IRA."

POST-REGULATION DISTRIBUTIONS

The issue of how to address the distribution of participant accounts, and whether and how they can be rolled over to an IRA, is significant to almost all practitioners in the retirement plan market. Advisors will need to decide how they will handle the potential fiduciary status, potential prohibited transactions and the related compliance obligations. Recordkeepers will need to decide how to handle participant inquiries about distributions, training of call center and other personnel, the impact on proprietary products and other issues. Third party administrators may be the least impacted, though they too will need to understand the implications of the new distribution education paradigm. Even plan document providers may need to address making changes to their master plans to facilitate the retention of accounts in a plan, especially at retirement.

In all of these cases except perhaps the last one, understanding distribution education will be an important part of our future. Properly done, providing education will avoid fiduciary status. This means giving participants information regarding all the options available to them (presumably, the four identified by FINRA in Regulatory Notice 13-45) and the pros and cons of each option, provided in a way that does not favor one option over another. The last point is especially important, because any apparent bias in the education materials will likely be viewed as advice. This will raise the possibility of fiduciary status and the application of the ERISA and Code prohibited transaction rules. The pros-and-cons discussion is important because the point of providing education is to enable participants to make an informed choice about what to do with their money, taking into account to the extent possible their individual needs and circumstances.

There are two other pieces to the distribution education formula. First, the information provided to participants should be in writing to provide evidence of what was said. And second, participants should be asked to acknowledge the educational information they received and that the advisor did not recommend a distribution.

CONCLUSION

If education is handled properly, participants should be equipped to make their own decisions about whether to take a distribution and, if so, whether to roll it to an IRA. And the person providing the information can then assist the participant in implementing the distribution decision without taking on fiduciary status. (Of course, a recommendation about how to invest the IRA assets would still be a fiduciary act.) While fiduciary status is not necessarily something to be dreaded, it will likely be a complicating factor for many in the retirement community, especially if they do not already serve in that capacity. Others, though, may accept fiduciary status by making distribution and rollover recommendations and then complying with a prohibited transaction exemption. PC

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RECORD KEEPING

The Mobile Workforce and the Distribution Decision:

Generational and Gender Differences

What are participants' distribution decisions telling us?

BY NEAL RINGQUIST

"Make the smart decision the easiest decision." That may seem like an obvious goal for plan sponsors when designing participant-directed retirement plans, and it has certainly driven the rapid adoption of "auto" features, including auto enrollment, auto deferral escalation and auto pilot investment options such as target date funds.

However, with regard to the portability plan feature — specifically, the participant distribution decisions taken upon job change — the opposite has been the case.

In April 2015, groundbreaking research conducted by Boston Research Technologies (BRT), in collaboration with Retirement Clearinghouse (RCH) revealed that participants are selecting the easiest options with respect to their prior employer balances — cashing out and leaving balances behind. Participants later realized these were not the smartest decisions, as evidenced by the high percentage of participants who later regretted their choices.

This research also offers valuable insights into key behavioral differences by both age and gender, highlighting the need for targeted communication strategies to properly influence distribution decisions, and pointing to plan changes required to improve portability.

By managing portability — facilitating rollovers and roll-ins — plan sponsors can promote lifetime participation in retirement plans and effectively address some of the unintended consequences of the "autos," including high levels of cashouts, the proliferation of small accounts and missing participants.

RESEARCH OVERVIEW

To better understand participant attitudes and behavior regarding their retirement account distribution decision upon job change, BRT and RCH conducted a comprehensive study of participants who had changed jobs over their working lives. The first-of-its-kind study was conducted in April 2015, covering 5,000 active defined contribution plan participants weighted by geography, age, gender and record keeper.

The study examined the behavior of these participants upon separation from their prior employer(s), focusing on the four basic options available to them for their accumulated plan balances:

- Leaving the assets behind in a prior employer's plan
- Rolling the assets over to an IRA
- Rolling the assets in to their new employer's plan (or "roll-in")
- Cashing out

KEY RESEARCH FINDINGS

The study firmly established the following key findings:

- There are significant gender-based differences in distribution decisions.
- While there are interesting age and gender

distinctions, cashouts pose the largest single threat to retirement security across all groups.
- There is significant receptivity across all ages and genders to using an active plan as a vehicle for retirement savings consolidation. This represents a significant opportunity for plans to promote roll-ins.

Each of these findings are examined in more detail in the following section.

SIGNIFICANT GENDER DIFFERENCES IN DISTRIBUTION DECISIONS

The study revealed several interesting differences by both gender and age in participant behavior, experience and attitudes regarding the distribution decision:

- Women are not as aware of their distribution options: 65% of women said they were aware of their distribution options for their workplace retirement account, compared with 77% for men.
- Leaving balances behind in the prior plan was the most common option across gender and all age cohorts, with half of all participants indicating that this was the result of at least one of their prior employers' retirement accounts.
- The Millennial male participant group was the only age/gender cohort selecting another distribution option more often than leaving a retirement account balance behind with the prior employer, as 54% of Millennial males indicated they rolled a balance forward to the new plan compared with 53% who indicated they left a balance behind.
- Overall, males demonstrated a higher propensity to roll balances over to an IRA (37%) or their current employer plan (42%) when compared with their female counterparts (31% and 33% respectively).

CASHOUTS POSE A THREAT TO RETIREMENT SECURITY ACROSS ALL AGE GROUPS

Premature cashouts of retirement accounts when changing jobs put retirement savings at risk. The study found all age groups impacted.

- **Cash outs were more common among younger generations** with 34% of both Millennials and Generation X participants admitting they cashed out at least one retirement account, compared with 24% of Boomers.
- **Male participants tended to cash out larger balances** with the widest spread among Boomer participants with 31% of male Boomers cashing out at least one account with a balance over $20,000, compared with 18% of their female counterparts.
- **Male participants tended to use cashout proceeds for "splurge" expenditures** — 65% of male participants who cashed out at least one account used the balance to "pay for something nice" and 63% indicated they used cashouts to "pay for a special event," compared with 35% and 37% of female participants respectively for the same purposes.
- **Cashout regret increases as one ages** — 53% of Boomers regret their cashout decision, compared with 36% of Millennials and 46% of Generation X participants.
- **Female participants regret cashout decisions at higher percentages than their male counterparts**, with the largest disparity among Millennials, where 46% of female participants regretted cashing out compared with 30% of male participants.

HIGH RECEPTIVITY FOR PLAN ROLL-INS

The study found that a large majority of plan participants are receptive to consolidating their retirement savings accounts in their current plans, but have found the current "do it yourself" roll-in process time-consuming and difficult. For those participants who performed a roll-in, the mean time it took to process the roll-in was almost 6 weeks, with 27% indicating it took more than 2 months. In addition, 62% indicated they required assistance to complete the task.

When asked if they would take advantage of a sponsor-provided roll-in service to help with the consolidation process, 83% of Millennials, 83% of Generation Xers and 78% of Baby Boomers responded affirmatively — if the plan paid for it. Furthermore, the study found that even more participants — 91% of Millennials, 89% of Gen-Xers and 65% of Baby Boomers — would likely roll IRA balances into the plan if such a service existed!

CONCLUSION: PORTABILITY SHOULD BE MANAGED

By managing portability — facilitating rollovers and roll-ins — plan sponsors can promote lifetime participation in retirement plans and effectively address some of the unintended consequences of the autos, such as proliferation of small accounts and lost and missing participants.

The research results show that the frictions involved with the current "do it yourself" approach to portability causes participants to take the easy, harmful path: cashing out their retirement savings.

Facilitating consolidation and discouraging cashouts will increase participants' retirement savings over the long term, a goal that aligns with every sponsor's fiduciary duty to act in the best interests of their participants. PC

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REGULATIONS

Current Regulatory Happenings in the Benefits World

To help start the new year up to date, here's a look at what regulators wrought in 2015.

BY ILENE H. FERENCZY

As we begin 2016, we find ourselves in an interesting maelstrom of potential changes that may make the new year particularly challenging. While Congress is mired in political upheaval (which will likely get worse as the election year progresses), the Treasury/IRS and the Department of Labor are busy pursuing their own agendas.

THE FIDUCIARY/CONFLICT OF INTEREST REGULATION

Unless you have been doing a "Rip Van Winkle" for the past year, you know that the DOL has reproposed its regulation relating to the definition of who is a fiduciary, and has expanded this definition to include many new people, as well as providers of certain services to IRAs.

At this point, the real story is the amount of negative reaction to the regulation. The DOL received more than 3,100 comment letters, including more than 30 from collections of members of Congress and the Senate. It is significantly harder for an incoming administration to retract regulations that have been finalized than it is to put a halt to a regulation that is still only proposed. This explains the DOL's push to finalize the regulation before the inauguration of a new president in 2017. As the stated effective date of the regulation is eight months after publication in final form, one need only walk back the calendar from 2017 to realize that the regulation must be finalized in the first quarter of 2016.

How will the final version of the regulation change from the proposal? That is one of the great uncertainties. How much change can the DOL make (and is willing to make) in the short time left to it before its self-imposed deadline? Furthermore, a bill (H.R. 1090, the Retail Investor Protection Act) was passed by the House of Representatives in October that would put a halt to the DOL's fiduciary regulation process until 60 days after the Securities and Exchange Commission issues a final rule governing the standards of conduct of brokers and dealers.

While there is a lot of speculation about what will happen, it is impossible to know at this time. No one can really plan for the future in this regard, so "Keep Calm and Carry On" until we hear more.

"A bill (H.R. 1090, the Retail Investor Protection Act) was passed by the House of Representatives in October that would put a halt to the DOL's fiduciary regulation process until 60 days after the Securities and Exchange Commission issues a final rule governing the standards of conduct of brokers and dealers."

IRS PLAN DOCUMENT ISSUES ... MORE PREAPPROVED PLANS, FEWER SERVICES

While the end of the defined contribution preapproved plan restatement period approaches (all restatements must be done by April 30, 2016), the IRS has been working on the next cycles to come up. In particular, lead documents for the 403(b) preapproved plan program were due to the IRS earlier in 2015, with the restatement period expected to begin in 2017. In addition, the lead documents for preapproved defined benefit plans — including newly permitted cash balance plans — were due to the IRS by Oct. 30, 2015. The actual restatement period for defined benefit plans is likely to begin sometime in 2018. Therefore, those who provide documents to plan sponsors can expect there to be a lag in 2016, but activity in the last two to three years of the decade.

In the meantime, the IRS has taken another significant step in its efforts to discourage the use of individually designed plans. In Announcement 2015-19, the IRS told stunned practitioners that, starting in 2017, it will no longer issue favorable determination letters except on initial adoption and termination. This action is apparently motivated by budget challenges being faced by the IRS, and will theoretically allow the IRS to redirect the energies of some of its employees away from determination letter review to other departments.

While there are some practitioners that prefer individually designed plans in principle, there are many, many plan provisions that are commonly adopted that are inconsistent with preapproved plans. For example, while the preapproved program now permits cash balance provisions in defined benefit plans, these provisions are quite limited. In general, a cash balance plan that is of a flavor other than plain vanilla may not fit properly on a preapproved document, such as plans that allow participant choice of investments for purposes of determining the rate of interest in the plan or those that contain floor offset arrangements.

Similarly, while the IRS is also permitting ESOP provisions in preapproved plans, those provisions are also limited. For example, ESOPs that permit preferred stock or stock bonus plans are not available on a preapproved document.

The IRS apparently anticipates that attorneys will "attest" to the qualification of plan documents, although that is not practical under the current rules. The IRS does not always publish its positions regarding permissible plan provisions, and those positions can change at any time. For example, the IRS's current position that forfeitures

> "The IRS apparently anticipates that attorneys will 'attest' to the qualification of plan documents, although that is not practical under the current rules."

cannot be used to reduce 401(k) safe harbor contributions is inconsistent with language that it permitted in the EGTRRA documents. The decision to deny permission for these provisions to continue was not pursuant to any change in law, regulation or official IRS guidance, and could not have been predicted by practitioners. If something like this happens after determination letters are unavailable, there will be no way for a lawyer to know if previously permitted provisions in an individually designed plan have become disfavored until the plan is audited.

Practitioners are encouraging the IRS to modify positions and procedures in relation to individually designed plans to provide the predictability that is needed to ensure that plans do not have surprise disqualifications. Furthermore, changes will be needed to Revenue Procedure 2013-12 (*i.e.*, the Employee Plan Compliance Resolution System or EPCRS) to enable plans that cannot obtain current determination letters to be eligible for correction. As it stands, favorable determination letters (or their preapproved plan equivalents) are a prerequisite to be able to use the EPCRS procedures.

And finally, without the five-year cycle that has been present for individually designed plans since 2007, it will be impossible to know when the remedial amendment period for these plans expires. The IRS will need to fine-tune these rules, as well.

WE'RE NOT HERE TO HELP

Also apparently motivated by budgetary issues, the IRS has determined that its "800 number" helpline and email service for practitioners is too expensive to maintain. The phone has been unplugged, the email system has been disbanded, and personnel that used to handle these calls and emails have been reassigned. You're on your own, folks.

ON THE OTHER HAND, YOU HAVE NEW FORMS TO COMPLETE

The IRS has issued a draft of the new Form 5500-SUP to accompany Form 5500 filings beginning in 2016 for 2015 plan years. Although this Form is an IRS form, it will be filed with the Form 5500 electronically under EFAST2 in most cases (*i.e.*, employers who file more than 250 returns of any type during the year must file electronically; others may file either electronically or by paper copy). Form 5500-EZ filers will not need to file a Form 5500-SUP.

While the form may appear innocuous at first glance, this impression may be misleading. In particular, practitioners have expressed significant dissatisfaction with this form, whose issuance was quite a surprise and was not the subject of public input before the draft was issued. Complaints about the form center on three issues:

- Several items on the form are repetitive of information that is provided on the Form 5500.
- Certain information on the form could be provided easily on Form 5500 with additions to the plan features codes.
- Some questions imply that only simple "yes or no" answers are needed, when the issue is more complex. For example, the form asks whether current or prior year testing is used for ADP/ACP testing without contemplating that one plan may use current year testing for one of these tests and prior year testing for the other.

Practitioners have also noted that the IRS's estimate of the time it will take to complete the Form 5500-SUP is understated. While the form itself is not long or complex, gathering the information that has not been previously reported may take longer than expected. The ASPPA Government Affairs Committee, among others, has provided input to the IRS as to changes it would like to see to the draft form before it is finalized.

> "In the meantime, the IRS has taken another significant step in its efforts to discourage the use of individually designed plans."

HARDSHIP CERTIFICATION

The IRS has become much more vocal (albeit informally) regarding its views on the required substantiation of hardship events for 401(k) distributions. Although many in the industry have believed that a participant can certify (without additional proof) that a safe harbor hardship event has occurred, IRS representatives have made it clear that this is not sufficient. Plan administrators must obtain and retain records in paper or electronic format to document the existence of the participant's immediate and heavy financial need, as well as the fact that the distribution was necessary to satisfy the need. In addition, the files should document the application, review and approval process, as well as proof of the distribution and Form 1099R.

PLAN AUDITS: NOT UP TO SNUFF?

A study by the DOL has reflected that 39% of the examined retirement plan audits performed in 2011 had significant errors, a substantial increase from the 19% error rate in 1997. Even audits performed by firms that are responsible for peer reviews of other firms contained major deficiencies. How the DOL will address these issues is not yet clear, but a speech by EBSA head Phyllis Borzi at the AICPA National Conference on Employee Benefit Plans earlier this year expressed disappointment with the results of the study.

ONGOING DUTY TO MONITOR ANNUITY PROVIDERS

In FAB 2015-02, the DOL clarified the ongoing duty of plan fiduciaries to monitor the financial health of annuity providers that have been selected for plans.

Generally, a plan fiduciary must take the following action in choosing an annuity provider:

- Engage in an objective, thorough, and analytical search to identify and select providers of annuities to be purchased by the plan.
- Consider information sufficient to assess the ability of the provider to make all future payments.
- Consider the cost of the annuity contract in relation to the benefit provided.
- Conclude that, at the time of selection, the annuity provider is financially able to make all future payments and that the cost is reasonable in relation to the benefit provided.
- If necessary, consult with experts to assist in the selection process.

However, once the annuity is chosen, is there further obligation on the part of the fiduciary to monitor the annuity provider's health? The answer depends on whether the annuity provider was chosen in regard to a certain annuity purchase, or whether it was selected to be used on an ongoing basis. If it is a one-time purchase, then there is no need to continue to monitor the annuity provider after the selection of the product for the participant. However, if the annuity provider has been selected to act on an ongoing basis, then the fiduciary is responsible for periodically monitoring the ongoing financial health of the provider.

2016 COLAs

As expected, most of the IRS' annually adjusted limits applicable to employee benefit plans remain unchanged for 2016 because the increase in the cost-of-living index did not meet the statutory thresholds that trigger their adjustment. Only three limits will change in 2016:

- For an IRA contributor who is not covered by a workplace retirement plan and is married to someone who is covered, the deduction is phased out if the couple's income is between $184,000 and $194,000, up from $183,000 and $193,000 in 2015, respectively.
- The AGI phase-out range for taxpayers making contributions to a Roth IRA is $184,000 to $194,000 for married couples filing jointly, up from $183,000 to $193,000 in 2015. For singles and heads of household, the income phase-out range is $117,000 to $132,000, up from $116,000 to $131,000.
- The AGI limit for the Saver's Credit is $61,500 for married couples filing jointly, up from $61,000 in 2015; $46,125 for heads of household, up from $45,750; and $30,750 for married individuals filing separately and for singles, up from $30,500. PC

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401(k) Plan Problems and Suggestions for TPAs

Guidance from a plan auditor on how TPAs can help prevent plan errors.

BY KATHRYN SNIEGOWSKI

Since they were introduced, 401(k) plans have become extremely popular, in part because they generally cost employers less than defined benefit pension plans, and can allow employees to take ownership in their retirement investment options.

But there is much more involved in 401(k) plan administration than most business owners realize.

Unfortunately, many plan sponsors don't really understand their responsibilities, the terminology or the rules they are required to follow. This frequently results in plan errors, and as plan auditors, we see many of them.

Often, the reason that auditors come across so many plan errors is there seems to be a disconnect between plan sponsors and their TPAs. Plan sponsors are relying too heavily on TPAs and TPAs are relying too heavily on plan sponsors. Each believes that the other is taking care of certain plan tasks that are not getting done, which ultimately causes things to slip through the cracks.

As a 401(k) plan auditor for more than 20 years, I have encountered many plan errors and problems. It's unfortunate that some of these errors are caused by simple, honest mistakes because many plan sponsors fundamentally don't know the rules, nor do they understand their responsibilities. This is an area where TPAs can be of significant help to their clients, by educating the appropriate personnel at the plan sponsors, so plans can be monitored on an ongoing basis.

Many of the problems that we come across are preventable if the plan sponsors, trustees and plan administrators know the rules and monitor their plans on an ongoing basis. Following are some common examples of problems that we have seen over the years and suggestions for ways TPAs can educate and assist their clients. I've provided these suggestions in the hope that TPAs can educate their clients and we will see fewer problems during 401(k) plan audits.

CENSUS DATA

Problem: The company provided incorrect or incomplete census data to their third-party plan administrators. The TPAs didn't verify the information and they performed compliance testing on this incorrect data. When we discovered the error upon audit, the census had to be corrected and the testing rerun. This is inefficient and where nondiscrimination testing failed, it also resulted in late corrections (*i.e.,* refunds to HCEs).

Suggestion: TPAs should instruct their clients to reconcile the census to the W-2s issued for the year before submitting the census data to their TPA. They should also explain how to do so, or refer them to their outside CPAs for assistance or guidance.

"Often, the reason that auditors come across so many plan errors is there seems to be a disconnect between plan sponsors and their TPAs."

HIGHLY COMPENSATED EMPLOYEES

Problem: The company did not properly identify all of the HCEs to their TPA. Again, testing was completed on incorrect data and when we discovered the error upon audit, the testing had to be rerun.

Suggestion: TPAs can help their clients by explaining the definition of an HCE and walking through their census with them to appropriately identify all HCEs before any required testing is completed.

MATCHING CONTRIBUTIONS

Problem: The company incorrectly calculated matching contribution amounts. This is something that can be corrected long before the audit is performed.

Suggestion: TPAs can help their clients review the match calculations periodically and correct any errors, or refer them to their outside CPAs for assistance or guidance.

LATE DEFERRALS

Problem: The company made late remittance of employee deferrals. It is a highly debated topic as to when deferrals are considered late. The DOL has provided guidance as to the definition of "timely remittance" of deferrals, but the rule is not cut and dried. There is frequent misinterpretation of the rule and even when it is interpreted correctly there is still some judgment involved. The DOL has determined a safe harbor for small plans, which is within 7 days of payroll, but for those plans that require an audit, there is no safe harbor. In my experience, a good rule of thumb is to deposit deferrals at the same time payroll taxes are deposited. Typically this is within just a few days and, in most cases, would be considered timely.

Suggestion: TPAs can provide guidance to their clients to deposit deferrals at the same time that payroll tax deposits are made, make sure the company is monitoring the deposits throughout the year and assist their clients in making a determination as to whether any deposits are late.

FIDELITY BOND

Problem: The company had a fidelity bond that had expired or had inadequate coverage. It is easy to determine the required coverage needed as of the first date of the plan year.

Suggestion: TPAs should review fidelity bond coverage with their clients at the beginning of each plan year.

> "Plan sponsors are relying too heavily on TPAs and TPAs are relying too heavily on plan sponsors."

DEFINITION OF COMPENSATION

Problem: The company incorrectly applied the definition of plan compensation — for example, not withholding deferrals on employee bonuses. Plan sponsors often think they can change the definition of compensation at their discretion, which in fact they can, however it must be done formally. So, if a plan sponsor wants to exclude bonuses from the definition of plan compensation and it's not in the plan document, they have to amend the plan document.

Suggestion: TPAs should review the definition of compensation in the plan document with their clients to verify that they are applying the rules correctly.

PLAN DOCUMENT

Problem: The company is not following its own plan document. The plan document and the features selected in the adoption agreement are chosen by the client when the plan is implemented. However, over the years, plan sponsors may change their minds about various plan provisions, which is allowed, but only by plan amendment. Plan sponsors often forget or don't realize that many changes require formal plan amendment. So, they change a plan provision without making a formal amendment and subsequently don't realize they are not following their own plan document. This could cause significant compliance issues that may require the company to seek further advice from their ERISA lawyers to correct such compliance failures.

Solution: TPAs should remind clients to review their plan documents and adoption agreements annually to verify they are in compliance with the features they selected and determine whether changes are warranted.

PLAN LOANS

Problem: Plan loans in default are not identified and 1099-Rs are not issued timely.

Suggestion: TPAs should review loans that have no repayments for a period of time and also review accounts of terminated employees with outstanding loans so 1099-Rs can be issued in the proper year.

ELIGIBILITY NOTIFICATION

Problem: Participants are not notified when they are eligible to participate.

Suggestion: TPAs can assist their clients at each plan entry date to identify newly eligible employees and make sure that proper notifications are sent to employees.

OPT-OUT FORMS

Problem: The company did not ask employees to complete opt-out forms when they were eligible but chose not to participate in the plan.

Suggestion: TPAs can assist clients with identifying those participants and remind them to obtain the signed opt-out forms and keep that documentation on file to protect the plan sponsor and trustees from potential future liabilities.

FIDUCIARY RESPONSIBILITY

Problem: The company does not take plan administration seriously. They consider it an administrative task that they often assign to a payroll clerk. Unfortunately, often the trustees of the plan do not understand their responsibility and liability.

Suggestion: TPAs should educate the trustees as to who is considered a fiduciary and explain their basic fiduciary responsibilities. These responsibilities, at a minimum, consist of acting solely in the interest of the plan participants and beneficiaries, following the plan document, making sure that investments are diversified and making sure that plan expenses are reasonable. They should also explain that plan fiduciaries can be held personally responsible for plan violations if they breach their fiduciary duties. In addition, TPAs should make sure plan trustees are aware that penalties can be assessed to individuals.

PLAN EXPENSES

Problem: The plan administrator does not review plan expenses for reasonableness.

Suggestion: TPAs can assist their clients with understanding fee disclosures and review plan expenses with them. They can provide information to assist their clients with an evaluation as to whether the expenses are reasonable or not. If expenses are not reasonable, they can assist their clients with selecting different investments with reasonable fees.

INVESTMENTS

Problem: The plan does not have an investment policy. It is the plan trustee's responsibility to establish an investment policy and to make sure that it is being followed. Many plan sponsors don't even know what that means.

Suggestion: TPAs can assist their clients with developing an investment policy, documenting it and monitoring it annually.

Problem: The plan administrator or trustees do not monitor investment diversity.

Suggestion: Again, similar to the fees, TPAs can assist their clients

Audit Checklist

If 401(k) plans are large enough, the DOL requires them to be audited by an independent CPA. There are many things that TPAs can do to specifically assist their clients and the auditors with 401(k) plan audits.

In writing this article, I asked my firm's 401(k) plan audit teams across the country for suggestions that TPAs can use to help make the audit process more efficient and effective. Based on their responses, here is a checklist of items that would be particularly helpful when working with a plan auditor.

1. Failure to amend the plan for tax law changes by the required date
2. Failure to follow the plan's definition of compensation for purposes of determining contributions
3. Failure to include eligible employees in the plan or to exclude ineligible employees from the plan
4. Failure to satisfy plan loan provisions
5. Impermissible in-service withdrawals
6. Failure to satisfy required minimum distribution rules
7. Employer eligibility failure
8. Failure to pass annual nondiscrimination testing
9. Failure to properly provide the minimum top-heavy benefit or contribution to non-key employees
10. Failure to observe the limits on maximum annual contributions a participant can receive (in a defined contribution plan) or the amount of benefits a participant can accrue (in a defined benefit plan)
    a. SOC-1 report.
    b. Loan reconciliation/roll-forward schedules showing the beginning balances, new loans, principal payments, interest payments, deemed distributions, accrued interest, and ending balances.
    c. Distribution schedules showing the reason for the distributions including deemed distributions.
    d. Include an audit guide that indicates the type of investments that are held in the plan (*i.e.,* mutual funds, common collective trusts, derivatives, etc.)
    e. Fair value leveling information as required by Accounting Standards Codification Topic No. 820 "Fair Value Measurements and Disclosures."
    f. Deferral change log indicating the participant name and deferral history (changes made and dates of changes).
    g. Investment allocation log indicating the participant name and investment allocation changes (changes made and dates of changes).
    h. Fair market value to contract value adjustments.
    i. Compliance testing including a reconciliation of participant counts.
    j. If the plan has a stable value fund, GIC, or common collective trust, include the financial statements and documents to support the additional net asset value (NAV) disclosure requirements.
    k. Participant activity that has been reconciled to the trust statements.
    l. Reconciliation of Form 5500 Schedule H to the trust statements, if applicable.

with making this determination and selecting investment options that are diversified.

SPD AND ADOPTION AGREEMENT

Problem: The Summary Plan Description and Adoption Agreement do not match.

Suggestion: TPAs should remind their clients to review their plan documents, adoption agreements and amendments, and confirm that they all agree. In addition, they should walk through the current operations of the plan with their clients to verify that the plan is in compliance rather than just sending out an annual survey or questionnaire.

CONCLUSION

TPAs can educate plan sponsors, and provide guidance throughout the year with more frequent and clearer communication. If they do, plans should experience fewer errors. In addition, TPAs can assist with annual plan audits by providing the information needed in one package and/or via online access, which should increase the efficiency and effectiveness of their clients' 401(k) plan audits. PC

Any views or opinions expressed in this article are solely those of the author and do not necessarily represent those of BDO USA, LLP.

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From Adversity to Excellence

THE CELEBRATION OF ASPPA'S 50 YEARS AT THE FOREFRONT OF THE RETIREMENT INDUSTRY STARTS HERE.

BY JOHN ORTMAN

This photo taken at the 1969 Annual Conference shows Bill Hand, Harry Eidson, Carl Duncan, featured speaker Isadore Goodman of the IRS and Bill White (L-R). Eidson, Duncan and White were the founders of ASPA.

As ASPPA begins its 50th anniversary year, the Society and its members find themselves at a crossroads, facing an uncertain future. Significant challenges to the industry and the organization lie ahead. The private retirement system must be preserved and protected, and strategic decisions about ASPPA's future must be made.

As always, those decisions will be informed by the big decisions and accomplishments of the Society's past. These accomplishments include protecting the profession in the 1960s; a commitment to education, certification and conferences in the 1970s; government advocacy in the 1970s and 1980s; and growth via inclusion in the 2000s and 2010s.

Throughout its existence, ASPPA has met the challenges of the future by expanding its horizons — defining "pension professionals" more broadly, adding new focuses of activity such as government affairs, and reshaping its educational outreach through novel ways of teaching and examining members and creating new professional designations — and then applying its longtime values to the new horizons.

Will the ASPPA of the future look much different from today's organization? "ASPPA will grow, and it will take on other partners," says 2007 President Chris Stroud, "but I don't see it changing its mission. And I can't imagine my life without ASPPA."

Over five decades, ASPPA has presented a remarkable story of hardscrabble creation, dire straits, controversial evolution, and growth. The organization is both a survivor and a success. "I can't believe it. I just cannot believe it," says 90-year-old Carl Duncan, a founder of ASPPA in 1966 who served as the Society's second president in 1971. "Going from our little threesome in the Circus Bar of the Monteleone Hotel in New Orleans, where ASPPA began to take shape, to nearly 8,000 members, that just blows my mind. I can't believe it has happened."

It's said you can't know where you're going if you don't know where you've been. ASPPA's 50th year

> "We get an odd feeling about ASPPA. It's almost like our second family. Part of it is because we work in a difficult business that most other people don't understand and sometimes don't appreciate, so we have bonded over that. It's also because the Society is full of smart, honest, and hardworking people — and we've all found kindred spirits."
>
> — Sarah Simoneaux, 2006 President

offers the perfect opportunity to look back, recall ASPPA's rich history, and celebrate our contributions to the industry and the actuarial profession — and the people who made it happen.

The storytelling starts here, with this cover story. It will continue throughout 2016 — in each issue of *Plan Consultant*, on ASPPA Net, with videos, trivia quizzes, the ASPPA history book and more — culminating with the 50th anniversary gala at the ASPPA Annual Conference in October. So sit back, kick back, and enjoy.

THE FOUNDERS AND EARLY LEADERS

ASPA's early leaders in the 1960s were a feisty bunch of pension professionals, many of them Texans, who didn't like how established actuarial organizations treated practitioners of their specialty. They took it upon themselves to create the kind of society that would serve their needs and advance their profession, overcoming resistance and long odds to build what became a highly influential professional organization.

Three friends from the Lone Star State are recognized as the founders of ASPA: Harry T. Eidson, Carl I. Duncan and William F. (Bill) White.

Eidson worked for the New England Mutual Life Insurance Company, initially as a training actuary and, later, as an agent. He was a decorated veteran of World War II and a significant community leader prior to ASPA's founding. Eidson served as ASPA's first President from 1966 to 1970. "Harry was super intelligent, a bit difficult to get to know, but he sure knew what he was doing," recalled White.

When Eidson was a colonel in the U.S. Air Force during World War II, he played an odd role in the defense of the United States. At the time of Japan's surprise bombing of Pearl Harbor, Eidson was one of a small number of combat pilots stationed at an airfield near Washington D.C. Nobody knew what Japan's next move would be, and many people feared an attack on the nation's capital. The military was so unprepared for war that the only fighter planes available to defend the nation's capital were armed with cameras only, not with weapons and ammunition. Nevertheless, Eidson and two other pilots were ordered aloft to patrol the skies of Washington D.C., even though they could have done little if an attack occurred. "I don't know what was going through Harry's mind when he was up there with his cameras," said ASPA's longtime executive director Chet Salkind. "But even though the military eventually worked out something more effective, Harry stayed with it. It gave an initial inkling of the courage of the man and his ability to stick with it."

Eidson died in 1994, at age 85. Those who knew him through ASPA held him in universally high esteem. Without his vision and strong leadership, ASPA might never have existed. In honor of his memory, ASPA created the annual Harry T. Eidson Founders Award, given to the ASPA leaders and other industry luminaries who followed in his footsteps.

Carl Duncan was the partner of an early ASPA director, Julius Stein, in their actuarial firm in San Antonio. A Texan to the core, he spoke with a pronounced drawl and entertained many with his Texas colloquialisms and infectious wit. He might have starred in a cowboy movie, but he was a highly competent and well-

A Year-Long Celebration

ASPPA members can look forward to special events, content and videos throughout the anniversary year. Special plans for 2016 include:

- Special 50th anniversary credential certificates
- Website devoted to ASPPA's 50th anniversary activities
- ASPPA trivia quizzes at ASPPA conferences and events
- Articles excerpted from the ASPPA history book in *Plan Consultant*
- "This month in ASPPA history" posts on ASPPA Net
- ASPPA history videos on the 50th anniversary website
- ASPPA history book coming in October
- 50th anniversary gala celebration and other special events at the 2016 ASPPA Annual Conference

Sept. 2, 1974: President Gerald Ford signs ERISA into law at the White House.

respected pension actuary. Currently age 90, Duncan is the sole surviving ASPA founder.

Bill White, the third of the trio of founders, was one of the initial group of ASPA members who qualified as Enrolled Actuaries after the enactment of ERISA in 1974. Over the course of his career he designed, installed and administered countless pension plans for numerous clients.

Eidson, Duncan and White were joined by a number of other early leaders, including:

- **Allen S. George,** a vice president of the First Life Insurance Company in Corpus Christi and a frequent lunch partner of Harry Eidson, volunteered to serve as ASPA's first vice president and wrote the bylaws of the new organization.
- **William W. (Bill) Hand** of Houston was the longtime owner of a pension consulting firm founded by his father. An especially dynamic leader, Hand served as ASPA President in 1973, leading up to the passage of ERISA. ASPA later established the William Hand Memorial Scholarship in his honor at the University of Texas at Austin.
- **James ("Kirk") Kirkpatrick**, a lifelong actuary, was also a member of the Conference of Consulting Actuaries and the Academy. He held a graduate degree in actuarial science and had long-standing relationships in the academic actuarial community. Like his fellow early ASPA members, he grew disenchanted with the other organizations' lack of focus on the education of pension actuaries. He became the first chair of ASPA's Education and Examination Committee, and designed the organization's earliest examinations.

THE 1970s: EDUCATION AND ADVOCACY

As ASPA entered the 1970s and grew from a fledgling organization to a recognized and respected professional association, America's pension systems were ready for transformation. About two-thirds of the working population participated in an employer-sponsored retirement plan, and many of those without pension benefits worked for smaller businesses. In particular, small business pension plans were overdue for development, and the members of ASPA, still small in number, had the background, training and interest necessary to help expand the coverage of private retirement programs.

This focus attracted young actuarial professionals rising in their careers, such as Steve Rosen, a future ASPA president (2005). "There were a lot of people like myself who

were coming along and found a new professional specialty that they wanted to make their career," Rosen says. "Even though the actuarial profession has been around for a long time, dedicated pension actuaries were really just coming into their own. I was intrigued by the concept and latched onto a number of ASPA people, with whom I became very good friends."

Its small cadre of leaders were scattered. The executive director was in Texas and the committee chairs and members were spread around the country. More than anything else, the organization strongly emphasized education: ASPA was building its brand for examining and accrediting members as pension actuaries. The Education and Examination (E&E) Committee was one of the organization's busiest groups of volunteers. Education and advocacy quickly became the Society's two-pronged focus and, in many ways, the key to its survival.

The 1974 Annual Conference, at the Mayflower Hotel in Washington, was overshadowed by the enactment of ERISA the previous month.

> "Even though I'm not an actuary, I feel a lot of the kinds of feelings that actuaries feel. The actuarial mindset is a positive one and full of respect and very analytical. Other than their geekiness, I think they're wonderful people."
> — Stephen Dobrow, 2009 President

The Impact of ERISA

For years, the IRS had regulated the pension industry. The applicable legislation at the time consisted of one subsection of the Internal Revenue Code that was limited to a few principles, with very little detail. And since regulators can only regulate what the law specifies, there were relatively few regulations.

Congress had begun considering pension law reform in the early 1960s — beginning a long process of drafting federal legislation that would establish specific rules on how pensions could operate and who could design and administer them. Proposed pension legislation ground slowly through many sessions of Congress. During the ASPA presidency of Bill Hand in 1973, for instance, about 20 pension regulatory bills were introduced in the U.S. Congress. "A number of those bills contained a provision that one must be a member of the Academy of Actuaries in order to be allowed to certify defined benefit valuations in the future," Hand later remembered.

Most ASPA members were not members of the Academy of Actuaries. In fact, ASPA was established in reaction to the Academy's refusal to admit many long-practicing, independent pension actuaries. "The organization was in a battle for its existence, in that enactment of the legislation in the form originally proposed would have disenfranchised a large number of ASPA members," 1972 ASPA President Samuel J. Savitz remembers.

During the first half of 1973, ASPA staff and government affairs volunteers spent countless hours testifying before congressional committees to influence the final wording of the draft "Employee Retirement Income Security Act" bill. ASPA reasoned that it should be among the named organizations that could train and qualify pension actuaries under the new law. ASPA's representatives also recommended that the legislation should also require that actuaries must have three years of meaningful experience working in the pension field in order to be allowed to certify pension valuations.

The bill was passed by Congress that summer. On Labor Day, Sept. 2, 1974, ERISA was signed into law by President Gerald Ford. Forty years of pension law changed overnight, and an entirely new industry was created.

In addition to establishing the Pension Benefit Guaranty

An April 2012 House Ways & Means hearing featured testimony from ASPPA's Judy Miller.

> "We're here for the support of small retirement plans and the private pension system, and anything that harms the private pension system is something we have to attack with great force."
>
> — Ilene Ferenczy, member

Corporation, which insured defined benefit pensions against certain losses, the legislation provided new minimum funding, eligibility and vesting requirements and extensive reporting and disclosure requirements. Those provisions would prove to be the most burdensome aspect of the new law for employers.

But for ASPA, the most significant impact of ERISA was the creation of a federally licensed actuary, the "Enrolled Actuary." This was a tremendous victory for ASPA and its leaders who had worked so hard to assure that the independent pension actuaries would not be denied the opportunity to continue practicing their profession. Enrolled Actuaries would have the exclusive right and responsibility for certifying that sponsors of defined benefit pension plans met the newly created minimum funding requirements created by ERISA. Without that victory, ASPA might not have survived into the 1980s.

THE 1980s: TURBULENCE AND PROGRESS

After succeeding in its biggest challenge of the 1970s — gaining federal approval as an organization qualified to certify pension professionals to work under the new provisions of ERISA — ASPA had to grow up fast and continue its winning ways during the '80s. The congressional agenda was full of efforts to change America's pension plans; ASPA's membership was evolving and the organization's education programs had to keep up; and the IRS threatened some of the most basic assumptions ASPA members made when working on small pension plans.

It was a decade in which President Ronald Reagan famously advised, "Don't be afraid to see what you see." ASPA saw transformation, dangers, ways to assert its influence, and ways to help pension professionals thrive.

Throughout the decade, ASPA faced an onslaught of proposed retirement plan legislation and regulation. Most of the legislative initiatives affecting retirement plans in the 1980s involved modifications of the tax code. Dozens of mostly piecemeal bills and amendments to bills were introduced by a variety of legislators, and many laws were enacted, including:

- Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)
- Economic Recovery Tax Act of 1981 (ERTA)
- Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)
- Deficit Reduction Act of 1984 (DEFRA)
- Retirement Equity Act of 1984 (REA)
- Tax Reform Act of 1986 (TRA 86)
- Omnibus Budget Reconciliation Act of 1986 (OBRA 86)
- Omnibus Budget Reconciliation Act of 1987 (OBRA 87)
- Technical and Miscellaneous Revenue Act of 1988 (TAMRA)
- Omnibus Budget Reconciliation Act of 1989 (OBRA 89)

Ed Burrows, ASPA's President in 1986, called the TRA 86 "one of the great disasters of 1986 — actually just the climax of a five-year disaster which included TEFRA, DEFRA, REA '84 and the Tax Reform Act of 1986," all of which impacted the livelihoods of ASPA members and damaged the viability of defined benefit plans.

"The shift was away from defined benefit to defined contribution plans," says 1983 President Curtis Hamilton, "because 401(k) plans were now replacing defined benefit plans. Most ASPA members had to completely change their knowledge and administrative skills as the industry moved into administering 401(k) plans, including adding daily recordkeeping services. That caused a lot of market consolidation, and most of our firms couldn't or wouldn't make the move to the daily business. It required all types of changes in systems, staffing, training, trading, investment knowledge, etc. It was a shift that was tectonic in nature. We saw the prospect of ASPA changing dramatically. The organization had to continue to evolve to keep pace with events and be successful. That was the challenge we faced."

ASPA met the challenge by developing programs to educate members on the new 401(k) plans, for which there was an urgent need. "Some people knew a little bit about 401(k) plans, but at that time there was not a lot of information out there," says member Joan Gucciardi. "Everyone was in the same boat. We all thought, 'Yes, we want to offer 401(k) plan services to clients, but we really don't know all the answers to the questions.' "

> It's not about showing off or being loud or being friendly, it's about commitment to something higher. That's a really sweet part of the traditional ASPPA that I hope we hold onto as we grow into a more powerful and outgoing organization."
>
> — Mark Davis, member

In the years after 1986, Congress continued to tinker with the deductibility of retirement plans. "Congress saw the 'tax expenditure' on pension plans and retirement plans as easy pickings for solving some budget problems. Most of the focus was on revenue generation and equity, with little regard for social good, in the form of adequate retirement income, a primary goal of ERISA. And the law would change nearly every year in order to fix budget problems but not to fix benefit plan problems," observed Carol Gold, former director of the IRS' Employee Plans unit.

While the '80s were a turbulent time for ASPA and its members, it was also a decade of tremendous progress for the organization in many ways: expansion and diversification of membership and member services; significant strides in education and member communication; greater information resources; new conference offerings; and perhaps most importantly, successful efforts in preventing more damaging legislation and regulation.

THE 1990s: GROWTH VIA INCLUSION

"Our future, while yet to be written," speculated 1991 President Patrick Byrnes, "will undoubtedly involve enormous change… We've seen a major shift in the pension industry. Consultants and money managers have become, in many instances, strategic partners." Members of the various pension professions had to learn how to peacefully coexist, Byrnes warned. "Those who we now view as threats to our businesses will probably force us to continue to change and grow. We should keep in mind, though, the lessons of the past — these perceived 'enemies' may eventually become our partners."

Gradually, says member Kristine Coffey, "the idea that there were other people who came from different specialties, with different areas of expertise, ought to be represented, and ASPA ought to reach out to them, took root."

"The organization grew in numbers, just plain grew," remembers member Fred Reish. "It was a bigger financial enterprise, running more conferences, taking on more responsibility." ASPA couldn't help but change. "In some cases it moved at an evolutionary pace, in other cases at a revolutionary pace," he adds.

Although Reish appreciates the professional improvement of the organization that occurred during the 1990s, he still feels fond of the ASPA that was about to vanish. "We had fun back then not being rigidly structured," he says. "We were sort of a big group of people hanging together."

THE 2000s: A CHANGE IN NAME, A CHANGE IN MISSION

From ASPA's earliest days, when non-actuarial pension professionals of various kinds began joining the pension actuaries who made up ASPA's core membership, there had been a tension regarding the American Society of Pension Actuaries name.

With the passage of another decade, the conflicts among history, mission and name had not eased. By 2000, actuaries made up 14% of ASPA's membership, consultants 13%, administrators 40%, and associated professionals and affiliates 34%.

"There was a lot of recognition that we had to do something with our name, because it didn't reflect what our vision for the organization was," recalls Executive Director Brian Graff. "But of course there was this tremendous history with the name. We were struggling with it, but we couldn't land on something that seemed right. So we

came up with the idea of surveying the members on some possible new names we made up." Members did not favor any names on the Board's list (which included the cumbersome American Society of Pension Actuaries, Administrators, and Other Retirement Plan Professionals), but someone suggested simply adding another 'P' to the acronym to create the American Society of Pension Professionals and Actuaries (ASPPA). The new name was announced to members in 2004.

"It pleased me that we were able to make a name change that recognized the history in the acronym but made it clear that we were an open door, a bigger tent, and that we all wanted to be professionals," Graff says.

"I don't know if I was the last president of ASPA," says 2004 president Bruce Ashton, "or the first president of ASPPA. Maybe I was both."

Later in the decade, ASPPA embraced professionals who work in the 403(b) and 457 plan markets, then 401(k) plan investment advisors. "The vision was that we wanted to be the premier organization for all retirement plan professionals," Graff says. "We started out as an actuarial society, and we grew to embody the vision of becoming the American Medical Association or American Bar Association of retirement plan professionals." The evolution affected the entire organization. "It has broadened the horizon of the organization," says Ashton, "broadened the understanding of the organization, and broadened the focus of the ASPPA folks who deal with the Hill and the regulatory agencies, as well as those who provide education to members."

ASPPA TODAY AND TOMORROW

In the second decade of the 21st Century, ASPPA solidified is place as a force uniting many varied professionals in the retirement plan business. "We have become the go-to organization for the entire retirement plan industry, every aspect of it," says 2011 President Tom Finnegan.

Today, ASPPA is uniquely rooted in the retirement plan landscape. "ASPPA is really a steward of the industry," says NAPA Founding President Marcy Supovitz. "There are other organizations that do some of the job in the education side of the business, and in the networking side. But there is no other organization that brings together the education, the networking, and the advocacy. Nothing compares to ASPPA in having a presence on Capitol Hill. It does a fantastic job of bringing together all three of those benefits, and that's what makes it unique."

To better reflect the growth of its members in a wide range of retirement plan professions, ASPPA in 2015 restructured itself under an umbrella organization, the American Retirement Association, with divisions of membership for ASPPA, ACOPA, NAPA, and NTSA. The reorganization established a close affiliate relationship between the member groups, with each having independence, equal status, and its own credentialing standards and procedures. "We set out on this strategy to become the most pertinent organization for retirement plan professionals — to make membership in the organization essential to any retirement plan professional's success," says ASPPA Executive Director Brian Graff, who also serves as CEO of the American Retirement Association. "Now all of the affiliate organizations are fully integrated, with the American Retirement Association helping govern and coordinate the work of the affiliates."

In late 2015, nearly 23,000 people were part of the larger organization, compared with about 10,000 just five years earlier.

Through this restructuring, ASPPA's core values have not changed. "High quality education and credentialing, high standards, commitment to our principles of helping Americans save for retirement — especially small-business Americans and employees — it's all still with us," observes 2006 President Sarah Simoneaux. "Those principles were there when I joined, and they're the same today. That's what makes us able to grow without having to compromise our values."

Simoneaux is a big believer in the younger generation of employees and their ability to confront the most pressing of the retirement policy questions. "They represent what ASPPA has embodied for a long time," she says. "ASPPA is about saving, work/life balance, globalization, volunteerism — everything that young workers pay attention to. They're perfectly matched with what ASPPA will be doing. The economy is changing, but we've been through that before. ASPPA represents much of the entrepreneurial spirit of small business. And we are uniquely positioned to grow stronger over the next 20 years and help people build a successful retirement." PC

ASPPA Video Tribute a Must-See

A video tribute to ASPPA, featuring past presidents and others, debuted at the 2015 ASPPA Annual Conference last October. The 6-minute video is posted on ASPPA Net, on the news page. Just go to www.asppa-net.org and click on the 50th anniversary logo in the right column.

I'll Be Missing You: Tips for Locating Missing Participants

Think it's impossible to encounter issues with finding missing participants in today's digital world? Think again.

BY CHARLENE M. KELLY

How do plans have missing participants in a world in which nearly every interaction results in a digital footprint? You may think it is impossible to still encounter issues with missing participants — but that's not the case. This article describes the circumstances in which missing participants pose problems for plan sponsors of defined contribution plans, and the fiduciary steps (necessary and suggested) to take in locating them.

IS A PARTICIPANT MISSING?

Department of Labor Field Assistance Bulletin (FAB) 2014-01 brought renewed attention to missing participant issues. However, FAB 2014-01 only addresses information specific to the termination of a defined contribution plan and the fiduciary responsibility associated with executing the settlor termination decision. Plan sponsors encounter other "missing participant" issues that raise administrative challenges. As participants move and do not update contact information, locating problems result. These problems increase in difficulty if incorrect Social Security numbers, name changes and common names are involved.

What actions should a plan fiduciary take when a communication, such as a safe harbor notice or plan account statement, is returned by the post office as undeliverable? What steps do you take if a distribution check is returned in the same manner? How do you handle a plan correction under the IRS' Employee Plans Compliance Resolution System (EPCRS) that requires an additional payment to a terminated participant if you cannot find him or her?

A participant is generally considered missing when use of the address supplied by the participant — and reflected in the plan records as the most recent mailing address — results in returned mail. Many plans (in the plan documents or their Summary Plan Descriptions) include language informing participants that the participants are responsible for notifying the applicable plan of current contact information. Such language does not, however, relieve the plan sponsor from his or her responsibility to take reasonable steps to locate a participant when necessary.

> "If the required steps do not locate the participant, what additional actions constitute a reasonable effort?"

STEPS REQUIRED UNDER FAB 2014-01

FAB 2014-01, which reflects an update from Field Assistance Bulletin 2004-02, describes required search steps a fiduciary must take (in order to satisfy his or her duties of prudence and loyalty) to find a missing participant upon the termination of a defined contribution plan. These steps are:

- using certified mail;
- checking the employer's documentation related to other plans and employee records;
- checking with a designated beneficiary; and
- consulting free electronic search tools.

While the DOL states that these steps are the "required search steps," it also indicates that a plan fiduciary must make a reasonable effort to locate all missing participants.

REASONABLE ADDITIONAL STEPS

If the required steps do not locate the participant, what additional actions constitute a reasonable effort? FAB 2014-01 states that additional steps may be required to locate a participant with a large account balance, while keeping in mind that a fiduciary must defray reasonable expenses of plan administration. Commercial locator services often provide reasonable rates, and have a high level of success locating participants. Credit reporting agencies and fee-based databases may offer additional options. Evaluate the appropriateness of any action beyond the required steps on a facts-and-circumstances basis.

The IRS discontinued its letter forwarding service as of Aug. 31, 2012 (as announced in Revenue Procedure 2012-35). While the IRS service was useful in theory, any communication sent through it by the plan sponsor resulted in an information vacuum unless the participant contacted the plan — no information was provided about whether the IRS was able to forward the communication to the participant or whether the communication was returned to the IRS. Therefore, the plan sponsor could only speculate about whether the participant ever received it.

Similarly, on May 19, 2014, the Social Security Administration ended its letter forwarding service (via an announcement published in the Federal Register on April 17, 2014), which had been in place since 1945.

OPTIONS FOR TERMINATED PLAN BENEFIT OF MISSING PARTICIPANT

A terminating plan exhausted reasonable available options for finding a missing participant, and is ready to distribute — where should the participant's plan benefit be held? DOL Reg. §2550.404a-3 provides safe harbor distribution options. As a condition of using the safe harbor, the participant must have been supplied notice of the available distribution options. For a missing

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CHECKLIST FOR A TERMINATED DC PLAN

Below is a sample checklist to use when tracking the steps for locating a missing participant.
The plan should retain a copy of a completed checklist for each missing participant with its plan termination records.

Required Search Steps

Instructions: The plan fiduciary must take all of the following steps before determining that a missing participant cannot be located. The DOL allows fiduciaries to take the following steps in any desired order. Failure to take all of the following steps before distributing a missing participant's benefit will constitute a violation of the plan fiduciary's obligations under ERISA.

Step	Record
1. Use Certified Mail Send notice via certified mail. Plan fiduciary may use DOL model notice or may create own form of notice.	*Description of Actions Taken/Notes:*
	Attach: ☐ Returned letter and envelope
	Date Taken:
	Actor:
	Located Participant? ☐ Yes* ☐ No **If yes, no further attempts to locate required.*
2. Check Related Plan and Employer Records Check other records (*e.g.*, employment, other benefit plans) for more current contact information. *NOTE: If there are privacy concerns (e.g., under HIPAA), the plan fiduciary may ask that the employer or other plan fiduciary contact or forward a letter for the terminated plan to the missing participant.*	*Description of Actions Taken/Notes:*
	List Other Records Checked:
	Attach: ☐ Returned letter and envelope
	Date Taken:
	Actor:
	Located Participant? ☐ Yes* ☐ No **If yes, no further attempts to locate required.*
3. Check with Designated Plan Beneficiary Identify and contact any individual designated as the missing participant's beneficiary to find updated contact information. *NOTE: If the beneficiary is concerned about the missing participant's privacy, the plan fiduciary may ask that the beneficiary contact or forward a letter for the terminated plan to the missing participant.*	*Description of Actions Taken/Notes:*
	List Other Records Checked:
	Attach: ☐ Returned letter and envelope ☐ Letter sent to designated beneficiary
	Date Taken:
	Actor:
	Located Participant? ☐ Yes* ☐ No **If yes, no further attempts to locate required.*

CHECKLIST FOR A TERMINATED DC PLAN *(CONTINUED)*

4. Use Free Electronic Search Tools Online services could include Internet search engines, public record databases (*e.g.*, for licenses, mortgages and real estate taxes), obituaries and social media.	*Description of Actions Taken/Notes:*
	List Search Tools Used:
	Attach: ☐ Returned letter and envelope
	Date Taken:
	Actor:
	Located Participant? ☐ Yes* ☐ No **If yes, no further attempts to locate required.*

Additional Search Steps (May be Required)

Instructions: If the plan fiduciary is unable to locate the missing participant using the above Search Steps, the plan fiduciary *must consider* if additional search steps should be taken. In deciding whether to take additional search steps, the plan fiduciary should consider: (1) the size of the missing participant's account balance; and (2) the cost of further search efforts.

Size of Account Balance: $
Anticipated Cost of Further Search Efforts: $
Will Fiduciary Take Additional Steps? ☐ Yes ☐ No
Reasoning:

5. Use Paid Electronic Search Tools, Commercial Locator Services, Credit Reporting Agencies, Information Broker, Investigation Databases	*Description of Actions Taken/Notes:*
	List Additional Tools/Services Used:
	Attach: ☐ Information received using additional search tools/services
	Date Taken:
	Actor:
	Located Participant? ☐ Yes* ☐ No **If yes, no further attempts to locate required.*

CHECKLIST FOR A TERMINATED DC PLAN *(CONTINUED)*

Distribution Steps (Only Permitted if Unable to Locate Missing Participant)

Instructions: If the plan fiduciary is unable to locate the missing participant after taking the Search Steps above, the fiduciary has no choice but to select a distribution option for the missing participant in order to complete the plan termination. *The DOL prefers that plan fiduciaries distribute benefits for a missing participant into an individual retirement plan (i.e., an individual retirement account or annuity).* The choice of an individual retirement plan provider and choice of an investment option for the distributed amounts requires a fiduciary decision. However, the DOL provides a safe harbor for plan fiduciaries that meet the conditions in Steps 6-9 below. For more information regarding the safe harbor, see 29 C.F.R. §2550.404a-3. If the plan fiduciary cannot find an individual retirement plan provider to accept a rollover distribution for the participant (or determines not to make a rollover, for a compelling reason), the plan fiduciary may move to Step 10.

Step	Details
6. Search for Individual Retirement Plan Provider (preferred method of distribution)	*Provider must be one of the following (check applicable provider):* ☐ Individual retirement plan; or ☐ If for a non-spouse designated beneficiary, to an inherited individual retirement plan established to receive the distribution on behalf of the beneficiary.
	List selected Provider: ***If plan fiduciary is unable to find individual plan provider or determines not to make rollover for compelling reason, move to Step 10.*
	Date:
	Actor:
7. Enter into Agreement with Selected Individual Retirement Plan Provider	Agreement with provider must provide the following *(check as confirmation that provisions are included in agreement):* ☐ Distributed funds for missing participant will be invested in an investment product designed to preserve principal and provide a reasonable rate, whether or not guaranteed, consistent with liquidity. The investment product must: • Seek to maintain (over the term of the investment) the dollar value equal to amount invested in product by IRA. • Be offered by certain state or federally regulated financial institutions. ☐ All fees and expenses to the new plan or account, including investments of plan, must not exceed fees and expenses charged for comparable plans established for reasons other than termination distributions. ☐ Missing participant must have right to enforce terms of agreement with regard to transferred account balance against provider.
	Notes:
	Attach: ☐ Copy of agreement
	Date:
	Actor:

CHECKLIST FOR A TERMINATED DC PLAN *(CONTINUED)*

Step	Details
8. Confirm that Neither Plan Fiduciary's Selection of Provider nor Investment of Funds Results in a Prohibited Transaction under ERISA	*Check one:* ☐ Confirmed no prohibited transaction results from distribution ☐ Prohibited transaction results, but actions are exempted under ERISA §408(a) *List exemption:*
	*** If prohibited transaction results without a permitted exception, plan fiduciary should select a different individual retirement plan provider.*
	Notes:
	Date:
	Actor:
9. Send Missing Participant Notice of Plan Termination at Least 30 Days Before Plan Fiduciary Makes Distribution to Individual Retirement Plan Plan fiduciary may use DOL model notice or may create own form of notice.	*Notes:*
	Attach: ☐ Copy of notice
	Date:
	Actor:
10. If Plan Fiduciary Cannot Distribute Benefit to an Individual Retirement Plan, Fiduciary May Consider Two Other Options Options: 1. Open interest-bearing federally insured bank account in missing participant's name, or 2. Transfer balance to state unclaimed property fund. *** Plan fiduciary recommended to obtain advice from legal counsel before making distribution to account other than an individual retirement plan. The DOL advises that, in most cases, a plan fiduciary would violate ERISA by distributing a missing participant's benefits to any account other than an individual retirement plan.*	Must consider the following when determining whether to make distribution to bank account or state unclaimed property fund *(check to confirm considered):* ☐ Consider whether distribution is appropriate despite potential adverse tax consequences to participant *For Federally Insured Bank Accounts:* ☐ Account must be interest-bearing, federally insured and held in name of missing participant. ☐ Missing participant must have unconditional right to withdraw funds from account. ☐ Must give appropriate consideration to all available information about bank and interest rate (including bank fees, such as charges for establishing or maintaining account, and interest payable on funds). *For State Unclaimed Property Fund:* ☐ Consider availability of searchable database maintained by state which may help participants find funds, and interest payable by state (if any). ☐ Should use fund in state of missing participant's last known residence or work location. ☐ Distribution must comply with state law requirements
	Selected Method of Distribution:
	Details: (e.g., bank or fund information):
	Notes:
	Date:
	Actor:

Checklist reprinted with permission from Quarles & Brady LLP. (http://www.quarles.com/publications/procedure-checklist-for-missing-participants-in-terminated-dc-plan/)

> "By periodically reviewing and cancelling uncashed checks, the assets return to the plan's trust account."

» **Continued from Page 35**

participant who the plan sponsor has made reasonable attempts to locate, the notice is deemed to have been furnished if the participant does not make an election within 30 days.

The first avenue to explore for placing the distribution is a transfer to an individual retirement account or an individual retirement annuity. If the distribution is $1,000 or less and the plan cannot find a vendor to accept the small distribution, the options consist of:

- opening an interest-bearing federally insured bank or savings association account; or
- using the unclaimed property fund of the state in which the participant's last known address is located.

To maintain his or her duties of prudence and loyalty, a plan fiduciary must carefully consider these additional options because the distribution becomes immediately taxable and loses its tax deferred status on future earnings.

Some plan fiduciaries believe that withholding 100% of the benefit, which moves the entire benefit to the IRS, provides a distribution solution by crediting the distribution amount against a participant's income tax liability. The Department of Labor takes the position that a 100% income tax withholding approach violates fiduciary requirements, and is not in the best interest of a participant.

PROCEDURES FOR MISSING PARTICIPANTS IN ONGOING PLAN

A plan experiences issues with returned communication or uncashed benefit checks — should the plan take action? Consider adopting an unclaimed funds policy to address issues with missing participants impacting ongoing plan administration. The policy could include a quarterly review of communication mailings that have been returned and long outstanding uncashed (or returned) benefit checks. A plan fiduciary should monitor the level of uncashed checks because the plan assets are typically moved to a float account once the check is issued. By periodically reviewing and cancelling uncashed checks, the assets return to the plan's trust account. This process provides consistency with a fiduciary's duty to monitor service providers. In addition to cancelling uncashed checks, plan distribution reporting on Form 1099-R needs to be corrected to reflect the absence of an actual distribution.

The plan document may provide that the participant's benefit may not be forfeited for 5 years from the unsuccessful attempt to locate the participant. If so, remember that the benefit must be reinstated if the participant makes a claim for it. Therefore, any forfeitures used to pay plan expenses or reduce employer contributions to the plan may not be a permanent transfer of funds. The plan sponsor, or applicable employer under the plan, continues to be responsible for payment of any reinstated benefit. PC

Charlene M. Kelly, MBA, JD, is a partner at Quarles & Brady LLP, where she chairs the Women's Forum. Practicing in the firm's Chicago and Phoenix offices, she offers practical solutions to day-to-day and complex administrative, compliance and design issues related to retirement plans and executive compensation issues.

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Ahead of the Curve at the 2015 Annual Conference

The 2015 ASPPA Annual Conference featured a mix of practice tips, regulatory updates, policy discussions and more. Here's a wrapup.

BY JOHN ORTMAN AND JOHN IEKEL
PHOTOGRAPHY: JAMES TKATCH

Those who attended this year's popular Current Events session got a big surprise: a motley crew of past *Saturday Night Live* characters.

Bigger, cooler and more rewarding — the ASPPA Annual Conference keeps getting better every year.

The 2015 event featured six general sessions, more than 60 workshops and learning labs, peer-to-peer roundtable discussions, a carnival-themed party, and an exhibit hall featuring nearly 40 industry-leading firms — plus the biennial "March on the Hill" visits with members of Congress and their staffers. Oh, and an appearance by a host of *Saturday Night Live* characters from years past.

Mary Ann Rocco at her
"Actuarial 101 for Non-Actuaries" workshop.

Tuesday night's carnival drew a crowd — including these two hot dogs.

Let's take a look at some of the highlights from the general sessions and workshops.

DOL RULES ON STATE-RUN PLANS: ASPPA SEEKS LEVEL PLAYING FIELD

DOL regulations intended to pave the way for state-run retirement programs for private sector workers will create an unfair playing field and widespread confusion over ERISA preemption, as well other potentially damaging changes, said ASPPA Executive Director Brian Graff in a Sunday afternoon general session that kicked off the 2015 ASPPA Annual Conference Oct. 18.

Graff was joined by Judy Miller, the American Retirement Association's Director of Retirement Policy.

Retirement saving has become a Tier 1 political issue, said Graff, with elected officials at the state and federal levels focusing on coverage and access. Politicians are growing more impatient at the gap in coverage in private sector DC plans, Graff noted, drawing a parallel to the health care debate that resulted in President Obama's health care reform. In both cases, he said, "lack of coverage, access and cost" are the focus of policymakers. The states have taken the lead, stepping in and setting up government-run programs for private sector workers that don't have access to an employer-provided plan. "They believe that government is in a better position than we are" to solve the access problem, noted Graff. But a major hurdle stands in the way of these plans: ERISA's application to them.

Earlier this year, the federal government stepped in, as President Obama instructed the DOL to pave the way for faster development and implementation of state-run plans by easing ERISA's application to them via regulations.

The DOL rules were subsequently issued Nov. 16. They are in two parts:

1. Modifications to the rules governing payroll deduction IRAs providing that state programs are not subject to ERISA if the employer is required to participate in the plan — even though private payroll deduction IRA programs would be. "This will create a 'non-level' playing field," Graff said.
2. Guidance that will allow states to create open MEPs that would operate as if they were closed MEPs. Massachusetts and several other states are looking at this approach, Graff noted.

ASPPA wants this inequity issue to be addressed, Miller noted, seeking "at least" a level playing field for private sector plans. Formulation of the rules "is evidence that the President can't get a legislative solution," said Miller. Since the Obama administration wants the rule to be finalized before the end of 2016, "it's on a fast time schedule."

Miller questioned the efficacy of MEPs in expanding coverage and access. "I don't believe for a second that if all of a sudden we have many more MEPs, that will move the needle on coverage," she said.

How would multiple state regulatory schemes — all free of ERISA — impact the private retirement system? Several questioners in the audience noted that various issues, such as ERISA preemption, multistate employers, state of incorporation, and employees who work live and work in different states, would result in widespread confusion in the market.

Miller noted a 2013 ASPPA proposal highlighted open MEPs using a designated service provider approach. The essence of that proposal was picked up in the SAFE Act and the USA Accounts bills introduced in the 113th Congress. "We will continue to lobby for a level playing field," she asserted.

Said Graff, "We don't want the government in our soup. We believe that any significant role of the public sector in the private retirement system will degrade the system and result in lower performance, lack of innovation and higher costs in the long run. In that scenario, the American worker loses."

VIRTUE ETHICS: INTEGRATING YOUR PRIVATE AND PROFESSIONAL LIVES

"Ethics is in our daily life," said Michael P. Coyne, President of Waldheger Coyne, in an Oct. 19 workshop session.

Coyne observed that Circular 230 is central to government requirements regarding ethical behavior, but that it has weaknesses — and that among them is that it causes ethics to be viewed almost as if it were a regulatory burden.

Coyne argued that engaging in ethical behavior and practices should be a positive and natural action, not one that is grudgingly undertaken merely to meet regulatory and legal obligations. "It's a sad thing that the way we present ethics makes it a burden," he said.

One of the approaches Coyne suggests to pursue and follow ethical practices is to engage in virtue ethics — a tool for integrating private and professional lives in a positive way. This approach is centered on the notions that professional ethics should be driven by our own virtue and character, and that personal and professional life really are not separate. Under this mindset, ethics isn't driven by what you do, but by who you are as an individual.

Coyne offered some tips regarding how to conduct yourself in an ethical way:

- communicate;
- build relationships;
- communicate expectations at the office;
- consider how you interact with others in the profession;
- consider your relationship with competitors;
- ask yourself how you speak about competitors; and
- consider how involved you are in professional organizations.

"The key to practicing virtue ethics," Coyne said, "is to think about, and act, on the ethical aspects of everyday decisions." And he encouraged attendees to be consistent in the effort, saying that being ethical "requires constant attention — without it, ethics can fall apart."

EVERYTHING WE DO IS SERVICE

How do you manage client relationships and expectations? At an Oct. 20 workshop session, Norman Levinrad, President and Chief Actuary of Summit Benefit and Actuarial Services, offered practical tips and insights. The core of his message: It's all about service.

What does it mean to serve? At its most basic, it means making and keeping commitments. That means delivering good service on time. But is also means more than that.

Manage Expectations

An important part of that is managing expectations. To wit: consider whether you really want to offer service by the next day. Doing so can build an expectation that you can provide that level of service regularly. Remember, said Levinrad, "Just because you are not able to provide a service by the next day does not mean that you're not being of service." And doing so accomplishes more than controlling the expectations of a single client — it also serves your other clients by better enabling one to balance effort on multiple projects and meet other commitments.

Setting boundaries in communication is another aspect of managing expectations. "Service does not mean responding to email 24/7," he said, suggesting that clients can wait for office hours to receive a response. "The first time you respond to a client's email on a weekend or at night, you have set an expectation and are doomed," he said.

Be Open, Direct and Clear

Another underlying theme: there is great value in being open, direct and clear in interactions with clients. That means being honest and forthright about the amount of time it will take to get something done and provide service. But it means more than that: Make sure clients know how much they will be paying. "Clients don't like surprises and like knowing what they will be paying," Levinrad noted.

Acknowledge mistakes and pay for them when necessary or appropriate. "Clients respect you" when you do so, Levinrad said, adding that is especially true if one acknowledges a mistake after identifying it oneself.

Deliver bad news in person, not in a letter or mail. Doing so will build respect, Levinrad argues, while the converse will breed

ASPPA Bestows 2015 Industry Awards

ASPPA announced five annual industry awards during the 2015 ASPPA Annual Conference:

- **Harry T. Eidson Founders Award**: Dallas Salisbury, President and CEO of the Employee Benefit Retirement Institute (EBRI).
- **Edward E. Burrows Distinguished Achievement Award**: Larry Deutsch, FSPA, MAAA, EA, President of Larry Deutsch Enterprises and Owner of Penguin Consulting and Design, Ltd.
- **Educator's Award**: Kevin Donovan, CPA, MSPA, managing member and founder of Pinnacle Plan Design, LLC.
- **Martin Rosenberg Academic Achievement Awards**: Jacob M. Davis, QKA, and Hans E. Jones, QPA, QKA.
- **PenChecks Trust/ASPPA QKA Scholarship Endowment**: Suzie Andersen, Benefit Resources, Inc.; Taylor Clark, Pensionmark Retirement Group; Shantell Richarson, Retirement Strategies, Inc,; and Christopher Mathys, National Associates, Inc.

U.S. Sen. Mike Enzi (R-WY) (L) met with ASPPA member (and Wyoming resident) Jeffrey Stacey during the 2015 March on the Hill.

James E. Turpin (seated) and Andrew Ferguson covered the basics of cash balance plans.

ASPPA Annual's peer-to-peer roundtable sessions grow bigger every year.

disrespect. Remember that email communication with clients is still business communication and a vehicle that should be professional and employ varying degrees of familiarity and formality, as appropriate. And be careful with email — it can be as harmful for one's business as a business letter could be, and therefore deserves the review such a letter would receive.

And while email has its place, it can be used in a way that wastes time — and one should remember that a phone conversation can be a faster and more efficient way to communicate.

To help establish and maintain clarity, follow up every meeting and conference call with a letter or email to a client summarizing the discussion and any conclusions reached and actions decided upon. "If you don't, clients will have forgotten what was discussed and what was agreed to and there will be misunderstandings," he warned. And send an email to yourself for the same purpose.

Well-Being of Your Business and Staff

But being of service, and care in handling commitments, entails more than service to clients. It also means being mindful of the needs of one's business and personnel. "Don't ever make commitments for someone else in your office,' said Levinrad, adding it is wise to avoid making promises regarding the activity of those who report to you and also of those to whom you report. "It works down the chain and up the chain," he said.

Not only that, consider commitments to your personnel and the others in your life. "You will not lose clients because you take a vacation. You will not lose clients because you take a weekend off," he reminded attendees.

This extends to communication as well. Levinrad advised not spending time off reading email. "No good ever comes from it," he argued. "Connectivity leads to stress," he added, advising: "Disconnect totally when you leave the office."

Left: This year's Governmental Update general session featured ASPPA's Brian Graff, EBSA head Phyllis Borzi, Treasury's Mark Iwry, just-confirmed PBGC head Tom Reeder and Sunita Lough of the IRS.

Right: ACOPA's 2015-2016 President Karen Smith (L) is welcomed by outgoing President Lynn Young at this year's Actuarial Luncheon.

Protect your employees. Don't assume that if there is a mistake or a problem, it must be the employee involved who is at fault.

And be willing to fire difficult clients. "Remember that no amount of money is worth stress and misery," Levinrad said, adding, "there are enough pleasant clients to fill your time."

The Bottom Line

Don't work for free. Ever. Free, Levinrad argued, suggests that a service has no value. Rather, he suggested, "fix a price that covers everything you can anticipate, increase it by 50% and quote it as a guaranteed price. Bill an amount that makes you happy to handle a project without any resentment."

Remember that "every single interaction with a client" and its personnel "can get us fired." And don't burn bridges. "Our best clients and employees are those who return," he observed.

Finally, embrace change. "Change is good. Don't be discouraged by change," Levinrad said. And he went further than that, arguing that change, and challenges, are opportunities, positing, "A problem is what makes you do your best."

TIPS FOR A SUCCESSFUL DC PLAN TAKEOVER

For a TPA, the *real* red flag issues in a DC plan takeover aren't characteristics of the client, says Ilene H. Ferenczy — they're things the TPA itself does during the takeover process and afterwards.

At an Oct. 19 workshop session, Ferenczy, founder of the Ferenczy Benefits Law Center LLP, and co-presenter Ken Marblestone of the MandMarblestone Group, LLC offered a roadmap for managing a successful takeover — and avoiding mistakes and reducing liability along the journey. Ferenczy and Marblestone offered three overarching goals in a takeover: do the job effectively, do the job profitably, and limit risk and the potential for litigation.

Do the Job Effectively

The plan and the TPA have different overall goals in a takeover, Ferenczy noted. For the plan, these are getting the plan running smoothly and making sure it is in compliance with the law. The TPA has three overall goals: get the information you need, don't repeat the mistakes the predecessor made, and don't disrupt the plan, the client or your own business.

Ferenczy suggested three steps to ensure that a takeover is done effectively:

- **Pre-assess the client**. Do you want to work with this client? Can you — and do you want to — do this work? For example, ESOPs and cash balance plans require special expertise, Ferenczy noted. Can you meet the client's expectations? For example, can you really deliver daily valuation? And can you do all this without disrupting your business, losing money or creating unacceptable liability?
- **Prepare for the transitional year**. You and your client should both be prepared for the first year to be more difficult, more expensive and more thorough than any other year in your relationship, Ferenczy advised. "Your goals should be that by the end of that year, this case looks like all your other cases, the plan is running smoothly, the client's expectatons are met, the case is profitable and the risk level is acceptable," she said.
- **Make the client yours**. "You want the client to think of you as their pension expert," Ferenczy advised. She suggested four goals: build the relationship as you do with your regular clients; be a leader in that relationship by outlining the goals involved in meeting their needs; take the initiative in long-term planning, phasing in option over a timeline; and determine who should be involved in the process, *i.e.*, financial advisor, attorney, etc.

Do the Job Profitably

"Don't make the client's problems your problems," advised Marblestone. "Who's going to pay to clean up the client's problems?" He posed two key questions:

Top: Current Events Session: Roseanne Roseanna-Danna (Ilene Ferenczy) joins Craig Hoffman at the anchor desk.

Left: Two Wild and Crazy Guys Sheldon Smith (L) and Sal Tripodi in character, and then some.

Right: Hans (Adam Pozek, L) and Franz (JJ McKinney) pumped up the crowd.

- **Does a takeover have to be profitable?** The answer is no, he suggested — as long as you intended for the case to be a loss leader.
- **Do you know when a takeover is profitable?** The key here is having a reliable system for tracking time spent on a case. By a show of hands, less than half of the attendees said they currently do.

Marblestone described a four-part formula to ensure that a takeover is profitable:

1. **Prediction of fees and costs**. Can you predict what it will take for a case to be profitable?
2. **Client communication**. How do you communicate the fees and costs up front, especially how unexpected costs will be billed?
3. **Services agreement**. How are unexpected costs set forth in the agreement? For example, you might bill at an hourly rate beyond a certain point, with a cap.
4. **Necessary modifications**. Do you have the ability to modify the agreement if circumstances turn out to be different than what you were told?

Limit Risk and the Potential for Litigation

In a takeover situation, Ferenczy noted, your client thinks you will be responsible for everything from now on, even if it happened before you came. She offered four "liability protectors":

1. **Your services contract**. "First of all, if you don't have a contract, you're making a big mistake," Ferenczy advised. In your contract, you can limit responsibility to warrant past work, outline conditions for representation, discuss charges for takeover processes, and provide for indemnification.
2. **Your letters and records**. Having all communications and steps in writing protects yourself first, Ferenczy noted, and so is of primary importance — even if that information is discoverable in the event of a lawsuit.
3. **Your E&O insurance**. Know what procedures are involved in utilizing your errors and omissions insurance should the need arise, Ferenczy recommended — not following them can void your coverage.
4. **Your ethics**. "Think about what you will do if you have to work for a boss or a client who has situational ethics," Ferenczy said. "Would you testify in court against them to defend your own ethics?"

The American Retirement Association's Judy Miller and Brian Graff at Sunday's popular Washington Update general session.

ASPPA's 2016 President Joe Nichols is welcomed by outgoing President Kyla Keck at Sunday's ASPPA Business Meeting.

REGULATORY UPDATE: CONFUSION, CONFLICT, INTRANSIGENCE

Current regulatory issues facing the retirement industry, its professionals and participants were highlighted in a lively Oct. 19 general session.

American Retirement Association General Counsel Craig Hoffman, who headlined the session, noted at the outset the likelihood that the 2016 retirement plan and compensation limits will be "déjà vu all over again" and would be unchanged from the rates the IRS set for 2015.

Turning to the Department of Labor's (DOL) proposed fiduciary rule, Hoffman remarked: "We certainly do have to have some clarity on what those rules really mean." Drinker, Biddle and Reath partners Fred Reish and Bruce Ashton illustrated the varying viewpoints on the proposed rule in a point-counterpoint role play discussion.

"Conflicts are everywhere in investment advice," Reish argued, adding that "advisors have to act in plans' and participants' best interest." Ashton countered that the regulation will cut people off from the help they need and will disrupt the industry.

Reish further argued that disclosures under current rules are ineffective and that fees are excessive. Ashton responded that the industry is already highly regulated and believed the proposed rule to "killing a spider with a sledgehammer."

The session also addressed the changes the IRS plans for the Form 5500 SUP. Hoffman noted that the America Retirement Association and ASPPA have "led the charge against this" and outlined the many letters they have sent to the IRS and the meetings they have had with federal officials. Hoffman said "we're still saying our prayers, crossing our fingers" that the carefully prepared comments ASPPA and ARA have submitted will be considered. "It is a story that has yet to be resolved," he added.

But that is far from all that is taking place on the Form 5500 front. The DOL's modernization initiative is another development the session identified, with the caveat that it is not expected to be in place for at least four years. Yet another is the extension of the deadline for submission of the IRS portion of the Form 5500 for calendar year plans in for 2016 reporting. "The fact of the matter," Hoffman said, is that the Form 5500 SUP proposals and other changes have "caused a great deal of anxiety."

IRS silence at best, intransigence at worst, regarding restrictions on mid-year amendments to safe harbor 401(k) plans was an additional matter the session touched on. Robert M. Kaplan, Vice President, National Training Consultant at Voya Financial, reminded attendees that in accordance with the invitation in IRS Announcement 2007-59, ASPPA repeatedly submitted comment letters on the matter to the IRS, on the need for further guidance, to no avail. "What really frosts us as practitioners is that we are not sure what to tell our clients," said Kaplan. He went on to point out the absurdity of not being able to make a mid-year change in a plan's name. "Names change! Why can't we just change a name?" he asked.

McKay Hochman Company Managing Director Richard Hochman outlined changes to the IRS determination letter program, including the elimination of the five-year cycle for restatement on individually designed plans and the fact that the IRS will no longer be accepting off-cycle determination applications.

LOUGH: LOOK TO WEB, NOT EMAIL, FOR HELP

The IRS will not backtrack on its recent decision to stop answering questions by email and no longer forward questions sent to IRS Customer Account Services, said Commissioner of the IRS Tax Exempt and Government Entities Division Sunita Lough. Lough said she understood frustrations with the change, which went into effect Oct. 1, but doubled down on the decision.

One reason for the change is resources. "We have to use our resources to maximize them," said Lough, adding, "We can't keep doing more with less."

Another reason is concern over how responses to emails are regarded and acted upon. Lough said there is danger when answers are provided by email, and that it is "not in the purview of agents to provide opinions on specific circumstances of an email sender." She said that agents "should not be giving opinions on the application of the law on specific facts," and that that was the opinion of counsel.

Instead, Lough said, the IRS is working to improve its website to better provide answers to questions. "We are really working with our communication folks to do that," she said.

More Coverage on ASPPA Net

For more on the 2015 ASPPA Annual Conference, visit ASPPA Net at www.asppa-net.org. Click on the "News" entry in the nav bar, then "Browse Topics," and then "Inside ASPPA." Scroll down to the "Ahead of the Curve: 2015 ASPPA Annual Highlights" post, which features links to all of our coverage.

SAVE THE DATE

The 2016 ASPPA Annual Conference promises to be a very special one — the centerpiece of the event will be ASPPA's 50th anniversary gala, a night that's sure to be remembered for years to come. Make plans to join your ASPPA colleagues at National Harbor, Md., Oct. 23-26, 2016! PC

FEATURE

Plan Takeovers and Conversions: Pitfalls and Pointers (Part 1)

BY ROBERT E. (BOB) MEYER, JR.

Editor's note: This is the first of a two-part series of feature articles. Look for Part 2 in our Spring issue.

One of the certainties in the life of every plan is a change in providers, whether an investment advisor, custodian, recordkeeper or TPA. The purpose of this two-part article is to provide guidelines for TPAs going through the lengthy and detailed process of working with plan sponsors to effect a seamless transition.

A change of providers will be either a conversion or a takeover. While these terms are used indiscriminately and interchangeably by TPAs, in the strict sense a conversion does not involve the transfer of participant records, even though there will be a movement of assets. A takeover, on the other hand, involves not only the movement of plan assets, but also the acquisition of participant records, legal documents and historical information needed to establish the plan correctly. Since takeovers of plans are inherently more complex than conversions, this article will consider the steps required for a plan takeover.

ON THE SAME PAGE

McKay Hochman's Rich Hochman makes one of the most descriptive and accurate observations about plan takeovers: "takeovers are an abomination — and there is a reason why they are takeovers." The foremost challenge the new TPA faces is reducing the anxiety and stress that attend to plan transitions. Communication between all interested parties must be frequent and open.

In particular, everyone should understand as soon as possible why the sponsor has chosen to leave its current providers and undergo the temporary dislocation of a plan transfer.

Common incentives for changing may include:

1. The fees being paid right now are too high, and the new arrangement is less expensive.
2. The new RIA (who typically sells the plan takeover to the sponsor) has a better investment lineup.
3. The current investment advisor is not doing their job in monitoring the investments or providing education to the participants, and the new RIA promises to be more involved.
4. There has been a chronic (or recent) failure in the plan's operation (typically a failed nondiscrimination test) that the current TPA did not warn the sponsor about or propose a solution for.
5. The committee overseeing the plan, or its trustees, has elected the change as a result of putting the administration of the plan out for bids.

CLEAR EXPECTATIONS

For a TPA whose services are tied to a particular investment advisor, knowing what the reason or reasons for the changes can be extremely helpful in framing all the discussions in the early phases of the takeover. Everyone should have a clear idea of what the expectations are on all sides so that the resulting takeover will be satisfactory to all.

> "The foremost challenge the new TPA faces is reducing the anxiety and stress that attend to plan transitions."

Easily the most important of these expectations is that while efforts will be made to minimize the impact of the takeover and subsequent plan administration on the operations of the plan sponsor, it is likely that there will not be "business as usual" because of the change, and some modifications will be required, and these modifications represent an improvement in the administration of the plan, not a step backwards.

At the outset, TPA firms and other providers have to recognize that a plan takeover is far more extensive than gathering the final records from the old recordkeeper and dumping them into their systems once the final reports have been reconciled to the wire transfer or the positions reported with the new custodian. This would be analogous to plan administration simply consisting of asset reconciliation. Administrators must address other demographic, legal and compliance aspects as they do their annual work, and it is not uncommon that certain issues can recur each year. Takeovers involve addressing these issues as well, but for the new TPA firm they are being looked at for the first time.

In a certain sense, then, the takeover process is as much a part of the marketing of the TPA's business as it is an administrative function. To ensure a smooth takeover process, the TPA should perform its own due diligence about the new client and the plan, so there are no surprises to be unearthed while the takeover is taking place, or, even worse, after the client is fully on board and regular plan administration has begun in earnest. Simply asking the plan sponsor why they feel the need to change providers can be of invaluable assistance for the TPA. They will then know in what areas of service, if any, they will need to show superior performance to justify the company's decision to engage their firm for future recordkeeping and compliance work.

Since the takeover of a plan represents the first look the plan sponsor is getting at the new TPA, it is of paramount importance that the entire process be managed in a thorough, competent and professional manner. The plan takeover "sets the table" for the entire relationship that follows, both for the plan sponsor getting its first look at their new provider, and for the TPA getting their first look at a new client.

TEAM EFFORT

Recordkeeping and TPA firms should have an individual, or, better still, a team, that is dedicated to plan takeover and implementation work. Assigning takeovers to full-time administrators does not generate consistent results, even when detailed policies and procedures have been drawn up. Administrators who are forced, even temporarily, to wear multiple hats, are like the biblical man who serves two masters — ultimately they will gravitate to one function or the other. The result is that the skill sets required to perform the job that is not preferred will either deteriorate or never be developed.

In addition, several benefits accrue to those firms that have specialists in the takeover arena. First, and most obviously, the frequent repetition of tasks engenders process development. Second, those who continually and habitually perform the same tasks are more likely to locate inefficiencies and identify improvements to existing procedures. Third, there is a resulting consistency in processes. Fourth, external vendors, particularly

registered investment advisors, appreciate having a "go-to" person or group to handle the specialized work of implementation. Lastly, the perception of the professionalism of the TPA firm is likely to increase simply by having specialists in its ranks as opposed to a team of generalists.

The actual takeover of a plan is a team effort which requires frequent and clear communication between the plan sponsor, the TPA and the RIA for a smooth and successful transition. Each of the parties has its own expectations and measures of success, but of the three, the standard bar for success is set highest for the TPA.

From the TPA perspective, *a well done takeover will leave very few questions for the administrator who picks up the relationship after all the records and assets have been successfully brought on board.* A sure sign that a takeover has been done incorrectly is having very fundamental questions being asked of the takeover specialist as administration is being done for the takeover year. Not only is this a poor reflection on the performance of the takeover specialist, it requires considerable backtracking and research, usually after many months have passed since the actual transfer, to address what should have been resolved before the takeover took place.

PLAN DOCUMENTS

The TPA should ask for and receive the full complex of the plan's current and executed legal documents, including, but not limited to:

- the plan document itself
- the adoption agreement (if there is one)
- the Summary Plan Description
- all the mandatory and voluntary amendments executed since the last plan restatement

For the sake of completeness, the plan sponsor should be asked to locate all the prior versions of the plan document. Since this is required if the plan were to undergo an investigation by the Department of Labor, the takeover can become a "testing ground" for the sponsor's preparedness.

Generally speaking, a change of plan providers also means a change of document providers. The prior document provider usually stops supporting the plan document once the relationship goes away. The TPA will therefore need to restate the document onto its own prototype or volume submitter plan not only to guarantee that the document will be supported in subsequent years, but also to make ongoing administration of the plan easier.

> "External vendors, particularly registered investment advisors, appreciate having a "go-to" person or group to handle the specialized work of implementation."

CENSUS DATA

At the time of the initial request for census information, the TPA should make it clear that all the records produced need to be accurate, complete and comprehensive. When these records are requested, the plan sponsor should understand how an error in a date of birth or date of hire could compromise the accuracy of eligibility for participation and vesting status, and, if the plan has a new comparability arrangement, the actual amount of a benefit will be inaccurate. Dates of birth, hire and termination also factor into the determination of who is to receive a required minimum distribution.

Besides the operative dates, census information provided must accurately and completely identify ownership interest and compensation so that highly compensated and non-highly compensated employees can be classified correctly. Ideally, the sponsor will provide this information through a copy of the prior year's allocation reporting and compliance testing as well as in the census information.

A very common mistake is the failure to include terminated participants who still have account balances when the census information is initially requested. Usually this oversight is rectified when the final participant reports are delivered, but it makes the uploading of participant financial records less stressful when the census information for these participants is already on the recordkeeping system. Again, the indicative information for these individuals must be completely accurate so that former employees who have had or might potentially have a forfeiture of non-vested balances due to a 5-year break in service will not be overlooked.

The new TPA should also request and receive information and records for alternate payees in the plan set up as a result of a QDRO. Typically this is overlooked until the very end of the process.

A plan that is migrating to a daily valuation platform should also include contact information for each participant, particularly if the new TPA will coordinate the delivery of quarterly participant statements and other disclosures or notices.

FINANCIAL AND TAX INFORMATION

Many sponsors and other parties involved in plan takeovers do not appreciate how much financial information must be obtained in the beginning stage of the takeover. Typically, they look at all the financial data as coming at the very end when the assets transfer. There is a great deal of financial information,

though, that has to be transferred, and a smooth transition demands that thorough records be provided as soon as possible.

Hardship Availability

Often overlooked, even at the end of the takeover process, is the hardship availability amount from elective deferrals. Most of the larger providers of recordkeeping services track the pre-1987 and post-1986 contributions and earnings and the after-tax basis. If it so happens that the prior provider does not have these records, then the sponsor should be alerted to this missing data and be advised quickly that they may need to research years of payroll records to get the figures requested. Experience has shown that the earlier this is addressed, the better.

After-tax and Roth Deferral Basis

Like hardship availability, after-tax basis and Roth deferral basis must be part of the financial records, as does the first year of Roth contributions (either deferrals or in-plan Roth rollovers or transfers) to ensure that tax reporting is correct when distributions are made from these sources.

RMDs

Frequently the records for required minimum distributions are skipped until the end of the process. This may be perfectly fine, but, if the takeover is scheduled near the end of the year, it is critical that the RMD records be acquired early, so that if the new TPA has to coordinate the payment, the disbursements will take place and not get overlooked.

Planning for Year End

Most takeovers occur in the middle of a plan year, so the new TPA has to receive all of the year-to-date records for contributions and distributions by source. Obviously, when the year-end work has to be done, these records will be combined with the post-takeover data to perform the annual valuation and compliance work, but more importantly, without this data, the new TPA might be unaware of violations of 402(g) or 415 limits when they occur.

Vesting

Although many systems will impute vesting based on the census information provided, the resulting vesting for individual participants may be incorrect, particularly if there has been a change in the vesting schedule over the years, or there are multiple dates of termination and rehire that are not part of the census information. A comprehensive financial data file will include vesting in each source of money for each participant, and should be used instead of simply relying on vesting imputed from the census data.

Plan Loans

If the plan has participant loans, the financial records have to include so much data that they constitute a separate file by themselves. At a minimum, the loan data should include all of the following for each loan:

1. The participant with the loan.
2. A loan identifier for each loan taken by the participant.
3. The effective date of the loan.
4. The original amount.
5. The loan interest rate.
6. The total payments to be made.
7. The payment frequency (usually this corresponds with the pay cycle for the participant).
8. The number of payments remaining.
9. The due date (according to the amortization schedule) of the next payment.
10. The current outstanding principal balance.
11. If multiple sources of money were used to fund the loan, the outstanding balance in each source.
12. Whether the loan was a personal loan or a loan to purchase a home.
13. The highest outstanding loan balance for the last 12 months.

Very often, in lieu of this information, the new TPA has to work from just the amortization schedules for each loan and a final balance from the prior valuation. While most of the data pertaining to the establishment and disbursement of the loan is on the amortization schedule, very little else is there that would lead to an accurate takeover, which then means that there will be errors in future loan servicing. Principal and interest will be incorrectly applied with each payment, and a loan that was actually paid off according to the sponsor's records may show remaining payments from the takeover data. While this can frequently occur when loan data is taken from the prior recordkeeper's reports, resolving the issue takes less time than when the takeover is subject to interpolation and guesswork.

CONCLUSION

This article, Part 1, has summarized the takeover process in terms of what resources a TPA firm must have in place to execute a plan takeover, and the information required to transition a plan successfully. Part 2 will look at the takeover process itself, its stages, and what occurs in each stage of the process. PC

Robert E. (Bob) Meyer, Jr., QKA, coordinates the conversion, takeover and deconversion of plans for TPP Retirement Plan Specialists, LLC, of Overland Park, Kan. He has been an associate of TPP and an ASPPA credentialed member since 1998.

Building a Successful 403(b) Practice — With Minimal Marketing

Heightened IRS scrutiny, paired with the 403(b) pre-approved plan program, make this an opportune time to reach out to 403(b) plan sponsors.

BY JAMES E. ROWLEY AND CHARLES F. YOCUM

"If you've seen one 403(b) plan, then you've seen… one 403(b) plan." This aphorism guides our firm when we experience a new 403(b) plan. Each comes with its own unique history, quirks and nuances. It also reminds us there are no "one size fits all" solutions when it comes to addressing the needs of clients and prospective clients.

We are a full-service retirement consulting practice, providing plan-level fiduciary guidance, employee education and traditional TPA services to both for-profit and tax-exempt organizations in the greater Philadelphia area. We built a niche practice by addressing the needs of 403(b) plan sponsors — and with minimal marketing efforts.

PLAN DEFECTS AS OPPORTUNITY

Often we are approached to help remedy some area of non-compliance related to an existing 403(b) plan, perhaps by an executive, board member or outside service provider who has a general unease regarding a 403(b) retirement program and is searching for peace of mind. Many of our relationships began as one-off consulting engagements in which we were hired to review and document that there are no qualification failures present in an organization's retirement plan.

After an initial period of fact-finding that includes a thorough review of documents and records coupled with interviews of key plan personnel, we issue a report on our findings. Typically this report includes a thorough plan document, operational and demographic review. Where appropriate, we outline a series of recommendations for the plan sponsor to consider, including whether to bring their 403(b) plan back into compliance or to memorialize current best practices for future employees. When appropriate, we also refer plan sponsors to qualified legal counsel for advice.

Sometimes our relationship ends there. More times than not, however, there are plan defects that will need to be addressed. Since we are already familiar with these defects, we are often re-engaged to assist in their remediation. Typically this involves preparing submissions under the IRS's Voluntary Correction Program (VCP) and/or the DOL's Delinquent Filer Voluntary Correction Program (DFVCP) and Voluntary Fiduciary Correction Program (VFCP).

At first glance this may seem like a significant effort to gain a new client, but we find that doing so often leads to a long-lasting business relationship.

Historically, the 403(b) marketplace was dominated by bundled, single-product vendors. As a result, there were few independent consultants and TPAs who understood the client's need for objective, product-independent advice. Because of this, our role has always been different than the usual "replacing of the incumbent." Some advantages of this role include:

- *No one needs to be fired for us to be hired.* Initially, we are engaged to supplement other service providers (recordkeepers, TPAs, advisors) who may not have the requisite 403(b) plan experience or capacity.
- *An opportunity to build trust.* By limiting the scope of the engagement, we are able to demonstrate our value to the plan sponsor without the plan sponsor having to take the perceived risk of making wholesale changes to its existing stable of plan service providers.
- *It gives us the opportunity to "kick the tires."* Let's face it, not every plan can be fixed. Usually, this is due to an active indifference on the part of a plan sponsor that no amount of guidance can counteract. Consulting is a two-way relationship, and a commitment to change is necessary.

> "403(b) plans are liable to have certain defects that are often not seen in other defined contribution plans."

403(b) PLANS IN THE SPOTLIGHT

It has been almost seven years since the final 403(b) regulations went into effect and six years since the limited plan reporting requirements for ERISA 403(b) plans expired. The market has changed drastically over this time, and many of the most serious compliance failures have been addressed.

However, we believe that our industry is at the dawn of a second wave of 403(b) compliance work. In October 2015, Sunita B. Lough, Commissioner of the Tax Exempt and Government Entities Division at the IRS, outlined the enforcement priorities of the Employee Plans division for the 2016 fiscal year. Referencing a "historical pattern of non-compliance," 403(b) and 457(b) plans have been placed at the top of this list. This heightened scrutiny, paired with the 403(b) pre-approved plan program outlined in Revenue Procedure 2013-22, makes this an opportune time to reach out to 403(b) plan sponsors.

WHAT TO EXPECT

As we noted above, 403(b) plans are liable to have certain defects that are often not seen in other defined contribution plans. Following are a few of the problems that we commonly encounter.

Failure of a plan to be operated in accordance with its written terms

While this is not unique to 403(b) plans, the pre-2009 history of many 403(b) plans complicates this requirement. Many of these plans had previously invested in insurance contracts and custodial accounts no longer considered a part of the core 403(b) plan. While this may be permissible, certain requirements exist, and in some cases the employer must have entered into an information sharing agreement (ISA) with these investment providers. While an ISA may be required to exempt these legacy accounts from the IRS' written plan requirements, it is the data received via these ISAs that is necessary to properly operate the plan, such as determining the

> "Our industry is at the dawn of a second wave of 403(b) compliance work."

amounts available to plan participants in the form of a loan or in-service hardship withdrawal or to equip the auditors to do their job.

Failure to give all employees the opportunity to defer

In a 403(b) plan, with a few limited exceptions, the ability to defer your own money must be made universally available to the employees of the sponsoring employer. This means that if one employee is permitted to make deferral contributions, this opportunity must be extended to all employees of the employer. One of the problems we often encounter is the improper application of the "20 hours per week rule" in an effort to exclude part-time employees. The correction of a universal availability failure can be quite costly, and in some cases, disastrous.

Annual reporting errors

With each passing year we encounter fewer and fewer 403(b) plans that have failed to meet their annual reporting requirements under ERISA. However, there continue to be some common errors, especially among small plan filers. Some plan fiduciaries believe that they elected certain protections under ERISA §404(c) and worked with the plan's investment advisor to ensure that these requirements are being met, but nevertheless fail to make an affirmative election on the Form 5500.

The first-time audit requirements changed the whole environment

In 2009, 403(b) plans faced their first audit requirement. Chaos ensued. Many plan sponsors were under the incorrect impression that their platform and product provider were responsible for all aspects of the plan, including reporting, plan document, testing and notifications. The aforementioned difficulty with legacy accounts resulted in audit management letters due to the auditing firm's inability to determine an opening balance.

CONCLUSION

The classic adage of "knowing just enough to get in trouble" applies. Many in our industry believe that knowledge about 401(k) plans is transferable to 403(b)s. While this is generally true, the differences are what lurk in the background. Without a solid understanding of how 403(b) plans came to be what they are when you encounter them, it is nearly impossible to prescribe a method of treatment that works.

Additionally, there are many plan sponsors that have not experienced an audit, either because they may be a church plan or are under the employee limit. Our experience tells us they are still in need of help.

And finally, this is often a difficult transition for the plan sponsor because many of the services and remedies their plans need come at a cost. So it pays to be gentle! PC

James E. Rowley, AIFA, is the managing director of NFP Corporate Services Mid-Atlantic in Fort Washington, Penn. He founded NFP-LBG in 1987 to provide a full range of employee benefit and retirement services, primarily to the nonprofit community. He consults nationally on a full range of issues, with particular emphasis on 403(b) plans, and has spoken widely on 403(b) topics.

Charles F. Yocum, J.D., is the director of retirement consulting and compliance at NFP Corporate Services Mid-Atlantic. He has more than 15 years of experience working in the ERISA 403(b) plan industry.

Fee Flexibility and Retirement Readiness

How a TPA/record keeper helped a plan sponsor lower its fee expenses and boost employees' retirement readiness.

BY THERESA E. PIOTROWSKI

Earlier this year, Alliance Pension Consultants, LLC, was engaged by a professional service company's newly hired CFO to take over the record keeping and third party administration services for a plan with approximately 250 participants.

After initial findings uncovered high fees associated with the plan providers for which participants were for the most part responsible, Alliance (which does not provide advisory services) was also asked to conduct an advisor search.

Headquartered in Deerfield, Ill., Alliance provides retirement plan record keeping, administration, consulting and actuarial services. This article tells the story of how Alliance helped the plan sponsor understand that having the plan pay the fees may not be in its best interest — and implemented a multifaceted solution to the problems that had resulted.

THE ISSUES AT HAND

The plan allowed participants to contribute out of their own compensation in the form of 401(k) pre-tax deferrals or

Roth 401(k) deferrals; rollovers from other qualified plans and IRAs were allowed. It also had a profit sharing component. The company made generous profit sharing contributions each year to its employees — approximately 4% to 5% of compensation. The owners benefited more by utilizing a cross-tested profit sharing allocation method. They thought all was well with their plan — it had grown to more than $30 million, with about half the assets contributed by the company.

The profit sharing assets were directed by the company's three appointed trustees, not by the participants. They engaged three separate advisors to manage pooled accounts that had to be valued on a quarterly basis. The advisors were charging approximately 1% of plan assets to manage the profit sharing assets. Here's the bad news: the 1% was paid out of plan assets. More than 60% of the plan's assets were in the accounts of the company owners, so they were bearing more than 60% of the fees associated with the profit sharing plan assets. Distributions were a hassle, since they could only pay out a participant quarterly from the profit sharing portion, but that was minor compared to the other challenges their new CFO encountered.

In addition, Alliance discovered that the 401(k) mutual fund core line-up was fee-rich and revenue-sharing-rich — and that the costs of record keeping and 401(k) advisory were all borne by the plan participants. The company did pay its accounting firm to prepare the required annual plan audit, but when total fees associated with the plan for record keeping, third party administration, investment advisory, custody, mutual fund expense ratios net of revenue sharing and audit were initially analyzed, they were approximately $345,000. That was well over 1% of plan assets each year, paid mostly by plan participants!

That may not have been so bad if the advisor had been doing its job. Sadly, it turned out that the HR manager was the provider of education and resources to plan participants. Employees received little to no education or guidance from the advisor regarding existing mutual fund choices.

> "This experience is a true testament to how much of a difference can be made if someone recognizes that there is a better way and asks the right people to help."

THE SOLUTION

The steps that Alliance suggested were:

- replace the high-cost advisors on the profit sharing pooled accounts and on the mutual fund lineup with a new independent registered investment advisor; and
- replace the high-cost, revenue-sharing-rich mutual funds with a low-expense-ratio mutual fund lineup with almost no revenue sharing.

Alliance assisted in conducting a search for a new registered investment advisor, drafting a Request for Proposal (RFP) and assisting with analyzing the various RFPs submitted. The search was limited to advisors that were local, fee-based and expert at qualified plan services. Directly invoicing the plan or the plan sponsor was a critical component of the search for the right advisor.

The CFO and the plan trustees (the Committee) were involved in the RFP process.

The CFO also recognized the value of the company paying a portion of the plan fees — a deductible business expense. Alliance introduced the concept of plan fee obligation (PFO) to the committee. Under a PFO agreement, the company and the participants would each accept a share of the cost. The PFO that was ultimately agreed upon consisted of the participants paying the plan expense ratios of the low-cost funds selected. In addition, participants would pay an annual fee of $40 per head to pay for a portion of the record keeping and administration costs. Any revenue sharing paid by the mutual funds would be allocated back to the specific mutual fund as a dividend. The company would pay for the registered investment advisor services, the plan audit, the custody expenses and the balance of record keeping and third party administration services expenses not covered by the $40 per participant annual fee.

The result: total fees of $215,000 for the 250-participant, $30 million plan. Plan expenses were reduced by $130,000 — the company portion is now $115,000 (a deductible company expense) and the participant portion is $100,000. Over time the reduced expenses will make a difference in retirement account balances.

This experience is a true testament to how much of a difference can be made if someone recognizes that there is a better way and asks the right people to help. Employees' retirement readiness is extremely important and should always be foremost in the minds of a plan sponsor's leadership. PC

Theresa E. Piotrowski is a principal at Alliance Pension Consultants, LLC. Under her leadership, Alliance was one of the first firms to provide a truly open architecture 401(k) offering. Theresa holds a B.S. degree in statistics and operations research from the University of Illinois.

Welcome to the New Age of Electronic Participant Communications

Regulators continue to liberalize the requirements for using technology to communicate with participants.

BY CRAIG A. BITMAN AND CARLY E. GREY

As plan administrators face increasingly onerous participant disclosure obligations, they continue to look for ways to alleviate their burden through the use of technology. Using electronic media to communicate with participants not only reduces these administrative burdens on plans but also leads to significant cost savings and more accessible and searchable notices for participants.

While it is common to fulfill many of the notice obligations through electronic means, administrators must navigate the patchwork of rules issued by varying agencies. Notably, different requirements apply when providing different documents: multiple DOL requirements apply to ERISA-mandated disclosures, IRS requirements apply to certain disclosures required under the Internal Revenue Code, and SEC requirements apply to certain disclosures regarding employer stock.

THE DOL SAFE HARBOR

The DOL issued its original guidance on electronic communication more than a decade ago in the form of a safe harbor regulation. This complex rule has proven to be unworkable for many employers in industries where computers are not an instrumental part of the job (*e.g.*, trucking, construction, etc.). Thankfully, recent DOL guidance eases some of the restrictions of the original safe harbor and should allow for further use of electronic interactions with plan participants.

Because of its breadth, the DOL safe harbor for documents required by ERISA is a vital part of the regulatory patchwork. It applies to documents such as summary plan descriptions (SPDs), summaries of material modifications (SMMs), summary annual reports (SARs), COBRA notices and investment-related information required under ERISA Section 404(c). Importantly, however, the safe harbor only authorizes electronic distribution in cases where either the individual has regular work-based computer access that is integral to his or her job, or if the participant consents to receiving electronic disclosures. Such participant consent must be affirmative in a way that demonstrates that the participant has the effective ability to access the information. When seeking such consent, the plan administrator must, among other things, notify the participant that he or she may opt out of electronic disclosure at any time and request paper disclosures free of charge. If a participant does consent but the technology to access the documents changes, the plan must send notice of the change and resolicit the consent to receive electronic disclosure.

SPECIAL RULES FOR PENSION BENEFIT STATEMENTS

In addition to its safe harbor, the DOL has issued interpretive guidance providing more lenient rules for electronically distributing quarterly pension benefit statements to participants. Under that guidance, a plan administrator needs only to make the statement continuously available on a secure-access website, provide an annual notice that points participants to that website, and inform them that they may request a paper copy of the statement. The annual notice may be sent electronically to participants who satisfy the work-based computer access requirements in the DOL safe harbor; other participants must be mailed a paper copy.

SPECIAL RULES FOR PARTICIPANT FEE DISCLOSURES

The DOL also now permits participant fee disclosures to be sent electronically subject to a less stringent consent requirement. Specifically, a participant need only provide his email in response to an annual notice containing the same information as the DOL safe harbor for consent. That is, unlike the general safe harbor, participants need not demonstrate that they have the effective ability to access the information or re-consent if there are technology changes.

For industries in which employees do not use a computer as an integral part of their jobs, meeting even the least stringent of the DOL consent requirements can be quite difficult. The practical result is that plan sponsors in these industries often use electronic communication as a backup to paper-based mailings. Others choose to risk electronically communicating outside of the safe harbor (for instance, by requiring negative — instead of affirmative — consent to electronic communication). Obviously, operating outside the safe harbor carries risks of fiduciary breach claims by participants and the imposition of statutory penalties by a court for failing to provide ERISA-required disclosures.

IRS ELECTRONIC DISCLOSURE REQUIREMENTS

The IRS has taken a less cumbersome approach, but it applies to fewer required disclosures. Documents subject to the IRS disclosure rules include notices relating to 401(k) safe harbors, automatic enrollment, rollover rights and qualified joint survivor annuities. The regulations provide two methods for delivering these notices electronically. The first method adopts the consumer consent rules of the Electronic Signatures in Global and National Commerce Act (E-SIGN). This method is substantially similar to the DOL safe harbor, requiring among other things that a plan obtain affirmative participant consent before providing electronic notice.

The streamlined alternative method does not necessitate consent but merely requires that participants have the "effective ability to access" the electronic medium being used to provide the notice and be advised that they can request a paper copy at no charge. While there is little guidance on what constitutes an effective ability to access, it is generally interpreted to be more lenient than the DOL safe harbor standard, making it easier to provide IRS notices without participant consent.

SEC ELECTRONIC DISCLOSURE REQUIREMENTS

SEC electronic disclosure requirements are even easier to administer, but apply to only a limited number of participant communications (*e.g.*, prospectuses for plans offering employer stock). The three components of the SEC electronic disclosure requirements are notice, access and evidence of delivery. More specifically, the communication must:

- provide timely and adequate notice to the participant that the information is available;
- be effectively accessible to the participant so that he may save or access the information on an ongoing basis; and

- provide reasonable assurance that delivery to the intended recipient has occurred.

In contrast to the IRS and DOL rules described above, participants are not required to opt in to electronic disclosure, even if they do not have integral computer access or the effective ability to access the electronic notice at their worksite. The SEC's more liberal electronic disclosure requirements are consistent with its expressed position that there are numerous benefits of electronic distribution of information and that, in many respects, it may be more useful than paper.

WHICH BENEFITS-RELATED DOCUMENTS ARE COMMONLY PROVIDED ELECTRONICALLY?

Perhaps unsurprisingly given the disclosure requirements described above, common documents plan sponsors disclose electronically include SPDs, SMMs, SARs, quarterly benefit statements, fee disclosures and annual notices during open enrollment. For some voluminous documents like SPDs, there are sizable cost savings by providing documents electronically such that meeting the DOL safe harbor is worth complying with its tricky requirements. For other documents, such as participant fee disclosures, participant statements and annual safe harbor notices, the streamlined DOL consent requirements make providing them electronically more tenable.

On the other hand, items less commonly electronically disclosed include correspondence regarding claims (*e.g.*, adverse benefit determinations and explanations of benefits) and appeals. Generally, the advantages to electronic disclosure are less significant for these communications (given that they are not mailed in bulk), and the risks of providing electronic disclosure are greater (because ensuring actual and timely receipt is arguably more important than for routine plan communications).

ELECTRONIC DISCLOSURE RISKS

In addition to the potential participant claims and statutory penalties if an administrator fails to provide proper electronic disclosures, transitioning to electronic disclosure may increase the risk of cyberattack. Focusing solely on electronic disclosure in the health plan context, the Health Insurance Portability and Accountability Act (HIPAA) would apply to potential breaches of protected health information. For example, if an email or other electronic communication system were hacked or an electronic notice were sent to the wrong address, HIPAA's burdensome breach notification requirements could be triggered. In the retirement plan context, data is subject to state data security requirements that could similarly be triggered by unauthorized access or inadvertent disclosure of a participant notice (*e.g.*, a personalized benefit statement). Generally, these requirements apply to plan service providers rather than the plans themselves, but could be implicated depending on who is responsible for distribution of the electronic materials.

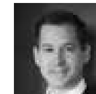
INNOVATIVE ELECTRONIC DISCLOSURE

The use of social media has now only just begun in the plan administration context. While plan participants may be on Facebook, Twitter and YouTube every day, and even the IRS and DOL host accounts on these sites, benefit plans have generally made limited use of these applications. These types of electronic media do not fit well within the DOL safe harbor or satisfy the IRS disclosure rules. As such, these methods are unlikely to be used as a primary method of communication under current guidance. However, they may continue to be used to reinforce plan messaging sent by mail or more traditional electronic means (*e.g.*, web posting and email).

DEVELOPMENTS

The DOL and some legislators recognize that the electronic disclosure requirements could be improved. In 2011, prior to providing the special participant fee disclosure rules, the DOL issued a request for information (RFI) regarding electronic disclosure by employee benefit plans. It remains to be seen whether this RFI will lead to further enhancements to the DOL's guidance. In addition, Congress has periodically introduced bills (most recently, the RETIRE Act (HR 2656)) to further streamline the varying regulatory requirements in this area. While these efforts have generally been supported by plan sponsors, none has made it to a congressional vote.

We are clearly still at the dawn (or perhaps early morning) of the age of electronic plan administration. As the regulators continue to liberalize the requirements for using technology to communicate with participants, we can expect fewer trees to be converted into SPDs, SMMs and benefit statements — a greener world we could all hope for! PC



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WORK SMARTER BY LEVERAGING CHEAP TECHNOLOGY

BY YANNIS P. KOUMANTAROS AND ADAM C. POZEK

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Yes, it's another ride-sharing service. And no, it's not like the others. Blacklane offers premium vehicles that you can book in advance. Travel in style in either Business Class (think Mercedes E, BMW 5 or equivalent) or First Class (Mercedes S, BMW 7, etc.).

Unlike some of the other ride-sharing services, Blacklane lets you book in advance rather than making you guess at how quickly you will make it through baggage claim or the server will bring the check so that you're not sitting on the curb waiting for your car to arrive. And since we are planning ahead here, you are not limited to the cars that are in your immediate vicinity.

Book your pickup time, destination and class of vehicle on their website or smartphone app, and you're all set. On the day of pickup, they will email and text you when your car is on the way and when it arrives. Your fare includes an hour of waiting time for airport pickups and 15 minutes at other locations. Blacklane is available in 180 cities around the world, including 71 right here in the U.S. of A.

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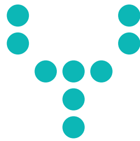
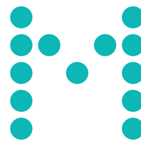


ou arrive at the airport with too much time to just sit at the gate but not enough time to roam the concourses in search of a place to pass the time in comfort. Your aimless airport wanderings are now at an end. Download the app for iOS or Android, create your profile, and LoungeBuddy gives you a rundown not only of the lounges in your current airport, but which ones you have privileges in or can access for a fee.

Have status with a certain airline? Add that to your profile, and those lounges come right to the top. Does your credit card company have its own lounges or give you privileges at others? You guessed it… if it's in your profile, LoungeBuddy will point you in the right direction. Lucky enough not to travel so much that you have status? No problem. If there is a lounge in the vicinity that will allow you to cross its threshold for a small fee, you will know about it. And if you're already in plan-ahead mode after booking your car through Blacklane, add your upcoming itinerary to LoungeBuddy so you know ahead of time where to make a beeline during that layover.

Sway» sway.com



icrosoft is back. No, seriously. Not sure if it's because they have a new CEO or because the LA Clippers got a new owner, but either way, we are stoked. Enter Sway, Microsoft's newest addition to the Office 365 Software as a Service (SaaS) platform. This free application lets you create interactive reports, presentations, voyages, newsletters, etc., and share them instantly with your friends, family and business colleagues.

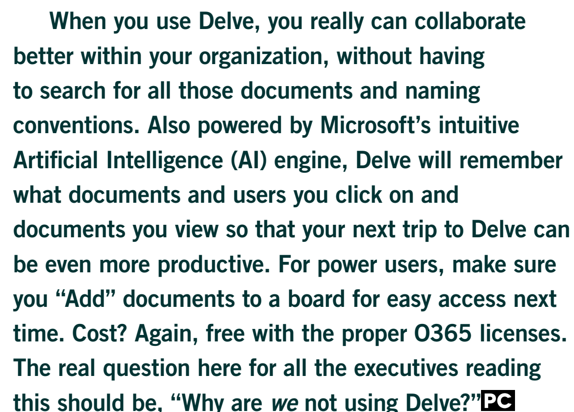
We previously wrote about Prezi being the PowerPoint killer, but Microsoft really came up with something awesome when they launched this software application for no additional fee. As long as you have an O365 subscription, you get this; in fact, you probably already have it. What is the added bonus? Microsoft uses machine learning (a.k.a. artificial intelligence) algorithms to "remix" your presentations with whatever themes you may want, just like themes in Windows. Time to go back to Microsoft!

Adam and Yannis are always on the lookout for new and creative mobile applications and other technologies. If you have any tips or suggestions, please email them at:

Adam.Pozek@DWCconsultants.com and Yannis@SpectrumPension.com.

Delve» delve.com

eeping the Microsoft theme alive, make sure you look at Delve as well. This product, also free with an O365 subscription, helps deliver content to you based on what everyone in your office is working on. Sorry, large institutional businesses still on Office 2007, but you must be on cloud-based O365 with at least version 2013 or the new 2016. It brings you colleagues' profiles (courtesy of Outlook's Exchange and SharePoint) and projects they are working on, but never changes your company's permissions. So these are only files that you or others in your business have access to.



When you use Delve, you really can collaborate better within your organization, without having to search for all those documents and naming conventions. Also powered by Microsoft's intuitive Artificial Intelligence (AI) engine, Delve will remember what documents and users you click on and documents you view so that your next trip to Delve can be even more productive. For power users, make sure you "Add" documents to a board for easy access next time. Cost? Again, free with the proper O365 licenses. The real question here for all the executives reading this should be, "Why are *we* not using Delve?" PC

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GAC Update

BY CRAIG P. HOFFMAN

Highway Funding Bill Form 5500 Snafu Corrected

ASPPA GAC successfully lobbies for a fix.

Congress passed the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 in July 2015. This law extended for three months the funding of infrastructure projects related to transportation and is commonly referred to as the "Highway Funding Bill." The bill, however, also made a significant change to the extended filing deadline for Form 5500.

To offset the cost of the transportation projects, Congress found a creative way to raise revenue: by modifying the income tax filing deadlines for certain types of taxpayers. It's not entirely clear how the new filing deadlines could be classified as "revenue raisers," but nevertheless that is how they found their way into the bill. The real driver for these changes was a desire by many in the accounting profession to better align the tax filing deadlines for pass-through entities such as partnerships, subchapter S corporations and certain limited liability companies with the deadlines for the owners that receive the pass-through of taxable income or loss. The goal was to have the pass-through entity deadlines precede the other deadlines by at least a month.

The changes made by the new law will generally be effective for tax and plan years beginning after Dec. 31, 2015. Of particular interest to ASPPA members is that the Highway Funding Bill instructs the Treasury Department to modify the extended filing deadlines for the Form 5500 to a maximum of 3½ months after the normal deadline (rather than the current 2½-month period). This means the new extended deadline for a calendar year plan would be November 15, a month later than the current deadline of October 15.

> "ASPPA GAC met with members of Congress and their staffers with a goal of repealing the Form 5500 extension provision."

Importantly, the Highway Funding Bill only directed the Secretary of the Treasury to lengthen the automatic extension period to file Form 5500. There was no similar direction to the Secretary of Labor to lengthen the extended filing period for the report required under Title I of ERISA. (Remember, filing Form 5500 satisfies reporting requirements under both the Internal Revenue Code and ERISA).

ASPPA GAC was told that DOL was considering whether it too should lengthen the automatic extension period for filing the Form 5500 for Title I purposes. The DOL was concerned that a further extension would be contrary to recommendations made by the GAO and the DOL Inspector General to make Form 5500 data available sooner. It does not seem, however, that having two different filing deadlines makes much sense either.

ASPPA members voiced their concern that adding another month to the automatic Form 5500 extended filing period would simply drag the process out without any real benefit to any interested party. To the contrary, an additional month would conflict with year-end work that already makes this time of year very busy. For example, safe harbor 401(k) notices are due 30 to 90 days before a new plan year begins. Plan design and investment changes are also an important topic of discussion ahead of a new year. If an investment change is made, a "blackout" notice may have to be prepared as well.

As a result of this feedback, ASPPA GAC endeavored to get a legislative correction to return the extended deadline to a maximum of 2½ months after the regular deadline. In furtherance of this effort, ASPPA GAC met with members of Congress and their staffers with a goal of repealing the Form 5500 extension provision. I am happy to report that this effort was successful. The long-term highway bill (the Fixing America's Surface Transportation Act, or "FAST Act"), which was enacted in December, repealed the earlier provision. This means the 2½ month extension will remain in effect without interruption.

This is another excellent example of how ASPPA GAC serves as the voice in Washington for the concerns and interests of our members. Your support of the ASPPA PAC can help us continue to help you! Please consider making a contribution today. PC

Craig P. Hoffman, APM, is General Counsel for the American Retirement Association.

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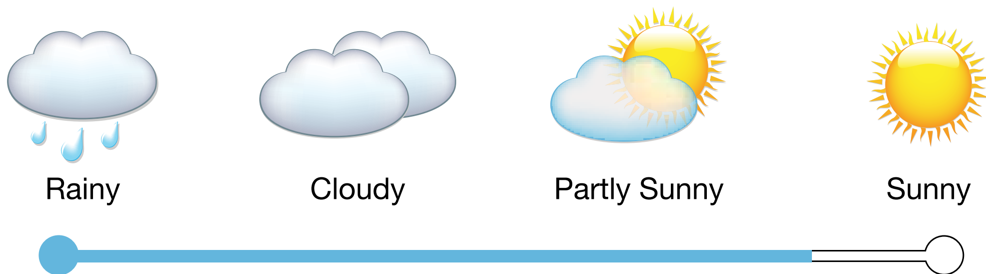

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